



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 21, 2005

Ms. Denise Anderson  
Walsh Anderson, Brown, Schulze & Aldridge, P.C.  
P.O. Box 168046  
Irving, Texas 75016-8046

OR2005-02383

Dear Ms. Anderson:

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# 220919.

The Midway Independent School District (the "district") received a request for information related to a particular student, a specific classroom, and district staff. You state that some responsive information has been provided to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.117, and 552.139 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in part that:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

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<sup>1</sup>As you did not submit to this office written comments stating the reasons why sections 552.102(b) and 552.139 would allow the information to be withheld, we assume that you no longer urge these exceptions. See Gov't Code §§ 552.301, .302.

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information includes a completed evaluation made of, for, or by the district, which must be released pursuant to section 552.022(a)(1), unless it is excepted from disclosure under section 552.108 or is expressly confidential under other law.<sup>2</sup> Although the district claims that the completed evaluation is excepted from disclosure under section 552.103 of the Government Code, we note that this exception is a discretionary exception to disclosure that does not constitute "other law" for the purposes of section 552.022.<sup>3</sup> Accordingly, we conclude that the district may not withhold the completed evaluation under section 552.103 of the Government Code. However, since the district also claims that the completed evaluation is excepted from disclosure under section 552.101 of the Government Code, we will address this claim with regard to this particular information as well as for the information not subject to section 552.022.

As it is potentially the broadest claim, we first address your assertion that the submitted information not subject to section 552.022 is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides 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

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<sup>2</sup>We note that the district does not claim that any portion of the submitted information is excepted from disclosure under section 552.108 of the Government Code.

<sup>3</sup>Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. See, e.g., Open Records Decision Nos. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general); see also *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.-Dallas 1999, no pet.) (governmental body may waive section 552.103). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

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). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was 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, no pet.); *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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. See Open Records Decision No. 588 at 7 (1991).

You state that the requestor “has previously filed for a Due Process Hearing against the [d]istrict in November 2004.” You have provided this office with a copy of a Notice of Filing of Request for a Due Process Hearing in Docket No. 091-SE-1104, dated November 19, 2004. Upon review, it appears that the district was involved in the pending litigation on the date the district received the present request. Based on your representations and our review, we agree that section 552.103 is applicable to the submitted Notice of Filing, which we have marked. However, you fail to explain how the remaining information at issue pertains to the pending litigation. As you have failed to show that section 552.103 is applicable to the remaining information, it may not be withheld from disclosure on that basis.

We note, however, that the marked Notice of Filing reflects on its face that it was obtained from or provided to the opposing party in the pending litigation. Once information has been obtained by all parties to the litigation, no section 552.103(a) interest exists with respect to that information. See Open Records Decision No. 349 at 2 (1982). Therefore, to the extent the opposing party has had access to the marked information, it may not be withheld under section 552.103 and must generally be released, unless confidential by law. We also note that the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” and encompasses information protected by other statutes, such as the Family Educational Rights and Privacy Act of 1974 (“FERPA”). See 20 U.S.C. § 1232g(b)(1). 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).

Under FERPA, "education records" means those records that contain information directly related to a student and 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 552.026 of the Government Code provides that "information contained in education records of an educational agency or institution" may only be released under the Act in accordance with FERPA. Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). Such information includes information that directly identifies a student as well as information that, if released, would allow the student's identity to be easily traced. *See* Open Records Decision No. 224 (1979) (finding student's handwritten comments protected under FERPA because they make identity of student easily traceable through handwriting, style of expression, or particular incidents related). The submitted information is maintained by the district and a portion of the information is related to students; that information is therefore subject to FERPA.

In this instance, the requestor is an advocate for the family of one of the students to whom the submitted information pertains. As noted, the parents of a minor student have a right of access under FERPA to information relating to the student, although this right of access does not extend to information in the records that identifies other students. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. §§ 99.10, .12(a). In this case, the parents of the student whom the requestor represents have provided the district with written consent to release to the requestor information relating to the student. If this written consent comports with the requirements of FERPA, then the district must grant the requestor access to information relating to this student. *See* 20 U.S.C. § 1232g(b); 34 C.F.R. § 99.30. Otherwise, all of the information that we have marked must be withheld from the requestor under FERPA.

You assert that social security numbers of employees that are contained in the submitted information are excepted from disclosure under section 552.101 in conjunction with section 58.001 of the Occupations Code, which provides as follows:

The social security number of an applicant for or holder of a license, certificate of registration, or other legal authorization issued by a licensing agency to practice in a specific occupation or profession that is provided to the licensing agency is confidential and not subject to disclosure under Chapter 552, Government Code.

Occ. Code § 58.001. You indicate that the social security numbers were provided to the Texas Education Agency. However, you do not inform us, nor does it otherwise appear, that the district itself holds the information as a licensing agency. Furthermore, you do not

inform us that the Texas Education Agency transferred the documents containing the social security numbers to the district, which would afford it the protection of the transfer doctrine as articulated in Open Records Decision No. 661 at 3 (1999) (information may be transferred between governmental bodies without violating its confidential character on the basis of a recognized need to maintain an unrestricted flow of information between governmental bodies). Accordingly, we find that the district may not withhold the social security numbers under section 552.101 in conjunction with section 58.001 of the Occupations Code.

You claim that some of the submitted information is excepted from disclosure pursuant to section 552.101 in conjunction with section 21.355 of the Education Code. Section 21.355 provides that “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355. This office has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, this office also concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* You inform us that the individual at issue is a certified teacher. Based on your arguments and our review of the information at issue, we find that the evaluation in Exhibit 2 constitutes an evaluation of a certified teacher of the district. Accordingly, we conclude that the district must withhold this completed evaluation pursuant to section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

The remainder of the information at issue, however, does not consist of the types of records made confidential by section 21.355. You argue that the Commissioner of Education has ruled that reprimands are evaluations for the purposes of section 21.355. *Tave v. Dallas Indep. Sch. Dist.*, Dkt. No. 067-R2-501 (Comm’s Educ. 2001). However, we disagree with the Commissioner’s ruling in *Tave*. Thus, we find that the submitted letter of reprimand is not confidential under section 21.355 and is not excepted from disclosure under section 552.101 on that basis.

You also seek to withhold the letter of reprimand pursuant to section 552.102 of the Government Code. 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* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. *See Indus. Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976),

The doctrine of common law privacy 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. *Id.* 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. In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

The letter of reprimand constitutes a record of the conduct and job performance of a public employee and, as such, it is subject to a legitimate public interest. Accordingly, the letter of reprimand is not protected by common-law privacy and is not excepted from disclosure pursuant to section 552.101 or 552.102 of the Government Code. *See* Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and the circumstances of public employee's resignation or termination), 405 at 2-3 (1983) (public has interest in manner in which public employee performs job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101 or 552.102), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under constitutional or common-law right of privacy); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). We have marked the information that the district must withhold pursuant to sections 552.101 and 552.102 of the Government Code in conjunction with common law privacy.

You also claim that portions of the remaining information may be excepted from disclosure under section 552.117(a)(1) 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 must be determined at the time the request for it is received. *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 on which the request for this information was received. We have marked the information in the submitted documents that may be excepted under section 552.117(a)(1). Provided the employees at issue timely elected to keep this information confidential, the district must withhold the marked information under

section 552.117(a)(1). In the event the employees did not make a timely election, however, the marked information may not be withheld under section 552.117(a)(1).

Even if not excepted under section 552.117, social security numbers may be excepted from disclosure under section 552.101 in conjunction with federal law. The 1990 amendments to the federal Social Security Act 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* 42 U.S.C. § 405(c)(2)(C)(viii)(I). We have no basis for concluding that any of the social security numbers in the file 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 number information, you should ensure that no such information was obtained or is maintained by the district pursuant to any provision of law enacted on or after October 1, 1990.

The submitted information also contains e-mail addresses 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). *See* Gov't Code § 552.137(a)-(c). The e-mail address at issue does not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that any member of the public to whom the e-mail addresses at issue pertain has affirmatively consented to the release of her e-mail address. The district must, therefore, withhold the e-mail addresses we have marked under section 552.137 of the Government Code.

In summary, we have marked the information that may be withheld under section 552.103 of the Government Code; however, to the extent the opposing party has had access to the marked information, it may not be withheld under section 552.103. If the written consent comports with the requirements of FERPA, the district must grant the requestor access to information relating to the specified student. Otherwise, all of the information that we have marked must be withheld from the requestor under FERPA. The district must withhold the marked evaluations under section 552.101 in conjunction with section 21.355 of the Education Code. We have marked the portions of the submitted information that are protected by common-law privacy and must be withheld pursuant to sections 552.101 and 552.102 of the Government Code. Provided the employees at issue timely elected to keep the information confidential, the district must withhold the information we have marked pursuant to section 552.117(a)(1) of the Government Code. Even if not excepted under section 552.117, social security numbers may be excepted from disclosure under section 552.101 in conjunction with federal law. The district must withhold the e-mail addresses we

have marked under section 552.137 of the Government Code. The remainder of the submitted 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 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Cindy Nettles". The signature is written in a cursive style with a large initial "C".

Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/krl

Ref: ID# 220919

Enc. Submitted documents

c: Mr. David Beinke  
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(w/o enclosures)