



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

September 3, 2009

Mr. Ricardo R. Lopez  
Feldman Rogers, L.L.P.  
Attorney for North East Independent School District  
517 Soledad Street  
San Antonio, Texas 78205-1508

OR2009-12506

Dear Mr. Lopez:

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# 354353.

The North East Independent School District (the "district"), which you represent, received a request for information related to teachers and administrators who were placed on administrative leave between August 2006 and June 16, 2009. You indicate that the district will release some responsive information to the requestor. You claim that the remaining requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of the requested information.<sup>1</sup>

Initially, we understand you to assert that the request has been withdrawn by operation of law because the requestor has failed to respond to an itemized cost estimate sent by the district. *See* Gov't Code § 552.2615. Under section 552.2615 of the Government Code, a governmental body is required to provide a requestor with an estimate of charges when a

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<sup>1</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

request to inspect a paper record will result in the imposition of a charge that will exceed forty dollars. *See id.* The relevant portion of section 552.2615 provides:

(a) [T]he governmental body must inform the requestor of the responsibilities imposed on the requestor by this section and of the rights granted by this entire section and give the requestor the information needed to respond, including:

(1) that the requestor must provide the governmental body with a mailing, facsimile transmission, or electronic mail address to receive the itemized statement and that it is the requestor's choice which type of address to provide;

(2) that the request is considered automatically withdrawn if the requestor does not respond in writing to the itemized statement and any updated itemized statement in the time and manner required by this section; and

(3) that the requestor may respond to the statement by delivering the written response to the governmental body by mail, in person, by facsimile transmission if the governmental body is capable of receiving documents transmitted in that manner, or by electronic mail if the governmental body has an electronic mail address.

(b) A request . . . is considered to have been withdrawn by the requestor if the requestor does not respond in writing to the itemized statement by informing the governmental body within 10 days after the date the statement is sent to the requestor that

(1) the requestor will accept the estimated charge;

(2) the requestor is modifying the request in response to the itemized statement; or

(3) the requestor has sent to the attorney general a complaint alleging that the requestor has been overcharged for being provided with a copy of public information.

*Id.* § 552.2615(a), (b). You state, and provide supporting documentation, that you provided the requestor with an itemized cost estimate for a portion of the requested information. Further, you state that the requestor did not respond to the issued estimate. However, we have examined the cost estimate at issue and have determined that it does not comply with the provisions of section 552.2615. Specifically, the estimate did not inform the requestor

that she could make a complaint to our office alleging that she has been overcharged. *See id.* § 552.2615. Accordingly, we conclude that the request has not been withdrawn by operation of law. The district must, therefore, release the information for which it does not seek a ruling, and we will address whether the submitted information is excepted from disclosure under the Act.

Next, we note that a portion of the submitted information, which we have marked, is not responsive to the instant request because it was created after the date of this request. The district need not release non-responsive information in response to this request, and this ruling will not address such information.

We also note that the United States Department of Education Family Policy Compliance Office has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, 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.<sup>2</sup> *See* 20 U.S.C. § 1232g(b); *see also id.* § 1232g(a)(4)(A) (defining "education records"); Open Records Decision No. 462 at 15 (1987). Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not 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").

The submitted information contains unredacted personally identifiable student information. Because our office is prohibited from reviewing an education record to determine whether appropriate redactions under FERPA have been made, 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.

We also note that the district has redacted portions of the submitted information. You do not assert, nor does review of our records indicate, that you have been authorized to withhold this information without seeking a ruling from this office. *See* Gov't Code § 552.301(a); Open Records Decision 673 (2000). Therefore, the district has failed to comply with section 552.301(e) with regard to the redacted information.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't

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<sup>2</sup>A 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>.

Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). A compelling reason generally exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977).

We are not able to discern the nature of the information you have redacted. Thus, because we are not able to review this redacted information, we have no means of determining whether it is excepted from release pursuant to the Act. We therefore have no choice but to order the release of the information we have marked pursuant to section 552.302 of the Government Code, to the extent such information is responsive to the present request and is not subject to FERPA. If you believe the information is confidential and may not lawfully be released, you must challenge the ruling in court as outlined below. In the future, the district must not redact requested information that it submits to this office in seeking an open records ruling, unless the information is the subject of a previous determination under section 552.301 or is subject to FERPA. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision No. 673 (2001).

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. You assert that the submitted information is excepted from disclosure under section 552.101 in conjunction with 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 addition, the court has concluded that 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.). We have determined that the word “administrator” in section 21.355 means a person who is required to and does in fact hold an administrator’s certificate under chapter 21 of the Education Code and is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *See* ORD 643. Similarly, this office also concluded that a teacher is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *See id.*

The information you seek to withhold under section 21.355 consists of: (1) letters of reprimand and counseling issued to teachers and administrators by district supervisors, (2) letters placing teachers and administrators on administrative leave, and (3) administrative logs maintained by the district’s Employee Relations Officer. Upon review, we conclude that

the document we have marked under section 21.355 constitutes an evaluation of the involved employee's performance as a teacher or administrator. Thus, the district may withhold this document under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code, to the extent that the involved employee held a teacher or administrator certificate at the time of evaluation. However, we find that none of the remaining information at issue consists of evaluations of teachers or administrators; therefore, the district may not withhold any of the remaining information under section 552.101 in conjunction with section 21.355.

Section 552.101 also encompasses chapter 411 of the Government Code. Criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 at 7 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI the Department of Public Safety ("DPS") maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. A school district may obtain CHRI from DPS as authorized by section 411.097 and subchapter C of chapter 22 of the Education Code; however, a school district may not release CHRI except as provided by section 411.097(d). *See id.* § 411.097(d); Educ. Code § 22.083(c)(1) (authorizing school district to obtain from any law enforcement or criminal justice agency all CHRI relating to school district employee); *see also* Gov't Code § 411.087. Section 411.087 authorizes a school district to obtain CHRI from the Federal Bureau of Investigation or any other criminal justice agency in this state. Gov't Code § 411.087. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* ORD 565. Furthermore, any CHRI the district obtained from DPS or any other criminal justice agency in this state must be withheld under section 552.101 of the Government Code in conjunction with section 411.097(d) of the Government Code. *See* Educ. Code § 22.083(c)(1). In this instance, you have failed to establish that any of the submitted information constitutes CHRI generated by the National Crime Information Center or by the Texas Crime Information Center. Accordingly, the district may not withhold any of the submitted information on this basis.

The district also asserts that release of the submitted administrative leave logs would implicate the involved teachers' and administrators' common-law right to privacy. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or 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 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. However, information pertaining to the work conduct and job performance of

public employees is subject to a legitimate public interest and, therefore, generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find that the information we have marked is highly intimate or embarrassing and not of legitimate public concern; thus, the district must withhold this information under section 552.101 in conjunction with common-law privacy. However, the remaining information at issue is not highly intimate or embarrassing, or pertains to district employees' employment and work conduct, such that there is a legitimate public interest in this information. Therefore, the district may not withhold any of the remaining information at issue on the basis of common-law privacy.

Finally, we note that 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.<sup>3</sup> 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. Therefore, the district must withhold the information we have marked under section 552.117(a)(1) to the extent that the involved employees timely elected under section 552.024 to keep their personal information confidential and, if any of the marked telephone numbers are cellular numbers, to the extent that the district did not pay for these cellular accounts.

In summary, the district: (1) may withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code, to the extent that the involved employee held a teacher or administrator certificate at the time of evaluation; (2) must withhold the information we have marked under section 552.101 in conjunction with common-law privacy; (3) must withhold the information we have marked under section 552.117(a)(1) to the extent that the involved employees timely

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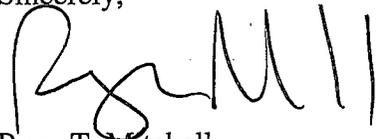
<sup>3</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

elected under section 552.024 to keep their personal information confidential and, if any of the marked telephone numbers are cellular numbers, to the extent that the district did not pay for these cellular accounts; and (4) must release the remainder of the responsive information.

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](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,



Ryan T. Mitchell  
Assistant Attorney General  
Open Records Division

RTM/rl

Ref: ID# 354353

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)