



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 18, 2008

Ms. Sonya M. Garcia  
Escamilla & Poneck, Inc.  
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Laredo, Texas 78041

OR2008-00920

Dear Ms. Garcia:

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# 300013.

The Zapata County Independent School District (the "district"), which you represent, received a request for information regarding a named former teacher and regarding a specified incident involving the former teacher. The district has redacted social security numbers pursuant to section 552.147 of the Government Code.<sup>1</sup> You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.114, 552.117, and 552.130 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information.

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<sup>1</sup>Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

<sup>2</sup>Although you raise section 552.026 of the Government Code as an exception to disclosure, we note that section 552.026 is not an exception to disclosure. Rather, section 552.026 provides that the Act does not require the release of information contained in education records except in conformity with the Family Educational Rights and Privacy Act of 1974. Gov't Code § 552.026. Additionally, we note that you initially raised section 552.111 of the Government Code, but you have not submitted arguments explaining how this exception applies to the submitted information. Therefore, we presume that you have withdrawn this exception. *See id.* §§ 552.301, 552.302.

Recently, the United States Department of Education Family Policy Compliance Office 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 Act.<sup>3</sup> 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 have submitted, among other things, redacted education records for our review. Because our office is prohibited from reviewing these 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.<sup>4</sup> Such determinations under FERPA must be made by the educational authority in possession of the education records.<sup>5</sup> We will, however, address the applicability of the remaining claimed exceptions to the submitted information.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes. You claim that the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), 42 U.S.C. §§ 1320d-1320d-8, governs portions of the submitted information. At the direction of Congress, the Secretary of Health and Human Services (“HHS”) promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts.160, 164 (“Privacy Rule”); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office addressed the interplay of the Privacy Rule and the Act in Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the

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<sup>3</sup>A copy of this letter may be found on the Office of the Attorney General’s website at [http://www.oag.state.tx.us/opinopen/og\\_resources.shtml](http://www.oag.state.tx.us/opinopen/og_resources.shtml).

<sup>4</sup>Thus, we will not address your arguments under section 552.114 of the Government Code.

<sup>5</sup>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.

Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* Open Records Decision No. 681 at 8 (2004); *see also* Gov’t Code §§ 552.002, .003, .021. We therefore held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *Abbott v. Tex. Dep’t of Mental Health & Mental Retardation*, No. 03-04-00743-CV, 2006 WL 1649003 (Tex. App.—Austin, June 16, 2006, no. pet. h.) (disclosures under the Act fall within section 164.512(a)(1) of the Privacy Rule); Open Records Decision No. 681 at 9 (2004); *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the district may withhold requested protected health information from the public only if the information is confidential under other law or an exception in subchapter C of the Act applies.

Next, we note that Exhibit B contains medical records. Section 552.101 of the Government Code also encompasses information that other statutes make confidential. Access to medical records is governed by the Medical Practice Act (the “MPA”), subtitle B of the Occupations Code. *See* Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See* Open Records Decision No. 598 (1991). Medical records may be released only as provided under the MPA. *Id.* Accordingly, the documents we have marked in Exhibit B may be released only in accordance with the MPA.

We also note that the submitted information includes an I-9 form (Employment Eligibility Verification), which is governed by section 1324a of title 8 of the United States Code. This section provides that the 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. 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of this

document under the Act would be “for purposes other than for enforcement” of the referenced federal statute. Accordingly, we conclude that the submitted I-9 form, which we have marked, is confidential for purposes of section 552.101 of the Government Code and may only be released in compliance with the federal laws and regulations governing the employment verification system.

You claim some of the submitted information is excepted from public disclosure under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. Section 261.201(a) of the Family Code provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). We note that the district is not an agency authorized to conduct a chapter 261 investigation. *See id.* § 261.103 (listing agencies that may conduct child abuse investigations). However, Exhibits C and D involve a report of alleged or suspected abuse made to the Zapata County Sheriff’s office and to the Child Protective Services Division of the Texas Department of Family and Protective Services (“CPS”), as well as other information used or developed in investigations by CPS. Upon review, we find that Exhibits C and D are within the scope of section 261.201 of the Family Code. Therefore, Exhibits C and D are confidential pursuant to section 261.201 of the Family Code and the district must withhold this information under section 552.101 of the Government Code as information made confidential by law.<sup>6</sup>

You claim that portions of Exhibit B are excepted from public disclosure under section 552.101 of the Government Code 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 determined that a teacher is someone who is required

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<sup>6</sup>As this ruling is dispositive, we need not address your remaining argument for this information.

to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of the evaluations. *Id.* Similarly, an administrator is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is serving as an administrator at the time of the evaluation. *Id.*

You claim that Exhibit B includes evaluations of the named former teacher that are confidential under section 21.355. You do not indicate, however, whether this individual held a teacher's certificate or permit under chapter 21 of the Education Code and was performing the functions of a teacher at the time of the evaluations. Nevertheless, to the extent the individual in question did hold a teacher's certificate or permit and was functioning as a teacher at the time of the evaluation, the district must withhold the evaluations in Exhibit B under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. *See Abbott v. North East Indep. Sch. Dist.*, No. 03-04-00744-CV (Tex. App.—Austin 2006, no pet.) (concluding that written reprimand constitutes an evaluation for purposes of Educ. Code § 21.355). To the extent the individual in question did not hold a teacher's certificate or permit or was not functioning as a teacher at the time of the evaluation, the information at issue is not confidential under section 21.355 of the Education Code and may not be withheld under section 552.101 of the Government Code.

You also claim that portions of the Exhibit B are excepted from public disclosure under sections 552.101 and 552.102 of the Government Code. Section 552.102(a) 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(a) 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 of the Government Code. Thus, we will consider your section 552.102(a) and section 552.101 claims together.

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. 540 S.W.2d 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. Upon review, we find that no portion of the submitted information constitutes highly intimate or embarrassing information for the purposes of common-law privacy. Furthermore, we note that the information at issue consists of employment information that is of a legitimate public interest and may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. Open Records Decision

Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Thus, the district may not withhold any of the information at issue under either section 552.101 or section 552.102 on the basis of common-law privacy.

You claim that the transcripts in Exhibit B are excepted from public disclosure under section 552.102(b) of the Government Code. 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). Thus, with the exception of the employee's name, the courses taken, and the degree obtained, the district must withhold the transcripts submitted in Exhibit B under section 552.102(b) of the Government Code.

Next, we address your argument that some of the remaining information in Exhibit B is excepted under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the current and former home addresses, telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). *See also* Open Records Decision No. 670 (2001) (extending section 552.117(a)(1) exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024). Whether a particular piece of information is protected under section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). If the employee at issue made a request for confidentiality under section 552.024 prior to the date on which the request for information was made, the district must withhold the information we have marked pursuant to section 552.117(a)(1). If the employee at issue did not make a timely request for confidentiality, the information at issue must be released.

You claim that some of the remaining submitted information is excepted from public disclosure under section 552.130 of the Government Code. In relevant part, section 552.130 provides:

(a) Information is excepted from required public disclosure if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]

Gov't Code § 552.130(a)(1). Upon review, we agree that you must withhold the Texas-issued motor vehicle record information we have marked under section 552.130 of the Government Code.

In summary, 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 consist of "education records" subject to FERPA, the district must dispose of that information in accordance with FERPA, rather than the Act. The district may only release the medical records we have marked in accordance with the MPA. The district must withhold the I-9 form we have marked 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 Exhibits C and D under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. To the extent the individual in question did hold a teacher's certificate or permit and was functioning as a teacher at the time of the evaluation, the district must withhold the evaluations in Exhibit B under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. To the extent the individual in question did not hold a teacher's certificate or permit or was not functioning as a teacher at the time of the evaluation, the information at issue is not confidential under section 21.355 of the Education Code and may not be withheld under section 552.101 of the Government Code. With the exception of the employee's name, the courses taken, and the degree obtained, the district must withhold the transcripts in Exhibit B under section 552.102(b) of the Government Code. If the employee at issue made a timely request for confidentiality, the district must withhold the information we have marked pursuant to section 552.117(a)(1) of the Government Code. The district must withhold the information we have marked pursuant to section 552.130 of the Government Code. The remaining 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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

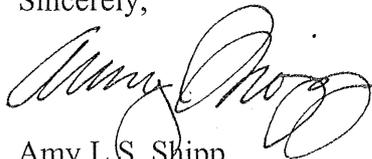
statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental 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 challenge 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,



Amy L.S. Shipp  
Assistant Attorney General  
Open Records Division

ALS/mcf

Ref: ID# 300013

Enc. Submitted documents

c: Dr. Mary Widmier  
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(w/o enclosures)