



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 18, 2015

Mr. Stephen Trautmann, Jr.  
Counsel for Zapata County Independent School District  
J. Cruz & Associates  
216 West Village Boulevard, Suite 202  
Laredo, Texas 78041

OR2015-19599

Dear Mr. Trautmann:

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# 579768.

The Zapata County Independent School District (the "district"), which you represent, received a request for all documents related to the relationship between a specified person and the district, as they pertain to a specified incident. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. Additionally, we have considered comments from an interested third party.<sup>1</sup> *See Gov't Code*

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<sup>1</sup>This office received comments from an attorney retained by the district's superintendent in which the attorney requests a ruling from this office with respect to the information at issue. However, we note the superintendent's attorney is not the attorney for the district and the superintendent's attorney has failed to demonstrate he or his client is authorized to request a ruling from this office on behalf of the district. Furthermore, we note and the superintendent's attorney acknowledges, even if the superintendent or his attorney did have the authority to request a ruling from this office on behalf of the district, the superintendent's attorney did not raise Texas Rule of Evidence 503 until after the district's ten-business-day deadline had passed. Accordingly, we do not address the arguments of the superintendent's attorney under rule 503. *See Gov't Code* §§ 552.301(b) (requiring governmental body to ask for ruling and state exceptions that apply within ten business days of receiving written request), .302; *see* Open Records Decision No. 676 at 6 (2002) (attorney-client

§ 552.304 (interested third party may submit comments stating why information should or should not be released). We have considered the arguments 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.” *Id.* § 552.101. Section 552.101 encompasses information other statutes make confidential. Section 551.104 of the Government Code provides in part “[t]he certified agenda or recording of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3).” *Id.* § 551.104(c). Thus, such information cannot be released to a member of the public in response to an open records request. *See* Attorney General Opinion JM-995 at 5-6 (1988) (public disclosure of certified agenda of closed meeting may be accomplished only under procedures provided in Open Meetings Act). Section 551.146 of the Open Meetings Act makes it a criminal offense to disclose a certified agenda and recording of a lawfully closed meeting to a member of the public. *See* Gov’t Code § 551.146(a)-(b); *see also* Open Records Decision No. 495 at 4 (1988) (attorney general lacks authority to review certified agendas or tapes of executive sessions to determine whether governmental body may withhold such information under statutory predecessor to section 552.101). However, other records related to a closed meeting, other than a certified agenda or recording, are not made confidential by chapter 551 of the Government Code. *See* Open Records Decision Nos. 605 at 2-3 (1992) (concluding that section 551.074 does not authorize a governmental body to withhold its records of the names of applicants for public employment who were discussed in an executive session), 485 at 9-10 (1987) (investigative report not excepted from disclosure under statutory predecessor to section 552.101 simply by virtue of its having been considered in executive session); *see also* Attorney General Opinion JM-1071 at 3 (1989) (statutory predecessor to section 551.146 did not prohibit members of governmental body or other individuals in attendance at executive session from making public statements about subject matter of executive session); *see also* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 649 at 3 (1996) (language of confidentiality provision controls scope of its protection), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public).

You assert Exhibit C is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code. We note

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privilege under rule 503 may be waived). Although the superintendent’s attorney raises section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2, 575 at 2 (1990). Additionally, although the superintendent’s attorney raises section 552.022 of the Government Code, this provision is not an exception to disclosure. *See* Gov’t Code § 552.022 (enumerating categories of information not excepted from disclosure unless made confidential under Act or other law).

the information at issue consists of a document created by the district's superintendent in which he recollects the closed meeting and does not constitute a certified agenda or recording of a closed meeting. Therefore, Exhibit C may not be withheld under section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code.

Section 552.101 also 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 "administrator" means a person who is required to and does in fact hold a certificate or permit under subchapter B of chapter 21 of the Education Code and who is performing the duties of an administrator 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 is in a position that requires the proper certification. Upon review, if the administrator at issue held the proper certification and was acting as an administrator at the time of the written reprimand at issue, we conclude Exhibit A consists of an evaluation for the purposes of section 21.355 and the district must withhold Exhibit A under section 552.101 of the Government Code with section 21.355 of the Education Code. However, we find Exhibit B does not evaluate the performance of an administrator for purposes of section 21.355 of the Education Code and the district may not withhold it under section 552.101 on that basis.

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 or embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Upon review, we find you have failed to demonstrate the remaining information is highly intimate or embarrassing and not of legitimate public concern. Therefore, the district may not withhold the remaining information under section 552.101 on that basis.

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, which is discussed above. See *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 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. Accordingly, we find no portion of the remaining information is subject to section 552.102(a) of the Government Code. Accordingly, the district may not withhold any of the remaining information on that basis.

The remaining information may contain information subject to section 552.117 of the Government Code.<sup>2</sup> Section 552.117(a)(1) applies to records a governmental body holds in an employment capacity and excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. See *Open Records Decision No. 530* at 5 (1989). Therefore, a governmental body must withhold information under section 552.117 on behalf of a current or former official or employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the individual whose information is at issue is a current or former employee or official of the district and timely requested confidentiality pursuant to section 552.024, the district must withhold the information we have marked under section 552.117(a)(1). The district may not withhold this information under section 552.117 if the individual at issue is not a current or former employee or official or if the individual did not make a timely election to keep the information confidential.

In summary, the district must withhold Exhibit A under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. If the individual whose information is at issue is a current or former employee or official of the district and timely requested confidentiality pursuant to 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 remaining information must be released.

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. See *Open Records Decision Nos. 481* (1987), *480* (1987), *470* (1987).

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](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,

A handwritten signature in black ink that reads "Mili Gosar". The signature is written in a cursive, flowing style.

Mili Gosar  
Assistant Attorney General  
Open Records Division

MG/akg

Ref: ID# 579768

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. Kevin O'Hanlon  
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(w/o enclosures)