



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 15, 2009

Ms. Marianna McGowan
Abernathy, Roeder, Boyd, & Joplin P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2009-06615

Dear Ms. McGowan:

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# 344226.

The Mansfield Independent School District (the "district"), which you represent, received a request for the personnel file of a named employee. You state you have released some of the responsive information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.117, and 552.137 of the Government Code. You state you have notified the named employee of the request pursuant to section 552.304 of the Government Code. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the attorney for the named employee.

Initially, you state the district sought clarification from the requestor. *See id.* § 552.222(b) (stating that if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used). You inform us the district has not received a response from the requestor. We note a governmental body has a duty to make a good faith effort to relate a request for information to information the governmental body holds. Open Records Decision No. 561 (1990). In this case, as you have submitted responsive information for our review and raised exceptions to disclosure for these documents, we consider the district to have made a good faith effort to identify information

that is responsive to the request, and we will address the applicability of the 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. Section 552.101 encompasses information protected by other statutes. Section 21.355 of the Education Code 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 Open Records Decision No. 643, we 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 engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4. 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.).

You state the submitted information contains evaluative and assessment information regarding the named employee's performance. You also inform us, and the submitted documentation reflects, the named employee holds a teacher's certificate under chapter 21 of the Education Code. Based on your representations and our review, we agree portions of the submitted information consists of evaluations for the purposes of section 21.355. Accordingly, the district must withhold the information we have marked under section 552.101 in conjunction with section 21.355 of the Education Code. However, upon review, we find you have not demonstrated how the remaining information consists of evaluations or written reprimands as contemplated by section 21.355 or as interpreted by *North East Indep. Sch. Dist.* Thus, the remaining information may not be withheld under section 552.101 in conjunction with section 21.355 of the Education 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). A portion of the submitted information contains ExCET Exam results of the teacher at issue. You do not inform us that subsection 21.048(c-1)(1) or (2) is applicable. Furthermore, the information reflects the named educator has not failed the examination more than five times. Thus, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code.

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 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. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. You generally claim the remaining information is confidential under common-law privacy in accordance with the holding in *Morales v. Ellen*, 840 S.W.2d 519 (Tex.App.—El Paso 1992, writ denied). The court in *Ellen* addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. In this instance, the remaining information consists of personnel records and does not involve a sexual harassment investigation. Thus, *Ellen* is not applicable to any of the remaining information at issue and none of the remaining information may be withheld on that basis.

We note this office has found the public has a legitimate interest in the qualifications and work conduct of employees of governmental bodies. *See* Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). You generally claim portions of the submitted personnel file are confidential pursuant to common-law privacy. Upon review of your arguments and the remaining information, we find you have failed to establish how any portion of the remaining information is highly intimate or embarrassing and of no legitimate

public interest. Thus, the remaining information is not confidential under common-law privacy, and the district may not withhold it on that ground.

Section 552.102(b) of the Government Code excepts from disclosure "a transcript from an institution of higher education maintained in the personnel file of a professional public school employee." Gov't Code § 552.102(b). This section further provides, however, "the degree obtained or the curriculum on a transcript in the personnel file of the employee" are not excepted from disclosure. Thus, except for the information that reveals the degree obtained and the courses taken, the district must withhold the transcripts we have marked under section 552.102(b) of the Government Code.

Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this information be kept confidential under section 552.024. 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 only be withheld under section 552.117(a)(1) on behalf of a current or former 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. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 that the information be kept confidential. Therefore, the district must withhold the information we have marked under section 552.117(a)(1) to the extent the named employee timely requested confidentiality for that information under section 552.024. To the extent the named employee did not timely request confidentiality, the district may not withhold the information we have marked under section 552.117(a)(1).¹

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). Gov't Code § 552.137(a)-(c). We note that section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public" but is instead the address of the individual as a government employee. The personal e-mail address in the remaining information does not appear to be of a type specifically excluded by section 552.137(c). You do not inform us the member of the public has affirmatively consented to the release of this personal e-mail address. Therefore, the district must withhold the personal e-mail address we have marked under section 552.137 of the Government Code.

¹Section 552.147(b) 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.

In summary, the district must withhold the teacher evaluations we have marked under section 552.101 in conjunction with section 21.355 of the Education Code and the information we have marked under section 552.101 in conjunction with section 21.048 of the Education Code. Except for the information that reveals the degree obtained and the courses taken, the district must withhold the transcripts we have marked under section 552.102(b) of the Government Code. To the extent the named employee timely elected to keep his personal information confidential, the district must withhold the information we have marked under section 552.117(a)(1). The district must withhold the personal e-mail address we have marked under section 552.137. 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,



Olivia A. Maceo
Assistant Attorney General
Open Records Division

OM/eeg

Ref: ID# 344226

Enc. Submitted documents

c: Requestor
(w/o enclosures)