



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 5, 2012

Ms. Tanya Rachal Dawson
Attorney
Office of Legal Services
Fort Worth Independent School District
100 North University Drive, Suite 172
Fort Worth, Texas 76107

OR2012-10353

Dear Ms. Dawson:

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# 458062.

The Fort Worth Independent School District (the "district") received two requests from different requestors for information relating to a named individual, including personnel records, and a copy of the district's Office of Professional Standards' Standard Operating Procedures. You state you will make some of the requested information available to the requestors. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, 552.117, 552.135, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the United States Department of Education Family Policy Compliance Office has informed this office the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, 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.¹ 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,

¹A copy of this letter may be found on the attorney general's website, <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

that is, in a form in which “personally identifiable information” is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). You state you have withheld some information subject to FERPA. Further, we note you have submitted unredacted and redacted education records for our review. Because this office is prohibited from reviewing an education record for the purpose of determining whether appropriate redactions have been made under FERPA, we will not address the applicability of FERPA to the information at issue. Such determinations under FERPA must be made by the educational authority in possession of the education records.² However, we will consider your exceptions to disclosure under the Act.

Next, we note some of the submitted information, which we have marked, is not responsive to the first request for information because it was created after the date the first request was received. The district need not release this non-responsive information to the first requestor, and this ruling will not address that information with respect to the first requestor.

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. Section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) defines the term “return information” as “a taxpayer’s identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]” *See* 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *aff’d in part*, 993 F.2d1111 (4th Cir. 1993). Thus, the submitted W-4 forms in Enclosure 9, which we have marked, constitute tax return information that are confidential under federal law and must be withheld under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses section 1324a of title 8 of the United States Code. Section 1324a governs I-9 forms and their related documents. This section provides an I-9 form and “any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8

²If in the future the district does obtain parental consent to submit unredacted education records and seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Thus, the district must withhold the I-9 form we have marked in Enclosure 8 under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code. *See* 8 U.S.C. § 1324a(b)(1)(B)-(D); 8 C.F.R. § 274a.2(b)(1)(v)(A)-(C).

Section 552.101 of the Government Code also encompasses section 21.355 of the Education Code, which provides, “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355(a). This section applies to any document that evaluates, as that term is commonly understood, the performance of a teacher or 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 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.

You state the named individual held the appropriate teaching certificate at the times the documents were created. You explain the information at issue were considered or to be considered in the individual’s performance evaluations. Based on your representations and our review of the information at issue, we conclude the information we have marked, Enclosure 4, 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 of the Education Code. However, we find you have failed to demonstrate the remaining information consists of teacher evaluations subject to section 21.355 of the Education Code, and may not be withheld under section 552.101 on that basis.

Section 552.101 also encompasses section 261.101 of the Family Code, which provides the identity of an individual making a report under chapter 261 is confidential. *See* Fam. Code § 261.101(d). We note the district is not an agency authorized to conduct a chapter 261 investigation. *See id.* § 261.103 (listing agencies that may conduct child abuse investigations). We have marked the identifying information an individual who made a report to the Department of Family and Protective Services. Therefore, the district must withhold the identifying information we have marked under section 552.101 of the Government Code in conjunction with section 261.101(d) of the Family Code.³ However, we find you have failed to demonstrate the remaining information at issue contains the identifying information of an individual who made a report under chapter 261 of the Family Code. Thus, the district may not withhold any of the remaining information at issue under section 552.101 in conjunction with section 261.101(d).

Section 552.135 of the Government Code provides the following:

³As our ruling is dispositive, we need not address your remaining arguments against disclosure.

(a) “Informer” means a student or a former student or an employee or former employee of a school district who has furnished a report of another person’s possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer’s name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

Gov’t Code § 552.135. Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of “law,” a school district that seeks to withhold information under the exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See id.* § 552.301(e)(1)(A). You indicate portions of the submitted information identify employees of the district who reported potential violations of civil, criminal, or regulatory laws. You do not indicate these individuals consented to public disclosure of their identities. Based on your representations and our review, we have marked information the district must withhold under section 552.135 of the Government Code.⁴ We note individuals who provide information in the course of an investigation, but do not make the initial report are not informants for purposes of section 552.135 of the Government Code. Upon review, we find you have failed to demonstrate how the remaining information at issue reveals the identity of individuals who reported another person’s possible violation of criminal, civil, or regulatory law and, thus, has not demonstrated the remaining information reveals the identity of an informer for the purposes of section 552.135. Therefore, the district may not withhold any of the remaining information at issue under section 552.135.

Section 552.101 also encompasses information protected by the common-law informer’s privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer’s privilege protects the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer’s identity. *See Open Records Decision Nos. 515 at 3 (1998), 208 at 1–2 (1978)*. The privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to “administrative officials having a duty of inspection or of law enforcement within their particular spheres.” *See Open Records Decision No. 279 at 2 (1981) (citing 8 John H. Wigmore, Evidence in Trials at Common Law, § 2374, at 767 (J. McNaughton rev. ed. 1961))*. The report must be of a violation of a criminal or civil statute. *See Open Records Decision Nos. 582 at 2 (1990), 515 at 4–5*. The privilege excepts the informer’s statement only to the extent necessary to protect the informer’s identity. *See Open Records Decision No. 549 at 5 (1990)*.

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure.

You generally assert the informer's privilege applies to portions of the submitted information. However, we find you have failed to demonstrate the information at issue identifies informers for purposes of the common-law informer's privilege. Accordingly, the informer's privilege is not applicable, and the district may not withhold any of the information at issue under section 552.101 of the Government Code on that basis.

Section 552.101 also encompasses the doctrine of common-law privacy, which 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). The type of information considered intimate or 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. This office has also found that 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, we find 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.

You generally raise section 552.101 of the Government Code for Exhibit 6. However, you have not pointed to any law, nor are we aware of any, that would make any of the information at issue confidential for purposes of section 552.101. *See, e.g.*, Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, none of the information at issue may be withheld under section 552.101 of the Government Code.

You claim the submitted college transcripts are subject to 552.102(b) of the Government Code, which excepts from disclosure all information in transcripts of a professional public school employee 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 employee's name, courses taken, and degree obtained, the district must withhold the transcripts under section 552.102(b) of the Government Code.⁵ We find you have failed to demonstrate the remaining information at issue consists of a transcript of a professional public school employee. Accordingly, the district may not withhold the remaining information at issue under section 552.102(b) of the Government Code.

You claim some of the remaining information is excepted from disclosure under section 552.102(a) of the Government Code. Section 552.102(a) excepts from disclosure

⁵As our ruling is dispositive, we need not address your remaining argument against 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). The Texas Supreme Court recently held section 552.102(a) exempts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Upon review, we find none of the remaining information is excepted under section 552.102(a), and none of it may be withheld on that basis.

Section 552.117(a)(1) of the Government Code exempts from disclosure the home addresses and telephone numbers, emergency contact information, 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. Gov’t Code § 552.117(a). 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). Information may only be withheld under section 552.117(a)(1) 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. You inform us the named individual timely elected to keep his information confidential. Thus, the information we have marked pertaining to the named individual must be withheld under section 552.117(a)(1) of the Government Code.⁶ We have also marked information pertaining to a former district employee. You have not informed us whether this individual chose to withhold her personal information prior to the district’s receipt of the requests for information. Therefore, we must rule conditionally. If the former employee timely elected to withhold her telephone number, the district must withhold that individual’s information, which we have marked, under section 552.117(a)(1) of the Government Code. If the former employee did not timely elect to withhold her telephone number, then the district may not withhold the marked information for that individual under section 552.117(a)(1).

In summary, the district must withhold (1) the information we have marked under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code; (2) the submitted I-9 form under section 552.101 in conjunction with section 1324a of title 8 of the United States Code; (3) the submitted teacher evaluations, which we have marked, under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code; (4) the information we have marked under section 552.101 in conjunction with section 261.101(d) of the Family Code; (5) the information we have marked under section 552.135 of the Government Code; and (6) the information we have marked under section 552.101 in conjunction with common-law privacy. With the exception of the individual’s name, courses taken, and degrees obtained, the district must withhold the submitted college transcripts pursuant to section 552.102(b) of the Government Code. The district must withhold the information we have marked pertaining to the named individual under section 552.117(a)(1) of the Government Code, and the information we have marked

⁶As our ruling is dispositive, we need not address your remaining argument against disclosure.

pertaining to the former employee under section 552.117(a)(1) if she timely requested confidentiality for her information under section 552.024. 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,



Charles Galindo Jr.
Assistant Attorney General
Open Records Division

CG/bs

Ref: ID# 458062

Enc. Submitted documents

c: Requestors
(w/o enclosures)