



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 31, 2009

Mr. Robert Viña
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
6521 North 10th Street, Suite C
McAllen, Texas 78504

OR2009-04195

Dear Mr. Viña:

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# 338572 (PIR# 4892).

The Brownsville Independent School District (the "district"), which you represent, received a request for the employee file of a named individual. You claim that the submitted information is exempted from disclosure under sections 552.101, 552.102, and 552.114 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

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 or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.² Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not

¹Although you also raise section 552.111 of the Government Code in your brief, you do not present any arguments against disclosure under that section. Since you have not submitted arguments concerning this exception, we assume that you no longer urge it. See Gov't Code §§ 552.301(b), (e), .302.

²A copy of this letter may be found on the Office of the Attorney General's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

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 state that a portion of the submitted information is subject to FERPA. Because our office is prohibited from reviewing these education records, 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.³ Likewise, we do not address your arguments under section 552.114 of the Government Code. *See* Gov’t Code §§ 552.026 (incorporating FERPA into the Act), 552.114 (excepting from disclosure “student records”); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 of the Government Code and FERPA). However, to the extent you determine the information you have submitted is not protected by FERPA, we will consider your other arguments against disclosure.

We next note that you appear to have redacted the employee’s personal information from some of the submitted documents. Pursuant to section 552.147(b) of the Government Code, all governmental bodies may redact social security numbers of living individuals without requesting a decision from this office. *See* Gov’t Code § 552.147(b). Accordingly, the district may withhold the social security numbers you have marked under section 552.147. For the remaining redacted information, we note that pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. *Id.* §§ 552.301(a), .301(e)(1)(D). You do not assert, nor does our review of the records indicate, that you have been authorized to withhold any of the remaining redacted information without seeking a ruling from this office. *See id.* § 552.301(a); Open Records Decision 673 (2000). As such, these types of information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we can discern the nature of the redacted information; thus, being deprived of that information does not inhibit our ability to make a ruling. In the future, however, the department should refrain from redacting any information it submits to this office in seeking an open records ruling. Redaction of such information may result in a determination that the information must be released. *See* Gov’t Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

With regard to the redacted personal information of the employee, we note that 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

³In the future, if the district does obtain parental or an adult student’s 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.

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). 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). You provide no indication that the employee at issue elected to keep her personal information confidential prior to the time the instant request was received. Further, the submitted change of address form indicates that she did not elect to keep her personal information confidential. Thus, the district may not withhold the employee's personal information under section 552.117 of the Government Code.

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. Section 552.101 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. In addition, the court has concluded a written reprimand constitutes an evaluation for purposes of section 21.355 because "it reflects the principal's judgment regarding [a teacher's] actions, gives corrective direction, and provides for further review." *North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). 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 decision, we 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 contend the documents labeled AG-0005 through AG-0015, as well as the documents labeled AG-0038 through AG-0061 contain evaluative and assessment information regarding a teacher's performance and should therefore be withheld from disclosure under section 21.355. However, the submitted information reflects that the individual at issue was working as a parent advisor for the district, rather than as a teacher or administrator. Accordingly, the district may not withhold the submitted information under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Next, you assert that the submitted information is subject to common-law privacy as encompassed by sections 552.101 and 552.102 of the Government Code. Section 552.101 encompasses the doctrine of common-law privacy, while section 552.102(a) excepts from public 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). Section 552.102 is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). 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 common-law privacy test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976). Accordingly, we will consider your section 552.101 and section 552.102(a) privacy claims together.

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. *Indus. Found.*, 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. Generally, however, the public has a legitimate interest in information that relates to public employment and public employees, and information that pertains to an employee's actions as a public servant generally cannot be considered beyond the realm of legitimate public interest. *See* Open Records Decisions 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) (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). Upon review, we find that a portion of the submitted information, which we have marked, constitutes highly intimate or embarrassing information of no legitimate concern to the public. Therefore, the district must withhold the information we have marked under section 552.101 of the Government Code on the basis of common-law privacy. However, the remaining information is either not intimate or embarrassing or is of legitimate concern to the public. Therefore, no portion of the remaining information may be withheld under common-law privacy and section 552.101 of the Government Code.

You state the pages marked AG-0023 and AG-0024 consist of the named employee's transcripts. Section 552.102(b) of the Government Code 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, except for the information that reveals the degree obtained and the courses taken, the district must withhold the information in pages AG-0023 and AG-0024 pursuant to section 552.102(b) of the Government Code.

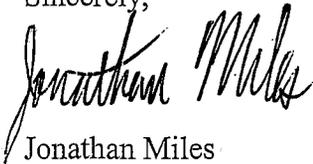
In summary, this ruling does not address the applicability of FERPA to the submitted information. Should the district determine that all or portions of the submitted information consist of "educational records" subject to FERPA, the district must dispose of that information in accordance with FERPA rather than the Act. The district may withhold the social security numbers you have redacted under section 552.147(b) of the Government Code. The district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. Except for the

information that reveals the degree obtained and the courses taken, the district must withhold the information in pages AG-0023 and AG-0024 pursuant to section 552.102(b) of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/cc

Ref: ID# 338572

Enc. Submitted documents

c: Requestor
(w/o enclosures)