



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 17, 2010

Ms. Bertha Bailey Whatley
Chief Legal Counsel and Public Information Designee
Fort Worth Independent School District
100 North University Drive
Fort Worth, Texas 76107

OR2010-03797

Dear Ms. Whatley:

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# 372798.

The Fort Worth Independent School District (the "district") received a request for all e-mail communications sent to or from a named member of the district's board of education during a specified time period. You claim the submitted e-mails and attachments are excepted from disclosure under sections 552.101, 552.102, 552.107, and 552.109 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we must address the district's obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for

¹Although you also claim some of the submitted information is excepted under section 552.305 of the Government Code, that provision is not an exception to disclosure. Rather, section 552.305 requires a governmental body to notify third parties whose proprietary interests may be implicated by a request for information of the request and of the parties' right to submit comments to this office explaining why the requested information should be withheld from disclosure. *See* Gov't Code § 552.305(d).

²We assume 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 those records contain substantially different types of information than that submitted to this office. Furthermore, it appears the district has redacted certain e-mail addresses in the submitted information under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009), which this office recently issued as a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

information it wishes to withhold. Pursuant to section 552.301(e) of the Government Code, the governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e). In this instance, you state the district received the request for information on December 10, 2009, and the district was closed December 21, 2009 through January 1, 2010, for its annual winter break. Accordingly, the district's fifteen-business-day deadline was January 14, 2010. However, you did not submit comments explaining why the stated exceptions apply, or a copy or representative sample of the information requested, until January 20, 2010. Thus, we find the district failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the waiver of its claims under the exceptions at issue, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *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); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). You assert the information submitted as Attachment B is excepted under section 552.107 of the Government Code. This section, however, is discretionary in nature. It serves only to protect a governmental body's interests, and may be waived; as such, it does not constitute a compelling reason to withhold information for purposes of section 552.302. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions). Thus, no portion of Attachment B may be withheld under section 552.107 of the Government Code. However, because sections 552.101, 552.102, and 552.109 can provide compelling reasons to withhold information, we will consider the applicability of these 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. This section encompasses information protected by other statutes, such as 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 "administrator" in section 21.355 means a person who is required to, and does in fact, hold an administrator's certificate under subchapter B of 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 at 4.

You assert the e-mails and attached letters submitted as Attachment A are confidential under section 21.355. Upon review, however, we find you have not demonstrated, nor do the documents reflect, how the e-mails and letters are an evaluation of an administrator. Accordingly, the district may not withhold Attachment A under section 552.101 of the Government in conjunction with section 21.355 of the Education Code.

You claim the e-mails submitted as Attachment C are confidential under section 552.101 of the Government Code in conjunction with the doctrine of common-law privacy and under section 552.102 of the Government Code. Section 552.101 also encompasses the doctrine of common-law privacy. Section 552.102(a) of the Government Code excepts from 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.

Common-law privacy protects information that (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. 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. 405 at 2-3 (1983) (public has interest in manner in which public employee performs job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under common-law right of privacy); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). This office has also found, however, some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review of Attachment C, we agree the medical

information we have marked is not of legitimate public interest and is, therefore, confidential under common-law privacy. We find, however, the remaining information in Attachment C is of legitimate public interest as it pertains to public employees' job performances. Consequently, the district may not withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy or under section 552.102(a) of the Government Code.

We note the remaining information in Attachment C contains e-mail addresses. 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).³ See Gov't Code § 552.137(a)-(c). The e-mail addresses we have marked in Attachment C are not specifically excluded by section 552.137(c). As such, these e-mail addresses must be withheld under section 552.137, unless the owners of the addresses have affirmatively consented to their release. See *id.* § 552.137(b).

Section 552.109 of the Government Code excepts from public disclosure "[p]rivate correspondence or communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy[.]" *Id.* § 552.109. This office has held the test to be applied to information under section 552.109 is the same as the common-law privacy test formulated by the Texas Supreme Court in *Industrial Foundation*, as outlined above. You contend the e-mails and attachments submitted as Attachment D are private. Although the information in Attachment D is correspondence of an elected office holder, you have failed to demonstrate how any of this information constitutes highly intimate or embarrassing information. Therefore, no part of Attachment D may be withheld under section 552.109 of the Government Code.

The remaining information includes district employees' family information that may be protected under section 552.117 of the Government Code. Section 552.117(a)(1) 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 this information be kept confidential under section 552.024 of the Government Code. *Id.* § 552.117(a)(1). Whether 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). The district may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made.

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

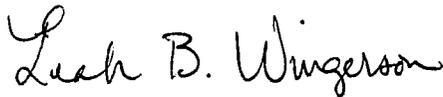
We have marked the family information that may be subject to section 552.117. You have not informed us, however, that any of the employees whose information is at issue timely chose to not allow public access to their personal information. Therefore, if the employees timely elected to withhold their family information, the district must withhold the information we have marked pursuant to section 552.117(a)(1) of the Government Code. If the employees did not timely elect to withhold their family information, then the district may not withhold the marked information under section 552.117(a)(1) of the Government Code.

In summary, the district must withhold the medical information we have marked in Attachment C under common-law privacy, and the e-mail addresses we have marked in Attachment C under section 552.137 of the Government Code, unless the owners of the e-mail addresses have consented to their release. To the extent the employees whose information is at issue timely elected to withhold their family information, the district must withhold the information we have marked pursuant to section 552.117(a)(1) 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, toll free, at (888) 672-6787.

Sincerely,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 372798

Enc. Submitted documents

c: Requestor
(w/o enclosures)