ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 6, 2004

Mr. Wayne D. Haglund
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OR2004-6655

Dear Mr. Haglund:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 206695.

The Leggett Independent School District (the "district"), which you represent, received a request for twenty categories of information concerning the activities and administration of the district. You indicate that the district seeks to withhold information responsive to items 5 and 20 of the request, but does not object to the disclosure of the remaining information at issue. Thus, with the exception of the information you have indicated, we presume the district has released the information at issue to the requestor. If not, the district must release it immediately. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under the circumstances). You claim that information responsive to items 5 and 20 of the request is excepted from disclosure under sections 552.026, 552.101, 552.110, 552.114, and 552.117 of the Government Code. You also indicate that release of the information at issue in item 20 may implicate the proprietary interests of third parties, and you state you have notified these third parties of the request and of their right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.

As a preliminary matter, you state that the district has asked the requestor to clarify item 5 of the request, which reads as follows:

> I am requesting a list of substitute teachers and what days they worked at the school for the year and a copy of their criminal background check. All the information can be blacked out except for the name and the date they signed it.

You indicate that the district asked the requestor to clarify whether the request is for a copy of the criminal background check authorization form signed by the teachers or the actual criminal background check documents. *See* Gov't Code § 552.222 (providing that a governmental body may ask the requestor to clarify the request if what information is requested is unclear to the governmental body); *see also* Open Records Decision No. 663 at 5 (1999) (discussing requests for clarification). You also indicate that the district has not received a reply from the requestor; however, you have submitted information responsive to the request for review and you have raised exceptions to its disclosure. We will therefore address your claimed exceptions to disclosure for the submitted information in the present ruling.

As a second threshold matter, we must address the district's obligations under section 552.301 with respect to the information at issue in item 20. Under section 552.301(e), a governmental body receiving a request for information that the governmental body wishes to withhold pursuant to an exception to disclosure under the Public Information Act (the "Act") is required to submit to this office within fifteen business days of receiving the request (1) general 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. You have not submitted a copy or sample of the information requested in item 20. We therefore determine the district has failed to comply with section 552.301(e) with respect to this portion of the request.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of 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).

Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing that the information is made confidential by another source of law or affects third party interests. *See* Open Records Decision No. 630 (1994). Although you contend that release of the information at issue in item 20 may affect third parties, because you have not submitted the information for review we have no basis to conclude that the information is excepted from disclosure. Furthermore, as of the date of this letter, we have not received any comments from any third party seeking to have the information withheld. *See* Gov't Code § 552.305(d)(2)(B) (interested third party generally allowed ten business days to submit comments pursuant to section 552.305(d)); *see also* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret). We therefore determine that the district must release the information at issue in item 20 to the requestor.

We now turn to your claimed exceptions with respect to the information submitted as responsive to item 5 of the request. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.,* 540 S.W.2d 668, 685 (Tex. 1976). 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. 540 S.W.2d at 683. We have marked information in the submitted documents that is protected by common-law privacy and must be withheld under section 552.101.

Next, section 552.101 also encompasses information made confidential by other statutes. Criminal history record information ("CHRI") is confidential and not subject to disclosure. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from

other criminal justice agencies). Under section 411.097 of the Government Code, a school district is authorized to obtain CHRI that the district is required or authorized to obtain under subchapter C of chapter 22 of the Education Code; however, a school district may not release CHRI except as provided by section 411.097(d). *See* Gov't Code § 411.097(d); Educ. Code § 22.083. We have marked CHRI in the submitted information that the district must withhold pursuant to section 552.101 of the Government Code in conjunction with state and federal regulations.

Next, you contend that the submitted documents include information that is made confidential under the Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of title 20 of the United States Code. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). Section 552.026 of the Government Code incorporates FERPA into chapter 552 of the Government Code. *See* Open Records Decision No. 634 at 6-8 (1995). Section 552.026 provides as follows:

> This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026. "Education records" under FERPA are those records that contain information directly related to a student and that are maintained by an educational agency or institution, or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A).

Section 552.114(a) of the Government Code excepts from disclosure "information in a student record at an educational institution funded wholly or partly by state revenue." This office generally has treated "student record" information under section 552.114(a) as the equivalent of "education record" information that is protected by FERPA. *See* Open Records Decision No. 634 at 5 (1995). In Open Records Decision No. 634 (1995), this office concluded that: (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 of the Government Code without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 of the Government Code as a "student record," insofar as the "student record" is protected by FERPA, without the

necessity of requesting an attorney general decision as to that exception. *See* Open Records Decision No. 634 at 6-8 (1995).

Information must be withheld from required public disclosure under FERPA only to the extent reasonable and necessary to avoid personally identifying a particular student the student's parent. *See* Open Records Decision Nos. 332 (1982), 206 (1978); *see also* 34 C.F.R. § 99.3. In this case, you have marked a small amount of information in the documents at issue that identifies a district student. We agree that the district must withhold this information pursuant to FERPA.

You also contend portions of the submitted information, which you have marked, are excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely elect to keep this information confidential pursuant to section 552.024. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the district may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who elected to keep information confidential pursuant to section 552.024 prior to the date the district received the present request.

You do not inform us whether the district personnel at issue timely elected to keep information confidential. We therefore determine that if the individuals at issue timely elected to keep such information confidential pursuant to section 552.024, the district must withhold the social security numbers, telephone numbers, and family member information you have marked in the submitted documents pursuant to section 552.117(a)(1). We note, however, that date of birth information is not within the scope of section 552.117(a)(1) and may not be withheld under that provision. If the district personnel at issue did not timely elect to keep the information confidential, the district may not withhold this information under section 552.117(a)(1).

We note, however, that in the event the district employees at issue did not timely elect to keep the marked social security numbers confidential, the social security numbers may nevertheless be excepted under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security numbers in the submitted documents are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the

release of confidential information. Prior to releasing any social security numbers, the district should ensure that the social security numbers were not obtained or maintained by the district pursuant to any provision of law, enacted on or after October 1, 1990.

In summary, we have marked information that is protected by common-law privacy and must be withheld pursuant to section 552.101 of the Government Code. The criminal history record information we have marked in the submitted documents must be withheld pursuant to section 552.101 in conjunction with chapter 411 of the Government Code and federal regulations. We have marked a small amount of information that the district must withhold pursuant to FERPA. Provided the individuals at issue timely elected to keep the information confidential pursuant to section 552.024 of the Government Code, the district must withhold the social security numbers, telephone numbers, and family member information you have marked in the submitted documents pursuant to section 552.117(a)(1) of the Government Code. In the event the individuals at issue did not timely elect to keep such information confidential, the district may not withhold it under section 552.117(a)(1); however, social security numbers may be excepted under section 552.101 in conjunction with federal law. Based on these findings, we do not reach your remaining arguments against disclosure of portions of the submitted information. The remainder of the requested information 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 thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten 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 ten 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 ten 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); *Tex. 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 ten calendar days of the date of this ruling.

Sincerely,

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/sdk

Ref: ID# 206695

Enc: Submitted documents

c: Mr. Mario Boykin
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(w/o enclosures)