



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 29, 2009

Ms. Meridith Hayes
Abernathy, Roeder, Boyd & Joplin, P.C.
Attorney for Lovejoy Independent School District
P.O. Box 1210
McKinney, Texas 75070-1210

OR2009-05703

Dear Ms. Hayes:

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# 341427.

The Lovejoy Independent School District (the "district"), which you represent, received a request for all documents from a specified time period related to the removal of the requestor's child to the disciplinary alternate education program, a copy of a named individual's statement and citation dated on a specified date, and a copy of a specified witness statement. You state that the district has redacted student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g(a).¹ You also state that you have released some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.111, 552.117, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

¹We note 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, except to note that some of the information you have redacted also exists in unredacted form elsewhere in the submitted information. We also note that parents generally have a right of access to their own child's education records. See 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3.

Initially, we note that Exhibit C is not responsive to the instant request for information because it was created after the date of the request. This ruling does not address the public availability of any information that is not responsive to the request and the district need not release that information in response to the request.

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 information protected by other statutes. You assert that a portion of Exhibit B should be withheld under section 552.101 in conjunction with the Medical Practices Act (the "MPA"). Section 159.002 of the MPA provides in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(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.

Id. § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See* Open Records Decision No.598 (1991). After reviewing the submitted information, we find that you have failed to demonstrate that the information you have marked under the MPA is information obtained directly from a medical record. Therefore, we find that none of Exhibit B is subject to the MPA.

Section 552.101 of the Government Code also encompasses the common-law right of 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). The privacy analysis under section 552.102(a) is the same as the common-law privacy standard under section 552.101. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor). We will

therefore consider the applicability of common-law privacy under section 552.101 together with your claim regarding section 552.102(a).

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. 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. 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 none of the submitted information constitutes highly intimate or embarrassing information of no legitimate concern to the public. Furthermore, although you claim that portions of the submitted information are excepted from disclosure under section 552.101 in conjunction with common-law privacy and the holding in *Morales v. Ellen*, the submitted information does not concern a sexual harassment investigation. See *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to an victims of sexual harassment was highly intimate or embarrassing information and the public did not have a legitimate interest in such information). Therefore, none of the submitted information may be withheld under either section 552.101 or section 552.102 on the basis of common-law privacy.

Next, you assert section 552.111 of the Government Code for a portion of Exhibit D. The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. See *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. See ORD No. 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; see

also *City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. See Open Records Decision No. 631 at 3 (1995). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5.

You state that Exhibit D contains the advice, opinions, and recommendations of district employees and district officials regarding policy matters. Upon review of your representations and the information at issue, we agree that some of the information in Exhibit D, which we have marked, consists of the advice, opinions, or recommendations of department employees regarding policymaking matters. However, you have failed to establish that the remaining information in Exhibit D consists of advice, opinions, or recommendations for purposes of section 552.111. Therefore, section 552.111 is not applicable to the remaining information. Accordingly, the district may only withhold the information we have marked under section 552.111 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from 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 the information be kept confidential under section 552.024 of the Government Code. Section 552.117 also encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cell phone service. See Open Records Decision No. 506 at 5-6 (1988) (Gov't Code § 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. See Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. In this case, you inform us that the employee whose personal information is at issue timely elected confidentiality under section 552.024. Thus, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code.

Section 552.147 of the Government Code provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act.² Gov't

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.

Code § 552.147. Upon review, however, we find that the submitted information does not contain any information subject to section 552.147, and none may be withheld on that basis.

In summary, the district may withhold the information we have marked under section 552.111 of the Government Code. The district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The remaining responsive 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/rl

Ref: ID# 341427

Enc. Submitted documents

c: Requestor
(w/o enclosures)