ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 21, 2014

Ms. Lynn Rossi Scott
Counsel for Burleson Independent School District
Brackett & Ellis, P.C.
100 Main Street
Fort Worth, Texas 76102-3090

OR2014-21234

Dear Ms. Scott:

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# 543922.

The Burleson Independent School District (the "district"), which you represent, received a request for specified categories of information related to the requestor's children.[1] The district states it will withhold information under section 552.024 of the Government Code and Open Records Decision No. 684 (2009).[2] The district states it has provided or will provide some of the requested information to the requestor, but claims some of the submitted

[1]The requestor asserts he did not make his request pursuant to the Act. However, we note a written communication that reasonably can be judged to be a request for public information is a request for public information under the Act. *See generally* Open Records Decision No. 44 at 2 (1974). *See also* Gov't Code § 552.301(a) (governmental body that receives written request for information that it wishes to withhold from public disclosure must ask for decision from this office). Thus, we will address whether the submitted information must be released to or withheld from the requestor pursuant to the Act.

[2]Section 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)(2). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of seeking a decision from this office.

information is excepted from disclosure under section 552.101 of the Government Code.[3] We have considered the claimed exception and reviewed the submitted representative sample of information.[4] We have also considered comments submitted by the requestor and an interested third party. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the interested third party asserts the district is prohibited from releasing the requested information to the requestor pursuant to a protective order. Section 552.107(2) of the Government Code provides information is excepted from disclosure if "a court by order has prohibited disclosure of the information." Gov't Code § 552.107(2). The requestor has submitted a copy of a Final Protective Order that was issued by the District Court of the 325th Judicial District in Tarrant County.[5] However, this protective order does not prohibit the district from releasing any of the requested information to the requestor pursuant to the Act. Thus, we conclude the interested third party has not established a court has prohibited disclosure of any of the submitted information to the requestor. Therefore, we find the district may not withhold any of the submitted information from the requestor under section 552.107(2) of the Government Code.

We next note the United States Department of Education Family Policy Compliance Office has informed this office that 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.[6] 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, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R.

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[3]The requestor asserts he previously made a request for some of the information at issue in October of 2013. *See* Gov't Code § 552.301(b), (e). Regardless of whether the district complied with the requirements of section 552.301 of the Government Code, sections 552.101 and 552.107(2) of the Government Code are mandatory exceptions that can provide compelling reasons to overcome the presumption of openness caused by a failure to comply with section 552.301. *See id.* §§ 552.007, .302.

[4]We 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.

[5]We note the interested third party states in her brief that she is enclosing a copy of the protective order at issue in her "Exhibit A." However, Exhibit A of the interested third party's briefing does not contain any such protective order.

[6]A copy of this letter may be found on the Office of the Attorney General's website: http://www.oag.state.tx.us/opinopen/og_resources.shtml.

§ 99.3 (defining "personally identifiable information"). The district has submitted unredacted education records for our review. The district further states it will withhold the identifying information of students, other than the requestor's children, from the requested documents pursuant to FERPA. Because our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records, other than to note that parents have a right of access to their own child's education records. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3. Such determinations under FERPA must be made by the educational authority in possession of the education records.[7]

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 261.201(a) of the Family Code provides as follows:

> [T]he following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:
>
> > (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
> >
> > (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You assert Exhibit D is confidential under section 261.201 of the Family Code. *See id.* §§ 101.003(a) (defining "child" for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes), 261.001(1) (defining "abuse" for purposes of chapter 261 of the Family Code). However, the district is not an agency authorized to conduct an investigation under chapter 261 of the Family Code. *See id.* § 261.103 (listing agencies that may conduct child abuse investigations). You do not explain, and we cannot discern, whether an agency authorized to conduct an investigation under chapter 261 used the information at issue in such an investigation. *See id.* § 261.201(a)(2). Thus, we conclude you have failed to demonstrate how any of the information at issue constitutes information

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

used or developed in an investigation under chapter 261. We also note the submitted information does not contain the identity of a person making a report of child abuse or neglect under chapter 261. *See id.* § 261.201(a)(1). Consequently, the district may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

Section 552.101 of the Government Code also encompasses the common-law physical safety exception that the Texas Supreme Court recognized in *Texas Department of Public Safety v. Cox Texas Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112, 117 (Tex. 2011) ("freedom from physical harm is an independent interest protected under law, untethered to the right of privacy"). In the *Cox* decision, the Supreme Court recognized, for the first time, a common-law physical safety exception to required disclosure. *Cox*, 343 S.W.3d at 118. Pursuant to this common-law physical safety exception, the court determined "information may be withheld [from public release] if disclosure would create a substantial threat of physical harm." *Id.* In applying this new standard, the court noted "deference must be afforded" law enforcement experts regarding the probability of harm, but further cautioned "vague assertions of risk will not carry the day." *Id.* at 119. Upon review of your arguments, the arguments of the interested third party, and the documents at issue, we find release of some of the information at issue, which we have marked, would create a substantial threat of physical harm to the individuals whose information is at issue. Accordingly, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

Finally, we note some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

To conclude, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the common-law physical safety exception. The district must release the remaining information, but may only release any copyrighted information in accordance with copyright law. This ruling does not address the applicability of FERPA to the submitted information. Should the district determine that all or portions of the submitted information consist of "education records" that must be withheld under FERPA, the district must dispose of that information in accordance with FERPA, rather than the Act.

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,

James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/cbz

Ref: ID# 543922

Enc. Submitted documents

c: Requestor
(w/o enclosures)