



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

May 22, 2003

Mr. Dan Junell
General Counsel
State Board for Educator Certification
4616 West Howard Lane, Suite 120
Austin, Texas 78728

OR2003-3460

Dear Mr. Junell:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181415.

The State Board for Educator Certification (the "board") received a request for twelve categories of information. Most of the requested information was considered in Open Records Letter No. 2003-1324 (2003). Following the board's receipt of this office's ruling, you discovered additional information responsive to the request, which you assert is excepted from disclosure under sections 552.101, 552.102, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the board's obligations under section 552.301 of the Government Code. Section 552.301(b) of the Government Code provides that a governmental body that wishes to withhold requested information must "ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request." Pursuant to section 552.301(e), the governmental body must, within fifteen business days of receiving the request, submit to this office (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A)-(D). You state that the board received this request on December 9, 2002. However, you did not request a ruling as to the additional information

or submit it for our review until March 20, 2003. Thus, the board has failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Because sections 552.101, 552.102, and 552.130 can provide a compelling reason for withholding information, we will address your arguments. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that information is made confidential by another source of law or affects third party interests).

The information submitted as Exhibit C consists of an Employment Eligibility Verification, Form I-9, and an appended identification form. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information made confidential by statute. Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that 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 I-9 and the appended identification form in this instance would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that Exhibit C is confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.¹

You assert that the document submitted as Exhibit D is confidential under state law. Section 301.081 of the Labor Code, which is also encompassed by section 552.101, provides:

- a) Each employing unit shall keep employment records containing information as prescribed by the commission and as necessary for the proper administration of this title. The records are open to inspection and may be copied by the commission or an authorized representative of the commission at any reasonable time and as often as necessary.

¹Because of our ruling on this issue, we need not address your arguments concerning section 552.130.

b) The commission may require from an employing unit sworn or unsworn reports regarding persons employed by the employing unit as necessary for the effective administration of this title.

c) Employment information thus obtained or otherwise secured may not be published and is not open to public inspection, other than to a public employee in the performance of public duties, except as the commission considers necessary for the proper administration of this title.

In Open Records Decision No. 599 (1992), this office interpreted the predecessor of section 301.081(c) and concluded that it applied to information the commission obtained from the records and reports that employers are required to file with the commission. You do not inform us, nor does it appear, that the document at issue is one that employers are required to maintain for or file with the commission for the purpose of administering the state unemployment insurance program. See Labor Code § 301.081(a). We therefore conclude that Exhibit D is not made confidential under section 301.081, and it may not be withheld on that basis.

You also contend that Exhibit D must be withheld under section 552.101 in conjunction with the common law right of privacy and under section 552.102. Section 552.102 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). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101. We will therefore consider your claims regarding common law privacy under section 552.101 together with your claims regarding section 552.102.

In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if it (1) contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Id.* at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Having reviewed Exhibit D, we conclude that it is not protected by common law privacy. See Open Records Decision Nos. 470 (1987) (public employee’s job performance does not generally constitute his private affairs), 455 (1987) (public employee’s job performance or abilities generally not protected by privacy), 444 at 5-6 (1986) (public has interest in public employee’s qualifications and performance and circumstances of his resignation or termination), 405 at 2-3 (1983) (public has interest in manner in which public

employee performs his job), 400 at 5 (1983) (information protected only if release would lead to clearly unwarranted invasion of employee's privacy); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Accordingly, none of the information in Exhibit D may be withheld under section 552.101 or section 552.102 of the Government Code in conjunction with common law privacy.

In summary, Exhibit C is confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system. Exhibit D must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Denis C. McElroy". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 181415

Enc. Submitted documents

c: Mr. Tom Purcell
P.O. Box 1167
Keller, Texas 76244
(w/o enclosures)