



January 9, 2015

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

OR2015-00445

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# 549515 (TEA PIR# 23087).

The Texas Education Agency (the "agency") received a request for all e-mails, telephone messages, faxes, and correspondence to or from a named agency employee regarding a named employee of Fort Bend Independent School District (the "district"). You state you have redacted driver's license information pursuant to section 552.130(c) of the Government Code, account numbers pursuant to section 552.136(c) of the Government Code, personal e-mail addresses subject to section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009), and social security numbers pursuant to section 552.147(b) of the Government Code.¹ You claim a portion of the submitted

¹Section 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). Section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). 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 requesting an attorney general opinion. 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 a decision from this office under the Act. *Id.* § 552.147(b).

information is excepted from disclosure under section 552.101 of the Government Code. Although you take no position as to whether the remaining submitted information is excepted under the Act, you state you notified the district of the request for information and of its right to submit written comments to this office stating why the submitted information should or should not be released. *See* Gov't Code § 552.304 (interested party may submit written comments to this office stating why information should or should not be released). We have received comments from the district. We have considered the submitted arguments and reviewed the submitted information.

Initially, the district asserts the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2014-14480 (2014). However, Open Records Letter No. 2014-14480 was issued to the district, not to the agency. As such, the agency may not rely on Open Records Letter No. 2014-14480 as a previous determination to withhold any information. *See* Open Records Decision No. 673 (2001) (listing elements of second type of previous determination under Gov't Code § 552.301(a)).

The district also asserts the submitted information may contain information subject to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code. The United States Department of Education Family Policy Compliance Office has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.² 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. § 99.3 (defining "personally identifiable information"); *see also* Open Records Decision No. 224 (1979) (student's handwritten comments protected under FERPA because they would make identity of student easily traceable through handwriting, style of expression, or particular incidents related in the comments). The district asserts FERPA may apply to some of the requested documents. Because our office is prohibited from reviewing such records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to the requested information. *See* 20 U.S.C. § 1232g(a)(1)(A). Such determinations under FERPA must be made by the agency. Therefore, we will consider the submitted arguments against disclosure of the submitted information.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(17) provides for the required public disclosure of "information that is also contained in a public court record," unless it is "made confidential

²A copy of this letter may be found on the Office of the Attorney General's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

under [the Act] or other law[.]” Gov’t Code § 552.022(a)(17). The submitted court-filed documents are subject to section 552.022(a)(17) and must be released unless they are confidential under the Act or other law. Although the district asserts this information is excepted from disclosure under section 552.101 of the Government Code in conjunction with common-law privacy, we note information that has been filed with a court is not protected by common-law privacy. *See Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992) (common-law privacy not applicable to court-filed document). As such, the agency may not withhold the information that is subject to section 552.022(a)(17) under section 552.101 in conjunction with common-law privacy. However, the district also raises section 552.101 in conjunction with section 21.355 of the Education Code, and sections 552.102 and 552.117 of the Government Code for the court-filed documents, which make information confidential under the Act. Thus, we will address the applicability of these arguments to this information. Additionally, we will address the agency’s and the district’s remaining arguments for the information that is not subject to section 552.022.

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 of the Government Code encompasses section 611.002 of the Health and Safety Code. Section 611.002 of the Health and Safety Code governs the public availability of mental health records and provides:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see id.* § 611.001 (defining “patient” and “professional”). Upon review, we find the information the agency has marked under section 611.002 consists of mental health records or information obtained from mental health records. Therefore, the agency must withhold the information it has marked under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.

Next, we address the district’s arguments against disclosure of the information subject to section 552.022 of the Government Code. The district raises section 552.101 in conjunction with 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). 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, which are delineated in *Industrial Foundation*. *Id.* at 683. This office has concluded some kinds of medical information are generally highly intimate or embarrassing.

See Open Records Decision No. 455 (1987). We also note the doctrine of common-law privacy generally protects the identifying information of juvenile victims of abuse and neglect. *See* Open Records Decision No. 394 (1983); *cf.* Fam. Code § 261.201. Additionally, a compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Moreover, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. We note, however, active warrant information or other information relating to an individual's current involvement in the criminal justice system does not constitute criminal history information for the purposes of section 552.101. *See* Gov't Code § 411.081(b). We also note that records relating to routine traffic violations are not considered criminal history information. *See id.* § 411.082(2)(B) (criminal history record information does not include driving record information). This office has also found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See generally* Open Records Decision Nos. 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Whether the public's interest in obtaining personal financial information is sufficient to justify its disclosure must be determined on a case-by-case basis. *See* ORD 373. However, this office has noted the public has a legitimate interest in information that relates to public employees and their conduct in the workplace. *See, e.g.,* Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs but in fact touches on matters of legitimate public concern), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), 329 (1982) (reasons for employee's resignation ordinarily not private).

Upon review, we find portions of the information that are not subject to section 552.022(a)(17) of the Government Code satisfy the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the agency must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. However, the district has not demonstrated the remaining information that is not subject to section 552.022(a)(17) is highly intimate or embarrassing and of no legitimate public concern. Therefore, no portion of the remaining information at issue may be withheld under section 552.101 on that basis.

The district also raises section 552.101 in conjunction with section 21.355 of the Education Code. Section 552.101 encompasses section 21.355, 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). 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. Additionally, the courts have concluded that a written reprimand constitutes an evaluation for purposes of section 21.355 as it “reflects the principal’s judgment regarding [a teacher’s] actions, gives corrective direction, and provides for further review.” *North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). Upon review, we find no portion of the remaining submitted information evaluates the performance of a teacher for purposes of section 21.355. Therefore, the agency may not withhold any portion of the remaining submitted information under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Section 552.102(a) of the Government Code 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). The Texas Supreme Court 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. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Thus, under the *Texas Comptroller* decision, section 552.102(a) is applicable to the birth date of an employee of a governmental body in a record maintained by the employer in an employment context. The date of birth contained in the submitted information is not held by the agency in an employment context. Thus, none of the submitted information is subject to section 552.102(a) of the Government Code, and the agency may not withhold it on that basis.

The district also raises section 552.117 of the Government Code for the remaining submitted information. Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov’t Code § 552.117(a)(1). We note section 552.117 only applies to information held by a governmental body in an employment context. Thus, information that is not held in an employment context may not be withheld under section 552.117(a)(1). The information the district seeks to withhold is contained within an agency complaint file. Thus, this information is not held by the agency in an employment context. Accordingly, the agency may not withhold any portion of the remaining submitted information under section 552.117(a)(1) of the Government Code.

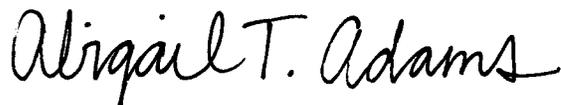
In summary, the agency must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code. The agency must withhold the information we have marked under

section 552.101 of the Government Code in conjunction with common-law privacy. The agency must release the remaining submitted information.

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,



Abigail T. Adams
Assistant Attorney General
Open Records Division

ATA/ac

Ref: ID# 549515

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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