



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 7, 2010

Mr. James M. Whitton
Attorney for Burleson Independent School District
Brackett & Ellis
100 Main Street
Fort Worth, Texas 76102-3090

OR2010-08269

Dear Mr. Whitton:

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# 381776.

The Burleson Independent School District (the "district"), which you represent, received a request for the last ten years of proficiency ratings, supervisor evaluations, and employment attendance records for a named teacher; files pertaining to any complaints filed against that teacher; any personnel letters or disciplinary records for that teacher; all students' scores and judges' notes related to a specified audition scheduled by the teacher; the names and educational backgrounds of the judges of that audition; and the written policies, guidelines or criteria created by the named teacher with regard to judging the auditions. You state that you will release some of the requested information. You state you have redacted some 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

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>.

social security numbers in the submitted information under section 552.147.² You claim that portions of the submitted information are excepted from disclosure under sections 552.101 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 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, including section 21.355 of the Education Code. Section 21.355 provides "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. Open Records Decision No. 643 (1996). This office has also concluded that a teacher is someone who is required to hold, and does hold, a certificate or permit required under chapter 21 of the Education Code, and is teaching at the time of his or her evaluation. *Id.* In addition, the Third Court of Appeals has concluded a written reprimand constitutes an evaluation for purposes of section 21.355. *North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

You state the information in Exhibit D consists of evaluative documents pertaining to an individual who holds a teacher's certificate under chapter 21 of the Education Code and was performing the functions of a teacher at the time of the evaluations. Based on your representations and our review, we agree a portion of the information in Exhibit D consists of teacher evaluations and a reprimand subject to section 21.355. Accordingly, the district must withhold the information we have marked in Exhibit D under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. However, we conclude that the self appraisal forms and sample classroom analysis do not evaluate the employee for purposes of section 21.355. Therefore, the district may not withhold this information under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Section 552.101 of the Government Code also encompasses the doctrines of common-law and constitutional privacy. 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. 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

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.

treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Based on your representations and our review, we find that the information we have marked in Exhibits C and D is highly intimate or embarrassing and not of legitimate public interest. Therefore, the district must withhold the information we have marked in Exhibit C and D under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find that you have failed to demonstrate how the remaining information you have marked in Exhibit C is highly intimate or embarrassing and not of legitimate public interest. Thus, none of the remaining information may be withheld pursuant to section 552.101 in conjunction with common-law privacy.

The constitutional right to privacy protects two types of interests. *See* Open Records Decision No. 600 at 4 (1992) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985)). The first is the interest in independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court. *Id.* The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.* The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. *See* Open Records Decision No. 455 at 5-7 (1987) (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is narrower than that under the common-law right to privacy; the material must concern the "most intimate aspects of human affairs." *See id.* at 5 (citing *Ramie*, 765 F.2d at 492). Upon review, we find you failed to demonstrate how any portion of the remaining marked information falls within the zones of privacy or implicates any party's privacy interests for purposes of constitutional privacy. Accordingly, the district may not withhold the remaining information under section 552.101 in conjunction with constitutional privacy.

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 state 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 we have marked under section 552.117 of the Government Code.

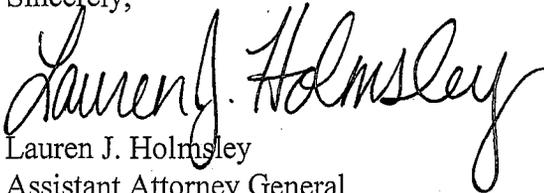
In summary, the district must withhold the information we have marked in Exhibit D under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must withhold the information we have marked in Exhibits C

and D under section 552.101 of the Government Code in conjunction with common-law privacy. The district also must withhold the information we have marked under section 552.117 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,



Lauren J. Holmsley
Assistant Attorney General
Open Records Division

LJH/jb

Ref: ID# 381776

Enc. Submitted documents

c: Requestor
(w/o enclosures)