



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 6, 2014

Mr. Scott McDonald
Counsel for Hidalgo Independent School District
O'Hanlon, McCollom & Demerath
808 West Avenue
Austin, Texas 78701

OR2014-07610

Dear Mr. McDonald:

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# 521642.

The Hidalgo Independent School District (the "district"), which you represent, received a request for the application submitted by a named individual for the superintendent position and the named individual's personnel file from his prior employment with the district. You state you have released some of the requested information to the requestor with redactions in accordance with Open Records Decision No. 684 (2009)¹ and pursuant to sections 552.024,² 552.130(c),³ and 552.147 of the Government Code.⁴ You claim that the

¹We note Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including a Form 1-9 and its attachments under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code and 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 opinion.

²Section 552.024 of the Government Code authorizes a governmental body to redact from public release certain personal information of a current or former employee excepted from disclosure under section 552.117(a)(1) of the Government Code without the necessity of requesting a decision from this office under the Act, if the employee timely elected to withhold such information. *See Gov't Code* §§ 552.024(a)-(c), .117(a)(1); *see also id.* § 552.024(a-1) (a school district may not require an employee or

submitted information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim 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. Section 552.101 encompasses federal law such as the Family and Medical Leave Act (the “FMLA”). See 29 U.S.C. §§ 2601 *et. seq.* Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states:

[r]ecords and documents relating to certifications, recertifications or medical histories of employees or employees’ family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if the ADA, as amended, is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements[], except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee’s physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). Upon review, we find the information in Exhibit 9 is confidential under section 825.500 of title 29 of the Code of Federal Regulations. Further, we find none

former employee of the district to choose whether to allow public access to the employee’s or former employee’s social security number).

³Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. See Gov’t Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). See *id.* § 552.130(d), (e).

⁴Section 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. See Gov’t Code § 552.147(b).

of the release provisions of the FMLA apply to this information. Accordingly, the district must withhold the information in Exhibit 9 under section 552.101 of the Government Code in conjunction with the FMLA.

Section 552.101 of the Government Code also encompasses the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, which governs release of medical records. *See* Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides, in relevant part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Upon review, we find the information in Exhibit 5 constitutes records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created or are maintained by a physician. Accordingly, the district must withhold Exhibit 5 under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 of the Government Code also encompasses section 21.048 of the Education Code, which addresses teacher certification examinations. Section 21.048(c-1) provides the following:

(c-1) The results of an examination administered under this section are confidential and are not subject to disclosure under Chapter 552, Government Code, unless:

(1) the disclosure is regarding notification to a parent of the assignment of an uncertified teacher to a classroom as required by Section 21.057; or

(2) the educator has failed the examination more than five times.

Educ. Code § 21.048(c-1). You have marked portions of Exhibit 10 that you state reflect the results of examinations administered under section 21.048. You further state subsections 21.048(c-1)(1) and (2) are not applicable to the information at issue. Based on your representations and our review, we find the district must withhold the information we have indicated in Exhibit 10 under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code. However, we note section 21.048 of the Education Code was added by the 74th Legislature in 1995. *See* Act of May 29, 1995, 74th Leg., R.S., ch. 260, § 1 (effective May 30, 1995). The remaining information in Exhibit 10 indicates the remaining examinations at issue were administered in 1986 and 1989. Thus, we conclude these examinations were not administered under section 21.048 of the Education Code. Accordingly, we find section 21.048(c-1) is not applicable to the remaining information at issue, and the district may not withhold any of the remaining information in Exhibit 10 under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses section 21.355 of the Education Code, which provides, in relevant part, “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355(a). 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 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 in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4. Further, in Open Records Decision No. 643, we determined an “administrator” for purposes of 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 as an administrator, as that term is commonly defined, at the time of the evaluation. *Id.*

You argue the information in Exhibit 8 consists of evaluations of the named individual by the district. You inform us, and have provided documentation demonstrating, the employee at issue was certified as a teacher or as an administrator by the State Board of Educator Certification and was acting as a teacher or as an administrator at the time the evaluations were prepared. Upon review, we find Exhibit 8 consists of evaluations of a teacher and an administrator by the district for purposes of section 21.355. Accordingly, the district must withhold Exhibit 8 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Section 552.102(b) of the Government Code excepts from disclosure “a transcript from an institution of higher education maintained in the personnel file of a professional public school employee[.]” Gov’t Code § 552.102(b). This exception further provides, however, “the degree obtained or the curriculum on a transcript in the personnel file of the employee” are not excepted from disclosure. *Id.* Upon review, we find the district must withhold the educational transcripts in Exhibit 6 under section 552.102(b) of the Government Code, except for the information that reveals the employee’s name, the degree obtained, and the courses taken.⁵ See Open Records Decision No. 526 (1989) (addressing statutory predecessor).

In summary, in conjunction with section 552.101 of the Government Code, the district must withhold (1) Exhibit 9 under the FMLA, (2) Exhibit 5 under the MPA, (3) the information we have indicated in Exhibit 10 under section 21.048(c-1) of the Education Code, and (4) Exhibit 8 under section 21.355 of the Education Code. The district must withhold the educational transcripts in Exhibit 6 under section 552.102(b) of the Government Code, except for the information that reveals the employee’s name, the degree obtained, and the courses taken. 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/tch

⁵As our ruling is dispositive, we need not address your remaining argument against disclosure.

Ref: ID# 521642

Enc. Submitted documents

c: Requestor
(w/o enclosures)