



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 15, 2008

Mr. Andrew D. Clark
Powell & Leon, L.L.P.
1706 West Sixth Street
Austin, Texas 78703-4703

OR2008-09625

Dear Mr. Clark:

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# 315762.

The Del Valle Independent School District (the "district"), which you represent, received two requests relating generally to investigations of misconduct by district teachers and the personnel file of any investigated teacher. You state that you have released some of the responsive information. You also state that you have redacted the responsive documents pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.¹ We note that you have redacted social security numbers pursuant to section 552.147 of the Government Code.² You claim that the submitted information is excepted from disclosure under sections 552.101; 552.102, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed 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

¹We note that our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made; therefore, we will not address the applicability of FERPA to any of the submitted records.

²Section 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. Gov't Code § 552.147.

Code § 552.101. This exception encompasses information that other statutes make confidential. Section 1324a of title 8 of the United States Code provides that an Employment Eligibility Verification Form I-9 “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.³ See 8 U.S.C. § 1324a(b)(5); see also 8 C.F.R. § 274a.2(b)(4). In this instance, the release of the submitted Form I-9 would be “for purposes other than for enforcement” of the applicable federal law. A Form I-9 may only be released for purposes of compliance with the federal laws and regulations governing the employment verification system. Therefore, the district must withhold the marked Form I-9 under section 552.101 in conjunction with section 1324a of title 8 of the United States Code.

Section 552.101 also encompasses section 21.048 of the Education Code, which addresses teacher certification examinations. Section 21.048(c-1) provides the following

The results of an examination administered under this section are confidential and are not subject to disclosure under Chapter 552, Government Code, unless:

- (1) the disclosure is regarding notification to a parent of the assignment of an uncertified teacher to a classroom as required by Section 21.057; or
- (2) the educator has failed the examination more than five times.

Educ. Code § 21.048(c-1). You inform us that the submitted information contains results of an examination administered under section 21.048 of the Education Code. You do not inform us that subsection 21.048(c-1)(1) or (2) is applicable; therefore, the district must withhold the information we have marked under section 552.101 in conjunction with section 21.048 of the Education Code. We note however, that if the individual has failed the examinations more than five times, the information we have marked under section 21.048(c-1) must be released.

Section 552.101 of the Government Code also encompasses 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 section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher. See Open Records Decision No. 643 at 3 (1996). We also determined that a “teacher” for purposes of section 21.355 means a person who (1) is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and (2) is

³This office will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4; *Abbott v. North East Independent School District*, 212 S.W.3d 364, 367 (Tex. App.—Austin 2006, no pet.) (holding that a document evaluates a teacher when it “reflects the principal’s judgment regarding [the teacher’s] actions, gives corrective direction, and provides for further review.”). We agree that a portion of the submitted information consists of evaluations. Thus, the information we have marked under section 21.355 is confidential, and the district must withhold it under section 552.101 of the Government Code. However, we find that the remaining documents do not consist of evaluations of the performance of the individual at issue for purposes of section 21.355, and the district may not withhold this information under section 552.101 on that ground.

Section 552.101 of the Government Code also encompasses common-law privacy, which protects information that is (1) highly intimate and embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See 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. *Id.* at 683. Although you claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with common-law privacy and the ruling in *Morales v. Ellen*, the submitted investigation does not identify the victims to or witnesses of sexual harassment for the purposes of *Ellen*. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). Therefore, we find that *Ellen* is not applicable in this instance.

Furthermore, there is a legitimate public interest in the qualifications of a public employee and how that employee performs job functions and satisfies employment conditions. *See generally* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job performance of public employees), 444 (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). Because the information at issue concerns the workplace conduct of district teachers, we find there is a legitimate public interest in the information. Accordingly, the district may not withhold any of the submitted information under common-law privacy as encompassed by section 552.101 of the Government Code.

Section 552.102(b) of the Government Code excepts from disclosure all information from transcripts of a professional public school employee other than the employee’s name, the courses taken, and the degree obtained. Gov’t Code § 552.102(b); Open Records Decision No. 526 (1989). Thus, except for the information that reveals the employee’s name, the

courses taken, and the degree obtained, the transcripts we have marked are confidential pursuant to section 552.102(b) of the Government Code and must be withheld on that basis.

Section 552.117(a)(1) of the Government Code excepts from disclosure the 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. *See* Gov't Code §§ 552.024, .117(a)(1). 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 made. *See* Open Records Decision No. 530 at 5 (1989). You state that the employee whose information is at issue timely elected to keep his home address, home telephone number, and social security number confidential. Accordingly, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code.

We note, however, that you do not state that the employee at issue timely elected to keep his family member information confidential under section 552.024 of the Government Code. To the extent that the employee in question timely elected confidentiality for this information under section 552.024, the district must withhold the family member information that we have marked under section 552.117(a)(1) of the Government Code. If no such election has been made under section 552.024, then you may not withhold any of the employee's family member information under section 552.117(a)(1) of the Government Code.

Section 552.130 of the Government Code excepts from disclosure information that relates to "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). The district must withhold the Texas driver's license information we have marked under section 552.130 of the Government Code.

Section 552.137 of the Government Code 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 id.* § 552.137(a)-(c). The e-mail address at issue is not of a type specifically excluded by section 552.137(c). Therefore, the district must withhold the e-mail address we have marked in accordance with section 552.137, unless the district receives consent for its release.

In summary, under section 552.101 of the Government Code, the district must withhold the marked Form I-9 in conjunction with section 1324a of title 8 of the United States Code and the information we have marked in conjunction with sections 21.048 and 21.355 of the Education Code. Other than the employee's name, the courses taken, and the degree obtained, the transcripts that we have marked must be withheld under section 552.102(b) of the Government Code. The district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. If, however, the employee at issue had not timely made an election under section 552.024 of the Government Code to keep his family

member information private, then you may not withhold any such information under section 552.117(a)(1) of the Government Code. The district must withhold the Texas driver's license information we have marked under section 552.130 of the Government Code. The district must withhold the e-mail address we have marked in accordance with section 552.137 of the Government Code, unless the district receives consent for its release. The remaining information must be released.

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). If the governmental body does not file suit over 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,

A handwritten signature in black ink, appearing to be the letter 'B' followed by a flourish.

Benjamin A. Diener
Assistant Attorney General
Open Records Division

BAD/jb

Ref: ID# 315762

Enc. Submitted documents

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