



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 21, 2016

Ms. Patricia Guidry
Director of Risk Management
Aldine Independent School District
2520 W.W. Thorne Drive
Houston, Texas 77073

OR2016-23727

Dear Ms. Guidry:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 631673.

The Aldine Independent School District (the "district") received a request for the personnel file of a named individual. You state the district has released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.114, 552.114, and 552.130 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the federal Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the

¹Although you raise section 552.024 of the Government Code, we note that section 552.024 is not an exception to public disclosure under chapter 552 of the Government Code. Rather, this section permits a current or former official or employee of a governmental body to choose whether to allow public access to certain information relating to the current or former official or employee that is held by the employing governmental body. *See* Gov't Code § 552.024. Please note that section 552.117 is the proper exception to raise when arguing the confidentiality of such information.

purpose of our review in the open records ruling process under the Act.² Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which “personally identifiable” information is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). We note you have submitted, among other things, unredacted records which may constitute education records. Because our office is prohibited from reviewing education records to determine the applicability of FERPA, we will not address FERPA with respect to those records. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3. Such determinations under FERPA must be made by the educational authority in possession of the education record. Likewise, we do not address your argument under section 552.114 of the Government Code. *See* Gov’t Code §§ 552.026 (incorporating FERPA into the Act), 552.114 (excepting from disclosure “student records”); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 of the Government Code and FERPA). However, we will consider your remaining arguments against disclosure of the requested information.

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses information protected by federal law, such as section 1324a of title 8 of the United States Code. Section 1324a governs I-9 forms and their related documents. This section provides an I-9 form and “any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of the submitted I-9 form and its attachment in this instance would be “for purposes other than enforcement” of the referenced federal statutes. Section 1324a, as a federal law, preempts any conflicting state provisions, including section 22.082 of the Education Code. *See Equal Employment Opportunity Comm’n v. City of Orange, Texas*, 905 F. Supp. 381, 382 (E.D. Tex. 1995) (federal law prevails over inconsistent provision of state law). Accordingly, we conclude the submitted I-9 form and its attachment, which we have marked, are confidential under section 1324a of title 8 of the United States Code and must be withheld under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses the federal Fair Credit Reporting Act (the “FCRA”), 15 U.S.C. § 1681 *et seq.* Some of the submitted information consists of criminal history record information (“CHRI”) from the Safe Schools Project, which is subject to the FCRA. Section 22.083 of the Education Code permits the district to obtain criminal history record information from a private entity that is a consumer reporting agency governed by the FCRA. *See* Educ. Code § 22.083(a-1)(3). We understand that the Safe Schools Project is a consumer reporting agency that furnishes reports to the district to be used for employment purposes. *See* 15 U.S.C. § 1681a(f) (defining “consumer reporting agency”),

²A copy of this letter may be found on the attorney general’s website at <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

(h) (defining “employment purposes”). A criminal history report compiled by a private consumer reporting agency is a “consumer report” under the FCRA. *See id.* § 1681a(d) (defining “consumer report”). Section 1681b of the FCRA permits a consumer reporting agency to furnish a consumer report to a person that the consumer reporting agency has reason to believe intends to use the information for employment purposes. *See id.* § 1681b(a)(3)(B); *see also id.* § 1681a(b), (d) (defining “person” and “consumer report”). Section 1681b further provides that “[a] person shall not use or obtain a consumer report for any purpose unless the consumer report is obtained for a purpose for which the consumer report is authorized to be furnished under this section; . . . and . . . the purpose is certified in accordance with section 1681e of this title by a prospective user of the report through a general or specific certification.” *Id.* § 1681b(f)(1)-(2). Section 1681e provides for the maintenance of compliance procedures by consumer reporting agencies under which prospective users of consumer reports must identify themselves, certify the purposes for which they seek information, and certify that the information will be used for no other purpose. *See id.* § 1681e(a); *see also* Open Records Decision No. 373 at 2 (1983) (federal law strictly limits distribution of consumer credit reports by credit reporting agencies). We find the submitted Safe Schools Project records are a consumer report for purposes of section 1681b of the FCRA. We note the FCRA does not permit the disclosure of information in a consumer report for the purpose of responding to a request for information under the Act. We therefore conclude the Safe Schools Project records, which we have marked, are confidential under section 552.101 of the Government Code in conjunction with the FCRA.³

Section 552.101 also encompasses other statutes, such as section 21.355 of the Education Code, which provides that “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355(a). This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. *See* Open Records Decision No. 643 (1996). Additionally, a court has concluded that a written reprimand constitutes an evaluation for purposes of section 21.355, as it “reflects the principal’s judgment regarding [a teacher’s] actions, gives corrective direction, and provides for further review.” *Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). In Open Records Decision No. 643, we concluded that a “teacher” for purposes of section 21.355 means a person who (1) is required to and does in fact hold a certificate or permit required under chapter 21 of the Education Code and (2) is teaching at the time of his or her evaluation. *See* ORD 643.

You claim the information you marked consists of evaluations of a teacher that are confidential under section 21.355 of the Education Code. You state, and provide documentation showing, the teacher at issue held the appropriate certification at the time of the evaluations and was functioning as a teacher at the time of the evaluations. Based on

³As our ruling is dispositive, we need not address your argument against disclosure of this information.

your representations and our review, we find some of the information you marked constitutes evaluations as contemplated by section 21.355. Accordingly, the district must withhold the documents we marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. However, we find you have failed to demonstrate any of the remaining information at issue consists of documents evaluating the performance of a teacher for the purposes of section 21.355 of the Education Code. Therefore, the district may not withhold the remaining information at issue under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Section 552.102(b) excepts from disclosure all information from transcripts of professional public school employees other than the employee’s name, the courses taken, and the degree obtained. Gov’t Code § 552.102; Open Records Decision No. 526 (1989). Accordingly, the district must withhold the date of birth we have marked under section 552.102(a) of the Government Code. Additionally, with the exception of the employee’s name, the courses taken, and the degree obtained, the district must withhold the information in the submitted transcripts pursuant to section 552.102(b) of the Government Code.

Section 552.103 of the Government Code provides, in relevant part, as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov’t Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law*

Sch. v. Tex. Legal Found., 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

You assert some of the submitted information pertains to settlement negotiations conducted by the district in anticipation of litigation. However, you indicate the negotiations at issue concluded in a final settlement agreement, which you state the district has released to the requestor. Thus, we find you have failed to demonstrate litigation was pending or reasonably anticipated on the date the district received the request. Therefore, the district may not withhold the information at issue under section 552.103 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code, except as provided by section 552.024(a-1). See Gov't Code §§ 552.117(a)(1), .024. Section 552.024(a-1) of the Government Code provides, "A school district may not require an employee or former employee of the district to choose whether to allow public access to the employee's or former employee's social security number." *Id.* § 552.024(a-1). Thus, the district may only withhold under section 552.117 the home address and telephone number, emergency contact information, and family member information of a current or former employee or official of the district who requests this information be kept confidential under section 552.024. We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. See Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. See Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Upon review, we find the submitted information includes information subject to section 552.117 of the Government Code. Accordingly, to the extent the employee whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the district may only withhold the marked cellular telephone number if a governmental body does not pay for the cellular telephone service. Conversely, to the extent the employee whose information is at issue did not timely request

confidentiality under section 552.024, the district may not withhold the information we marked under section 552.117(a)(1).

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See Gov't Code § 552.130*. Accordingly, the district must withhold the driver's license information, which we have marked, under section 552.130 of the Government Code.

We note the submitted information contains an e-mail address subject to section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). The e-mail address at issue, which we have marked, is not a type specifically excluded by section 552.137(c) of the Government Code. Accordingly, the district must withhold the e-mail address we marked under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to its disclosure.

Section 552.147(a-1) of the Government Code provides, "[t]he social security number of an employee of a school district in the custody of the district is confidential." Gov't Code § 552.147(a-1). Thus, section 552.147(a-1) makes the social security numbers of school district employees confidential, without such employees being required to first make a confidentiality election under section 552.024 of the Government Code. *See id.* § 552.024(a-1) (a school district may not require an employee or former employee of the district to choose whether to allow public access to the employee's or former employee's social security number). Reading sections 552.024(a-1) and 552.147(a-1) together, we conclude that section 552.147(a-1) makes confidential the social security numbers of both current and former school district employees. Accordingly, the district must withhold the social security number we have marked under section 552.147(a-1) of the Government Code.

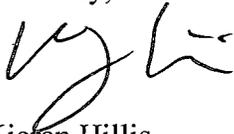
In summary, the district must withhold the marked I-9 form and its attachment under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code. The district must withhold the Safe Schools Project records we marked under section 552.101 of the Government Code in conjunction with the FCRA. The district must withhold the documents we marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must withhold the date of birth we marked under section 552.102(a) of the Government Code. With the exception of the employee's name, the courses taken, and the degree obtained, the district must withhold the information in the submitted transcripts under section 552.102(b) of the Government Code. If the employee whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code;

however, the district may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. If the employee whose information is at issue did not timely request confidentiality under section 552.024, the district may not withhold the information we marked under section 552.117(a)(1). The district must withhold the driver's license information we marked under section 552.130 of the Government Code. The district must withhold the e-mail address we marked under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to its disclosure. The district must withhold the social security number we have marked under section 552.147(a-1) of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Kieran Hillis
Assistant Attorney General
Open Records Division

KH/akg

Ref: ID# 631673

Enc. Submitted documents

c: Requestor
(w/o enclosures)