



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 8, 2006

Mr. M. Gustave Pick
Scott, Hulse, Marshall, Feuille, Finger & Thurmond
201 East Main Drive, Suite 1100
El Paso, Texas 79901

OR2006-10472

Dear Mr. Pick:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 258798.

The Ysleta Independent School District (the "district"), which you represent, received a request for all information received from or provided to the State Board of Educator Certification/Texas Education Agency regarding the requestor's client. Additionally, the requestor seeks any information about his client that has not been previously released to her. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.108, 552.117, and 552.137 of the Government Code.

Initially, we note that the United States Department of Education Family Policy Compliance Office (the "DOE") recently informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a), 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 purpose of our review in the open records ruling process under the Public Information Act (the "Act").¹ 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"). You argue

¹ A copy of the DOE's letter can be found on our website at http://www.oag.state.tx.us/opinopen/og_resources.

that some of the submitted information is protected under FERPA. Because our office is prohibited from reviewing education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records. Such determinations under FERPA must be made by the educational authority in possession of the education records.² We will, however, address the applicability of the remaining claimed exceptions to the submitted information.

Section 552.022 of the Government Code provides 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:

...

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

Gov't Code § 552.022(a)(1). You acknowledge that the submitted records are an investigation conducted by the district. You explain that this investigative file was turned over to the Texas Education Agency ("TEA") for use in that agency's investigation of the requestor's client. You argue that because your file is now part of a larger investigation, it is not a completed investigation for purposes of section 552.022. We disagree. The fact that this information may be incorporated into another governmental entity's investigation does not negate the fact that the district conducted and concluded its own investigation of this incident. Accordingly, we find that the submitted information is a completed investigation for purposes of section 552.022(a)(1). The district must release the submitted information unless it is expressly confidential under other law or is excepted under section 552.108. You claim that the submitted records are excepted under section 552.103 of the Government Code. Section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (stating that governmental body may waive Gov't Code § 552.103); Open Records Decision No. 542 at 4 (1990) (litigation exception does not implicate third-party rights and may be waived by governmental body); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 does not make information confidential for purposes of section 552.022. Therefore, you may not withhold these documents under section 552.103.

² In the future, if the district does obtain parental consent to submit unredacted education records and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

You also assert that the records are excepted from disclosure under section 552.108 of the Government Code. Section 552.108(a)(1) excepts from disclosure information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime if release of the information would interfere with the detection, investigation, or prosecution of crime. Gov't Code § 552.108(a)(1). You state that TEA is investigating allegations that the requestor's client misused public funds, which may be a criminal offense under the Penal Code. Section 552.108, however, applies only to a law enforcement agency or a prosecutor. You do not explain how TEA is a law enforcement agency. Thus, you have failed to demonstrate the applicability of section 552.108.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the common-law right of privacy. For information to be protected by common-law privacy it must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we have marked the information that must be withheld under section 552.101 in conjunction with the common-law right to privacy.

Section 552.101 also encompasses information protected by other statutes. We note that section 21.355 of the Education Code is applicable to the submitted teacher evaluations. Section 21.355 provides that, "[any] document evaluating the performance of a teacher or administrator is confidential." This office 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.* at 4. Since the individual who is the subject of this information held a teaching certificate under subchapter B of chapter 21 of the Education Code and was performing the functions of a teacher at the time of the evaluations, we conclude that the submitted evaluations are confidential in their entirety under section 21.355 of the Education Code. However, section 21.352(c) of the Education Code specifically provides that "[e]ach teacher is entitled to receive a written copy of the evaluation on its completion." Therefore, to the extent the evaluations are the type contemplated in section 21.352, the requestor has a right of access under section 21.352(c) to his client's evaluations. If the requestor does not have a right of access under section 21.352(c), the evaluations are excepted from disclosure pursuant to section 552.101 in conjunction with section 21.355 of the Education Code.

Section 552.117(a)(1) of the Government Code provides that information is excepted from disclosure if it relates to a current or former employee's home address, home telephone number, social security number, or reveals whether the employee has family members. *See* Gov't Code § 552.117(a)(1). The district is required to withhold this information if the employee timely requested that this information be kept confidential under section 552.024 of the Government Code. *See* Open Records Decision Nos. 622 (1994), 455 (1987); *see generally* Open Records Decision No. 530 (1989) (stating that whether particular piece of information is public must be determined at time request for it is made). As the representative of the former employee, the requestor has a special right of access to his client's personal information. *See* Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates or person's agent on grounds that information is considered confidential by privacy principles). You do not state, however, whether the remaining employees at issue elected to withhold their personal information in accordance with section 552.024. Accordingly, we have marked the information that is subject to section 552.117(a)(1) if the district received the proper election. If the district did not receive the proper elections, this information must be released.

Finally, 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). Section 552.137 does not apply to the e-mail addresses of a governmental body or a government employee's work e-mail address. The e-mail addresses at issue belong to the district and are, therefore, not excepted from disclosure under section 552.137.

In summary, we have marked the information that is protected by common-law privacy. We have marked the evaluations that are confidential under section 21.355, unless the district determines that the requestor has a right of access to these records under section 21.352(c). Finally, we have marked the information that must be withheld under section 552.117(a)(1) if the district received the proper elections under section 552.024. This ruling does not address the applicability of FERPA to the submitted information. Should the district determine that all or portions of the submitted information consists of "education records" that must be withheld under FERPA, the district must dispose of that information in accordance with FERPA, rather than the Act.

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).

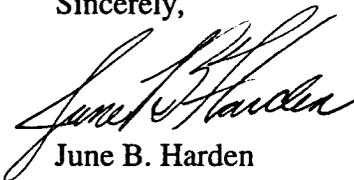
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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); *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 Office of the Attorney General 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. 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,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/sdk

Ref: ID# 258798

Enc: Submitted documents

c: Mr. Richard Arnett
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(w/o enclosures)