



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 26, 2008

Mr. Miguel A. Saldana
Walsh, Anderson, Brown, Schulze, & Aldridge, P.C.
103 East Price Road, Suite A
Brownsville, Texas 78521

OR2008-03913

Dear Mr. Saldana:

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# 305681.

The Brownsville Independent School District (the "district"), which you represent, received a request for information relating to a former teacher's termination by the district. You claim that the submitted personnel records are excepted from disclosure under sections 552.102 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the United States Department of Education Family Policy Compliance Office has informed this office that FERPA 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.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"). Although you have submitted some redacted education records for our review, we note that there are also unredacted students' names throughout the submitted personnel file. Because our office is prohibited from reviewing these education records to determine the applicability of FERPA, we will not address FERPA with respect to any of these records. Such determinations under FERPA must be made by

¹A copy of this letter may be found on the attorney general's website, http://www.oag.state.tx.us/opinopen/og_resources.shtml.

the educational authority in possession of the education records.² We will, however, address the applicability of your claimed exceptions to the submitted personnel file.

Section 552.102 of the Government Code 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).

In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found.*, 540 S.W.2d at 685. Upon review, we find that although the submitted personnel records relate to an intimate and embarrassing incident, this incident occurred within the scope of employment of a former district teacher, and it eventually led to the teacher's termination by the district. Therefore, we conclude that you have failed to establish that section 552.102 is applicable to any portion of the submitted information. See Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Thus, no portion of the submitted information may be withheld under section 552.102 of the Government Code.

You also claim the submitted personnel records are excepted under section 552.108 of the Government Code. Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. See *id.* We note that section 552.108(a) only applies to "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime." *Id.* You do not explain, nor do the documents reflect, that the submitted personnel records are maintained by a law enforcement agency or that they relate to a criminal investigation conducted by a law enforcement agency. Rather, it appears that these documents relate to an administrative investigation conducted by the district that resulted in a personnel action. Accordingly, we find that you have failed to demonstrate how the information at issue deals with the detection, investigation, or prosecution of crime for purposes of

²In 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.

section 552.108(a)(2), and no information may be withheld on this basis. *See generally* Open Records Decision Nos. 562 at 10 (1990), Open Records Decision No. 350 at 3-4 (1982).

We note that some of the submitted information may be subject to section 552.117 of the Government Code, which excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. The district may only withhold information under section 552.117 on behalf of current or former employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The district may not withhold the information we have marked under section 552.117 for those individuals who did not make a timely election to keep the information confidential.³

In summary, the district must withhold the information we have marked under section 552.117 of the Government Code on behalf of those employees who made a timely request for confidentiality under section 552.024 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

³We note that if the employee at issue did not elect confidentiality under section 552.024 of the Government Code, section 552.147(b) of the Government Code authorizes a government 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.

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,



Reg Hargrove
Assistant Attorney General
Open Records Division

RJH/eeg

Ref: ID# 305681

Enc. Submitted documents

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(w/o enclosures)