



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 5, 2015

Mr. W. Lee Auvenshine
Deputy Superintendent
Human Resources and Legal Services
Waxahachie Independent School District
411 North Gibson Street
Waxahachie, Texas 75165

OR2015-16110

Dear Mr. Auvenshine:

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# 574373.

The Waxahachie Independent School District (the "district") received two requests from the same requestor for information concerning the investigation and termination of a named employee. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.111, 552.117, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

You have indicated some of the submitted information is not responsive to the request because it concerns filling the terminated employee's vacant position. This ruling does not address the public availability of information that is not responsive to the request, and the district is not required to release non-responsive information.

¹We note you have marked some documents with section 552.101 of the Government Code but did not state on what basis you seek to withhold those documents under that exception. Accordingly, we will not address that exception for those documents. *See* Gov't Code § 552.301(e)(2) (governmental body must mark documents to indicate which exceptions apply). We also note the district did not state section 552.117 of the Government Code as an exception until after its ten-business-day deadline. Nonetheless, we will consider this exception because it provides a compelling reason against disclosure. *See id.* § 552.302.

You have redacted some of the responsive information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA 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.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"). Because our office is prohibited from reviewing these 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. Such determinations under FERPA must be made by the educational authority in possession of such records. We will, however, address the applicability of the claimed exceptions to the submitted information.

You have identified some of the responsive information as also responsive to previous requests for information, as a result of which this office issued Open Records Letter Nos. 2015-09262 (2015) and 2015-11444 (2015). As to that information, in Open Records Letter No. 2015-09262 this office determined the district must: (1) withhold the information we marked under section 552.101 of the Government Code in conjunction with section 261.201(a)(1) of the Family Code; (2) must withhold the information we marked under section 552.117(a)(1) of the Government Code if the individual whose information is at issue elected to keep that information confidential under section 552.024 of the Government Code; and (3) must release the remaining information. Also, in Open Records Letter No. 2015-11444 this office determined the district: (1) must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 261.201(a)(1) of the Family Code; (2) may withhold the attorney-client communications under rule 503 of the Texas Rules of Evidence, unless the non-privileged information we marked is maintained separate and apart from the e-mail strings in which they appear; (3) must withhold the information we marked under section 552.117(a)(1) of the Government Code if the individual whose information is at issue elected to keep that information confidential under section 552.024 of the Government Code; (4) must withhold the e-mail address you marked and the e-mail address we marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their release; and (5) must release the remaining information. We have concluded there has been no change in the law, facts, or circumstances on which the previous rulings were based. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not

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

excepted from disclosure). Accordingly, the district must rely on Open Records Letter Nos. 2015-09262 and 2015-11444 as previous determinations and withhold or release the information at issue in accordance with those rulings.

We turn now to the remaining responsive information for which no previous determination applies. 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 section 21.355 of the Education Code, which provides, “[a] document evaluating the performance of a teacher or administrator is confidential.” *See* 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 term “teacher” means a person who is required to and does in fact hold a teaching certificate or permit 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. The Third Court of Appeals has concluded 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.” *See North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). You state the individual at issue was a certified teacher at the time the written reprimand at issue was made. Based on your representation and our review, we conclude the information we marked consists of an evaluation for purposes of section 21.355 of the Education Code. Accordingly, the district must withhold that information 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 section 261.201(a) of the Family Code, which provides:

(a) Except as provided by Section 261.203, the following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent with [the Family 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 claim that the submitted information was used or developed in an investigation of alleged child abuse. *See id.* § 261.001 (defining “abuse” for purposes of chapter 261 of the Family Code); *see also id.* § 101.003(a) (defining “child” for purposes

of chapter 261). 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 an investigation under chapter 261). Nonetheless, the information we marked consists of the identifying information of a person who made a report of alleged or suspected child abuse to Child Protective Services. The district must withhold this information under section 552.101 of the Government Code in conjunction with section 261.201(a)(1) of the Family Code. None of the remaining information is subject to section 261.201 and the district may not withhold it under section 552.101 of the Government Code.

Section 552.117 of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, 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. Gov't Code § 552.117(a). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 the information be kept confidential. We note section 552.117 also encompasses a personal cellular telephone or pager number, unless the cellular or pager service is paid for by a governmental body. *See Open Records Decision No. 506 at 5-7 (1988)* (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). We have indicated the information that is subject to section 552.117(a)(1) of the Government Code. To the extent the former employee timely elected to keep this type of information confidential under section 552.024 of the Government Code, the district must withhold the information we indicated under section 552.117(a)(1) of the Government Code. The remaining information you seek to withhold is not subject to section 552.117, and the district may not withhold it.

Section 552.137 of the Government Code provides, "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address affirmatively consents to its release or the e-mail address is specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). Accordingly, the district must withhold the e-mail addresses that you marked and we marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release.

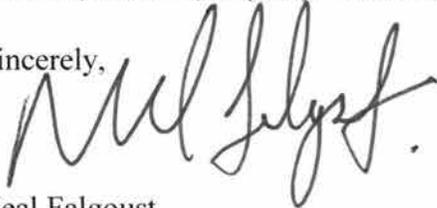
In summary, the district must rely on Open Records Letter Nos. 2015-09262 and 2015-11444 as previous determinations and withhold or release the information at issue in accordance with those rulings. The district must withhold under section 552.101 of the Government Code the information we marked in conjunction with section 21.355 of the Education Code

and the information we marked in conjunction with section 261.201(a)(1) of the Family Code. To the extent the former employee timely elected to keep her personal information confidential under section 552.024 of the Government Code, the district must withhold the information we indicated under section 552.117(a)(1) of the Government Code. The district must withhold the e-mail addresses that you marked and we marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release. The district must release the remaining responsive information. As our ruling is dispositive, we do not address any of the remaining claimed exceptions.

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,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/bhf

Ref: ID# 574373

Enc. Submitted documents

c: Requestor
(w/o enclosures)