



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

March 28, 2011

Mr. W. Montgomery Meitler  
Assistant Counsel  
Texas Education Agency  
1701 North Congress Avenue  
Austin, Texas 78701-1494

OR2011-05025

Dear Mr. Meitler:

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# 412546 (TEA PIR# 14415).

The Texas Education Agency (the "agency") received a request for all records related to disciplinary action against a named employee of a specified school district.<sup>1</sup> You state some information will be released to the requestor. You state the agency has redacted student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.<sup>2</sup> You state the agency has

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<sup>1</sup>You state, and provide documentation showing, the agency sought and received clarification of the request. *See* Gov't Code § 522.222(b) (stating if information requested is unclear or if large amount 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); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

<sup>2</sup>The 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>.

also redacted social security numbers pursuant to section 552.147 of the Government Code,<sup>3</sup> and other information as permitted by Open Records Decision No. 684 (2009).<sup>4</sup> You claim portions of the submitted information are excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the claimed exceptions 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 protected by chapter 411 of the Government Code, which addresses criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. *Id.* ch. 411. CHRI means "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." *Id.* § 411.082(2). Section 411.0845 of the Government Code provides in relevant part:

(a) [DPS] shall establish an electronic clearinghouse and subscription service to provide [CHRI] to a particular person entitled to receive [CHRI] and updates to a particular record to which the person has subscribed under this subchapter.

(b) On receiving a request for [CHRI] from a person entitled to such information under this subchapter, [DPS] shall provide through the electronic clearinghouse:

(1) the [CHRI] reported to [DPS] or the Federal Bureau of Investigation relating to the individual who is the subject of the request; or

(2) a statement that the individual who is the subject of the request does not have any [CHRI] reported to [DPS] or the Federal Bureau of Investigation.

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<sup>3</sup> Section 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 an attorney general decision under the Act.

<sup>4</sup> Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license numbers under section 552.130 of the Government Code and e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general opinion under the Act.

(d) [DPS] shall ensure that the information described by Subsection (b) is provided only to a person otherwise entitled to obtain [CHRI] under this subchapter. Information collected under this section is confidential and is not subject to disclosure under [the Act].

*Id.* § 411.0845(a)-(b), (d). Section 22.082 of the Education Code permits the State Board of Educator Certification (the "SBEC") to access CHRI from the DPS clearinghouse and other police departments, providing:

The [SBEC] shall subscribe to the criminal history clearinghouse as provided by Section 411.0845, Government Code, and may obtain from any law enforcement or criminal justice agency all [CHRI] and all records contained in any closed criminal investigation file that relate to a specific applicant for or holder of a certificate issued under Subchapter B, Chapter 21.

Educ. Code § 22.082 (footnote omitted). We note the agency has assumed the duties of the SBEC.<sup>5</sup> Section 22.08391 governs the confidentiality of information obtained by the SBEC under section 22.082, stating in relevant part:

(b) Any [CHRI] received by the [SBEC] as provided by [subchapter C of chapter 22 of the Education Code] is subject to Section 411.090(b), Government Code.

*Id.* § 22.08391(b). Section 411.090 of the Government Code provides, in relevant part:

(b) [CHRI] obtained by the [SBEC] in the original form or any subsequent form:

(1) may be used only for a purpose related to the issuance, denial, suspension, or cancellation of a certificate issued by the board;

...

(3) is not subject to disclosure as provided by [the Act.]

Gov't Code § 411.090(b). Thus, any CHRI obtained by the SBEC under section 22.082 of the Education Code, whether from DPS or another law enforcement or criminal justice agency, is not subject to disclosure under the Act. You have marked information you state consists of CHRI regarding the employee at issue that the agency obtained through the DPS

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<sup>5</sup> The 79th Texas Legislature passed House Bill 1116, which required the transfer of SBEC's administrative functions and services to the agency, effective September 1, 2005.

criminal history clearinghouse and from Live Oak Police Department, pursuant to section 22.082 of the Education Code. Based on your representation and our review, we agree the marked information is confidential under section 411.090(b) of the Government Code and must be withheld under section 552.101.

You raise section 552.102 and section 552.101 in conjunction with the ruling in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010), for the birth date of the licensed public employee at issue you have marked in the remaining information. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* § 552.102(a). You assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101, which also encompasses the common-law right to privacy. Under section 552.101, information is private 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 met. *Id.* at 681-82. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court recently expressly disagreed with *Hubert's* interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test under section 552.101. *Tex. Comptroller*, 2010 WL 4910163, at \*5. The supreme court then considered the applicability of section 552.102, not *Industrial Foundation* as the agency stated, and held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Id.* at \*10. Thus, *Texas Comptroller* applies only to a public employee's birth date maintained by the employer in an employment context. In this instance, the agency is not the employer of the public employee at issue. Rather, the agency maintains the birth date in its regulatory file as a part of its duties in licensing educators. Therefore, we conclude the agency may not withhold the information you have marked under sections 552.101 and 552.102(a) of the Government Code.

In summary, the agency must withhold the information you have marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. The remaining information must be released to the requestor.

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, toll free at (888) 672-6787.

Sincerely,



Misty Haberer Barham  
Assistant Attorney General  
Open Records Division

MHB/eeg

Ref: ID # 412546

Enc. Submitted documents

c: Requestor  
(w/o enclosures)