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ATTORNEY GENERAL OF TEXAS

June 24, 2015

Ms. Elizabeth G. Neally
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P. O. Box 460606
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OR2015-12463

Dear Ms. Neally:

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# 568434.

The Harlingen Consolidated Independent School District (the "district"), which you represent, received a request for the personnel file of a named individual. You state you have released some information to the requestor. You state you will redact information pursuant to section 552.147(b) of the Government Code and pursuant to section 552.137 of the Government Code in accordance with Open Records Decision No. 684 (2009).¹ You also state you will redact the employee's mailing address subject to section 552.117(a)(1) of the Government Code pursuant to section 552.024(c)(2) of the Government Code.² You claim portions of the submitted information are excepted from disclosure under sections 552.101

¹Section 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). Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 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)(2).

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. This section encompasses information protected by other statutes. Section 21.048 of the Education Code provides, in relevant part, the following:

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). Upon review, we find the information submitted in documents labeled AG-0010 and AG-0011 reflects the results of examinations administered under section 21.048 of the Education Code. We have no indication sections 21.048(c-1)(1) and (2) are applicable to the teacher certification exams we marked. Accordingly, the district must withhold the information at issue under section 552.101 in conjunction with section 21.048(c-1) of the Education Code.

Section 552.101 of the Government Code also encompasses information protected by section 21.355 of the Education Code. Section 21.355(a) 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, “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 or a school district teaching permit under section 21.055 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 assert documents labeled AG-0028 through AG-0041 consist of evaluations of the district employee that are confidential under section 21.355. Although the evaluations pertain to a district employee, we note the employee was an educational aide at the time of the evaluations. Section 21.355 protects evaluations of only teachers and administrators who held the proper certifications and were performing the functions of teachers and administrators at the times of the evaluations. Upon review, we find the district has failed to demonstrate the applicability of section 21.355 to the information at issue. *See id.* at 5 (teacher interns, trainees, and educational aides are not “teachers” for purposes of section 21.355). Therefore,

we conclude the submitted evaluations in documents labeled AG-0028 through AG-0041 may not be withheld under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Section 552.101 of the Government Code 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 or embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has 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. 600 at 9-10 (1992) (employee's withholding allowance certificate, designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* ORDs 600 at 9 (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure), 545 (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy). Upon review, we find the information we marked in documents labeled AG-0012 through AG-0016 satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, we conclude the district must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy. However, we conclude the district has failed to demonstrate the remaining information in documents labeled AG-0012 through AG-0016 is highly intimate or embarrassing and not of legitimate public interest. Thus, no portion of the remaining information at issue may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

You also seek to withhold information marked in documents labeled AG-0017 through AG-0027 under section 552.101 of the Government Code on the basis of common-law privacy. You state the district believes the information at issue "pertains to intimate aspects of this individual's private affairs, specifically their health, and the release would be highly objectionable to a reasonable person." You argue "[t]he only purpose the release of the information in question would serve would be to hold the individual up to public scorn and ridicule." This office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). However, information pertaining to leave of public employees is generally a matter of legitimate public interest. *See*

Open Records Decision No. 336 at 2 (1982) (names of employees taking sick leave and dates of sick leave taken not private).

You also contend the district “is required to ensure that it does not violate an individual’s liberty interest” and “must not release information that would stigmatize to the point of burdening an employee with a ‘badge of infamy.’” You cite to *Wells v. Hico Independent School District*, 736 F.2d 243 (5th Cir. 1984), in which the court stated that

[t]o establish a liberty interest, an employee must demonstrate that *his governmental employer has brought false charges* against him that ‘might seriously damage his standing and associations in his community,’ or that impose a ‘stigma or other disability’ that forecloses ‘freedom to take advantage of other employment opportunities.’ *Board of Regents v. Roth*, 408 U.S. 564 (1972).

We note false-light privacy is not an actionable tort in Texas. *See Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex. 1994); Open Records Decision No. 579 (1990). Further, we find you have failed to demonstrate the remaining information pertains to a “false charge.” Thus, we find you have failed to demonstrate *Hico* is relevant in this instance. We also note section 552.101 does not encompass the doctrine of false-light privacy, which concerns whether the release of information would place a person in a false light in the public eye. ORD 579 at 7-8 (attorney general could not conclude that legislature intended for statutory predecessor to section 552.101 to encompass doctrine of false-light privacy); *see also* Open Records Decision No. 408 at 11 (1984) (fact that the allegations were found untrue could easily be released with the allegations themselves, mitigating harm). Consequently, the district may not withhold any of the information contained in documents labeled AG-0017 through AG-0027 under section 552.101 in conjunction with common-law privacy.

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 documents labeled AG-0001 through AG-0006 under section 552.102(b). However, we find none of the remaining information at issue consists of higher education transcripts of a professional public school employee. Therefore, the district may not withhold any of the remaining information at issue under section 552.102(b) of the Government 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). 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 discussed above. 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 then 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. Upon review, we find the employee date of birth you marked 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 none of the remaining information may be withheld on that basis.

Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, emergency contact information, 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, except as provided by section 552.024(a-1).³ *See Gov't Code* §§ 552.117(a)(1), .024. Section 552.024(a-1) of the Government Code provides, "A school district may not require an employee or former employee of the district to choose whether to allow public access to the employee's or former employee's social security number." *Id.* § 552.024(a-1). Thus, the district may only withhold under section 552.117 the home address and telephone number, emergency contact information, and family member information of a current or former employee or official of the district who requests this information be kept confidential under section 552.024. Therefore, if the employee whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. Conversely, if the employee did not timely request confidentiality under section 552.024, the district may not withhold the marked information under section 552.117(a)(1).

Section 552.136 of the Government Code provides, "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Gov't Code* § 552.136(b). An access device number is one that may be used to 1) obtain money, goods, services, or another thing of value, or 2) initiate a transfer of funds other than a transfer originated solely by a paper instrument, and includes an account number. *See id.* § 552.136(a) (defining "access device"). Upon review, we find the district must withhold the insurance policy number we have marked under section 552.136 of the Government Code.

In summary, the district must withhold documents labeled AG-0010 and AG-0011 under section 552.101 of the Government Code in conjunction with section 21.048 of the Education

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Code. The district must withhold the information we have marked in documents labeled AG-0012 through AG-0016 under section 552.101 of the Government Code in conjunction with common-law privacy. With the exception of the employee's name, courses taken, and degree obtained, the district must withhold documents labeled AG-0001 through AG-0006 under section 552.102(b) of the Government Code. The district must withhold the date of birth it marked under section 552.102(a) of the Government Code. To the extent the employee timely requested confidentiality under section 552.024 of the Government Code, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The district must also withhold the information we have marked under section 552.136 of the Government Code. The district must release the remaining 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,



Joseph Keeney
Assistant Attorney General
Open Records Division

JDK/eb

Ref: ID# 568434

Enc. Submitted documents

c: Requestor
(w/o enclosures)