



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 26, 2009

Ms. Lynn Rossi Scott
Brackett & Ellis
100 Main Street
Fort Worth, Texas 76102-3090

OR2009-07065

Dear Ms. Scott:

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# 344090.

The Burleson Independent School District (the "district"), which you represent, received a request for the personnel file of a named individual, complaints or letters regarding an altercation between this individual and another specified individual and documentation of the leave of absence taken by the named individual. You indicate that you have released some of the requested information. You state you have redacted some of the submitted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You also state that you have redacted social security numbers in the submitted information under section 552.147.² You claim that

¹The United States Department of Education Family Policy Compliance Office (the "DOE") 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. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

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.

portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, 552.117, and 552.137 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 Code § 552.101. This exception encompasses information that other statutes make confidential. We understand you to raise section 552.101 in conjunction with the Americans with Disabilities Act of 1990 (the "ADA"). See 42 U.S.C. § 12101 *et seq.* Title I of the ADA provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. Information obtained in the course of a "fitness for duty examination" conducted to determine whether an employee is still able to perform the essential functions of his or her job is to be treated as a confidential medical record as well. See 29 C.F.R. § 1630.14(c); see also Open Records Decision No. 641 (1996). Furthermore, the federal Equal Employment Opportunity Commission (the "EEOC") has determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." See Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). Federal regulations define "disability" for the purposes of the ADA as "(1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment." 29 C.F.R. § 1630.2(g). The regulations further provide that physical or mental impairment means: (1) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. See *id.* § 1630.2(h). Upon review of the submitted information, we find that the district has failed to demonstrate the ADA is applicable to any portion of the submitted information, and none of the submitted information may be withheld under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses section 21.355 of the Education Code, which 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 or an administrator. See Open Records Decision No. 643 (1996). In Open Records Decision No. 643, we determined for purposes of section 21.355, the word "teacher" means a person who 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 who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4. The Third Court of Appeals has held that a written reprimand constitutes an evaluation for purposes of section 21.355. *See Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3rd 364 (Tex. App.—Austin, 2006).

You assert that the information you have marked under this section relates to a teacher who held the appropriate classroom teacher certification and was functioning as a teacher during the relevant time period. You have provided documentation showing the former teacher whose information is at issue held a teaching certificate under subchapter B of chapter 21 of the Education Code at the times of the evaluations. However, we note that some of the information at issue does not constitute an evaluation of the teacher for the purposes of section 21.355. Therefore, based on your representations and our review of the information at issue, we conclude that the information we have marked consists of teacher evaluations for the purposes of section 21.355. Therefore, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355. The remaining information does not constitute of teacher evaluations for the purpose of section 21.355 and may not be withheld under section 552.101 on that basis.

Section 552.101 also encompasses the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in pertinent 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.

Occ. Code § 159.002(a), (b), (c). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982)*. Upon review, we conclude none of the information at issue consists of medical records that are subject to the MPA. Thus, the district may not withhold any of the information under the MPA.

Section 552.101 also encompasses common-law privacy. 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. Upon review, we find that the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the district must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. No part of the remaining information is protected under common-law privacy, and it may not be withheld on that basis.

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(b); Open Records Decision No. 526 (1989). Thus, with the exception of the information you have marked for release, and the additional information we have marked for release, the district must withhold the information in the submitted transcripts under section 552.102(b) of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses and 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. 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 indicate that the employee at issue elected to keep these types of information confidential before the district received the request for information; therefore, the district must withhold the information you have marked, and the additional information we have marked, under section 552.117 of the Government Code.

Section 552.137 of the Government Code requires a governmental body to withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See* Gov't Code § 552.137 (b). You do not inform us that the owners of the e-mail addresses at issue have affirmatively consented to release. Therefore, the district must withhold the e-mail addresses you have marked under section 552.137 of the Government Code.

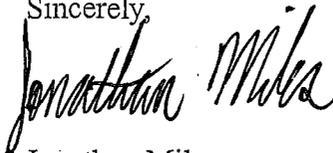
In summary, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355. The district must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. With the exception the

information you have marked for release, and the additional information we have marked for release, the district must withhold the information in the submitted transcripts under section 552.102(b) of the Government Code. The district must withhold the information you have marked, and the additional information we have marked, under section 552.117 of the Government Code. The district must withhold the e-mail addresses you have marked under section 552.137 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# 344090

Enc. Submitted documents

c: Requestor
(w/o enclosures)