



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 24, 2014

Mr. William M. Buechler
Counsel for the Flour Bluff Independent School District
Buechler & Associates, P.C.
3660 Stoneridge Road, Suite D-101
Austin, Texas 78746

OR2014-10800

Dear Mr. Buechler:

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# 526750.

The Flour Bluff Independent School District (the "district") received a request for the personnel files for four named individuals. You state you will release some information. You state you will redact information pursuant to section 552.130 of the Government Code under Open Records Decision No. 684 (2009).¹ You also state you will redact information pursuant to section 552.024 of the Government Code.² You claim the submitted information

¹Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information, including Texas driver's license numbers under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision. However, the Texas legislature amended section 552.130 to allow a governmental body to redact the information described in subsection 552.130(a) of the Government Code 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). Thus, the statutory amendment to section 552.130 of the Government Code supercedes Open Records Decision No. 684. Therefore, a governmental body may redact information subject to subsection 552.130(a) only in accordance with section 552.130, not Open Records Decision No. 684.

²Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c).

is excepted from disclosure under sections 552.101 and 552.102 of the Government Code.³ We have considered the exceptions you claim and reviewed the submitted representative sample of information.⁴

Initially, we note the requestor excluded any document that evaluates teachers or administrators. This information, which we have marked, is not responsive to the instant request for information. This ruling does not address the public availability of nonresponsive information, and the district is not required to release nonresponsive information in response to this request.⁵

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 made confidential by statute, such as 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

³Regardless of whether the district failed to comply with section 552.301 of the Government Code in requesting a ruling, we note sections 552.101 and 552.102 of the Government Code are mandatory exceptions that constitute compelling reasons to withhold information sufficient to overcome the presumption of openness caused by a failure to comply with section 552.301. *See* Gov’t Code §§ 552.007, .301, .302, .352. Accordingly, we will consider the district’s arguments under sections 552.101 and 552.102.

⁴We 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.

⁵As our ruling is dispositive for this information, we need not address your argument against its disclosure.

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 we marked in Exhibit F consists of 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 the information we marked in Exhibit F under section 552.101 of the Government Code in conjunction with the MPA. However, you have failed to demonstrate the remaining information you marked in Exhibit F consists of the identity, diagnosis, evaluation or treatment of a patient. Accordingly, the district may not withhold any of the remaining information in Exhibit F under section 552.101 in conjunction with the MPA.

Section 552.101 of the Government Code also encompasses 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(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 an administrator. *See* Open Records Decision No. 643 (1996). We have 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. In addition, the Third Court of Appeals has held a written reprimand constitutes an evaluation for purposes of section 21.355 because “it reflects the principal’s judgment regarding [a teacher’s] actions, gives corrective direction, and provides for further review.” *Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

You claim the responsive information in Exhibit E consists of confidential teacher evaluations under section 21.355. You inform us each individual referred to in the information at issue is a certified teacher. *See* ORD 643 at 4. You state the employees at issue were acting in this capacity when the evaluations were created. However, upon review, we find you have failed to demonstrate how any of the remaining responsive information in Exhibit E consists of an evaluation for section 21.355 purposes. Accordingly, no portion of the remaining responsive information in Exhibit E may be withheld under section 552.101 in conjunction with section 21.355 of the Education Code.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Furthermore, this office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 600 (1992) (personal financial information includes choice of a particular insurance carrier), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information). Upon review, we find the information we marked in Exhibit F satisfies the standard articulated in *Industrial Foundation* and must be withheld under section 552.101 in conjunction with common-law privacy. However, you have failed to demonstrate how any of the remaining information in Exhibits F and G are highly intimate or embarrassing and of no legitimate public interest. Accordingly, the district may not withhold any of the remaining information in Exhibits F and G under section 552.101 of the Government Code in conjunction with common-law privacy.

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.” Gov’t Code § 552.102(a). We understand you to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code. As previously mentioned, 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.*, 540 S.W.2d at 685. 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 of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert’s* interpretation of section 552.102(a) and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The supreme court also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. We have marked dates of birth within Exhibit F which must be withheld under section 552.102(a) of the Government Code. However, we find none of the remaining information is subject to section 552.102(a) of the Government Code, and the district may not withhold any of the remaining information on that basis.

Section 552.102(b) of the Government Code 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 information we marked in Exhibit H under section 552.102(b) of the Government Code. However, we find the remaining information in Exhibit H does not fall under section 552.102(b). Accordingly, the district may not withhold this information under section 552.102(b).

In summary, the district must withhold the information we marked in Exhibit F under section 552.101 of the Government Code in conjunction with the MPA. The district must withhold the information we marked in Exhibit F under section 552.101 in conjunction with common-law privacy. The district must withhold the dates of birth we marked in Exhibit F under section 552.102(a) of the Government Code. With the exception of the employee's name, courses taken, and degree obtained, the district must withhold the information we marked in Exhibit H under section 552.102(b) 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.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,



Rahat Huq
Assistant Attorney General
Open Records Division

RSH/dls

Ref: ID# 526750

Enc. Submitted documents

c: Requestor
(w/o enclosures)