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ATTORNEY GENERAL OF TEXAS

February 8, 2016

Mr. Juan J. Cruz
Counsel for the San Marcos Consolidated School District
J. Cruz & Associates, LLC
216 West Village Boulevard, Suite 202
Laredo, Texas 78041

OR2016-02973

Dear Mr. Cruz:

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# 597178.

The San Marcos Consolidated School District (the "district"), which you represent, received a request for the personnel records from a specified time period relating to three named employees of the district. The district states it will release some of the requested information. The district claims some of the submitted information is excepted from disclosure under sections 552.101, 552.117, 552.130, 552.137, and 552.147 of the Government Code.¹ We have considered the exceptions the district claims and reviewed the submitted information.

We note the district has redacted some of the submitted information. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue or has statutory authorization to withhold the information without requesting a decision under the Act. *See Gov't Code* § 552.301(a), (e)(1)(D). The district does not assert, nor does our review of our records indicate, the district is authorized to withhold this information without first

¹Although the district does not raise section 552.137 of the Government Code in its brief, we understand it to raise this exception based on its markings.

seeking a ruling from this office. *See id.* § 552.301(a); Open Records Decision No. 673 (2000) (previous determinations). Therefore, this type of information must be submitted in a manner that enables this office to determine whether it falls within the scope of an exception to disclosure. However, because we can discern the nature of the redacted information, being deprived of the information does not inhibit our ability to make a ruling. Nonetheless, in the future, the district must not redact information from the information it submits to this office unless it is authorized to do so by statute or the information is the subject of a previous determination under section 552.301 of the Government Code. Failure to comply with section 552.301 may result in the information being presumed public under section 552.302 of the Government Code. *See Gov't Code* § 552.302.

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 made confidential by statute, such as the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code, which governs release of medical records. Section 159.002 of the MPA provides, in relevant part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Upon review, we find the information we have marked constitutes records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created or are maintained by a physician. Accordingly, the district must withhold the marked medical records under section 552.101 of the Government Code in conjunction with the MPA.²

²As our ruling is dispositive, we need not address the district’s arguments against disclosure of this information.

Section 552.101 of the Government Code also encompasses section 21.355 of the Education Code, which provides, in relevant part, “[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 administrator. *See* Open Records Decision No. 643 (1996). 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.” *Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). 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* ORD 643 at 4.

The district contends the remaining information in Exhibit C consists of confidential evaluations of teachers by the district. We understand the teachers at issue were engaged in the process of teaching at the time of most of the evaluations. However, the district does not inform us the teachers at issue held teaching certificates or permits under chapter 21 of the Education Code at the time of the evaluations. *See* ORD 643 at 4. Accordingly, we must rule conditionally. To the extent the teachers at issue held teaching certificates or permits under chapter 21 of the Education Code, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. To the extent the teachers at issue did not hold teaching certificates or permits under chapter 21 of the Education Code, the information we have marked is not confidential under section 21.355 of the Education Code and may not be withheld on that basis under section 552.101 of the Government Code. Further, we note the remaining information at issue pertains to the employees at issue in their capacity as coaches. Thus, we find the district has failed to demonstrate the remaining information at issue consists of documents evaluating the performance of a teacher for purposes of section 21.355 of the Education Code. Accordingly, none of the remaining information in Exhibit C may be withheld under section 552.101 of the Government Code 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[.]”³ 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). Upon review, we find the

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. Open Records Decision No. 481 (1987), 480 (1987), 470 (1987).

district must withhold the dates of birth it has marked and we have marked under section 552.102(a) of the Government Code.⁴

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 and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has also found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. See Open Records Decision Nos. 600 (1992) (personal financial information includes choice of particular insurance carrier), 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).

Additionally, under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Indus. Found.*, 540 S.W.2d at 682. In considering whether a public citizen's date of birth is private, the Third Court of Appeals looked to the supreme court's rationale in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336 (Tex. 2010). *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). The supreme court concluded public employees' dates of birth are private under section 552.102 of the Government Code because the employees' privacy interest substantially outweighed the negligible public interest in disclosure.⁵ *Texas Comptroller*, 354 S.W.3d at 347-48. Based on *Texas Comptroller*, the court of appeals concluded the privacy rights of public employees apply equally to public citizens, and thus, public citizens' dates of birth are also protected by common-law privacy pursuant to section 552.101. *City of Dallas*, 2015 WL 3394061, at *3. Upon review, we find the remaining information the district has marked and the information we have marked satisfy the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the district must withhold the remaining information it has marked and the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.102(b) of the Government Code excepts from public disclosure "a transcript from an institution of higher education maintained in the personnel file of a professional

⁴As our ruling is dispositive, we need not address the district's argument against disclosure of this information.

⁵Section 552.102(a) 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).

public school employee[.]” Gov’t Code § 552.102(b). However, section 552.102(b) further provides, “the degree obtained or the curriculum on a transcript in the personnel file of the employee” is not excepted from disclosure. *Id.*; *see also* Open Records Decision No. 526 (1989). Thus, with the exception of the employees’ name, courses taken, and degrees obtained, the district must withhold the submitted college transcripts under section 552.102(b) of the Government Code.

Section 552.117(a)(1) of the Government Code 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, except as provided by section 552.024(a-1). *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. We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body’s receipt of the request for the information. *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 or official 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 or official who did not timely request under section 552.024 the information be kept confidential. The district informs us, and provides documentation showing, the employees at issue timely elected confidentiality for certain information under section 552.024. Therefore, with the exception of the information we have marked for release, the district must withhold the information it has marked and we have marked under section 552.117(a)(1) of the Government Code. However, the district may only withhold the marked cellular telephone numbers if a governmental body did not pay for the service. Further, one of the employees at issue did not elect confidentiality for their address and some of the remaining information at issue is not subject to section 552.117(a)(1). Thus, the district may not withhold this information, which we have marked for release, under section 552.117(a)(1).

Section 552.130 of the Government Code provides information relating to a motor vehicle operator’s or driver’s license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. Gov’t Code § 552.130(a). Upon review, we find the district must withhold the

motor vehicle record information it has marked and we have marked under section 552.130 of the Government Code.

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.” *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Upon review, we find the district must withhold the partial credit card number we have marked under section 552.136 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). Upon review, we find the district must withhold the e-mail addresses it has marked and we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

Section 552.147(a-1) of the Government Code provides, “[t]he social security number of an employee of a school district in the custody of the district is confidential.” *Id.* § 552.147(a-1). Thus, section 552.147(a-1) makes the social security numbers of school district employees confidential, without such employees being required to first make a confidentiality election under section 552.024 of the Government Code. *See id.* § 552.024(a-1) (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). Reading sections 552.024(a-1) and 552.147(a-1) together, we conclude that section 552.147(a-1) makes confidential the social security numbers of both current and former school district employees. Accordingly, the district must withhold the social security numbers of the district employees it has marked and we have marked under section 552.147(a-1) of the Government Code.

Section 552.147(a) of the Government Code excepts the social security number of a living individual from public disclosure. *Id.* § 552.147. Upon review, we find the district may withhold the remaining social security numbers it has marked under section 552.147 of the Government Code.

In summary, the district must withhold: (1) the medical records we have marked under section 552.101 of the Government Code in conjunction with the MPA; (2) the information we have marked under section 552.101 in conjunction with section 21.355 of the Education Code, to the extent the teachers at issue held teaching certificates or permits under chapter 21 of the Education Code; (3) the dates of birth it has marked and we have marked under section 552.102(a) of the Government Code; (4) the remaining information it has marked and the information we have marked under section 552.101 in conjunction with common-law privacy; (5) and with the exception of the employees’ name, courses taken, and degrees obtained, the submitted college transcripts under section 552.102(b) of the Government

Code. With the exception of the information we have marked for release, the district must withhold the information it has marked and we have marked under section 552.117(a)(1) of the Government Code; however, the district may only withhold the marked cellular telephone numbers if a governmental body did not pay for the service. The district must withhold: (1) the motor vehicle record information it has marked and we have marked under section 552.130 of the Government Code; (2) the partial credit card number we have marked under section 552.136 of the Government Code; (3) the e-mail addresses it has marked and we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure; (4) the social security numbers of the district employees it has marked and we have marked under section 552.147(a-1) of the Government Code. The district may withhold the remaining social security numbers it has marked under section 552.147 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,



David L. Wheelus
Assistant Attorney General
Open Records Division

DLW/bhf

Ref: ID# 597178

Enc. Submitted documents

c: Requestor
(w/o enclosures)