



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.  
The ruling and judgment can be viewed in PDF  
format below.



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

December 27, 2016

**The ruling you have requested has been amended as a result of litigation and has been attached to this document.**

Mr. Harry F. Wright, Jr.  
School Attorney  
Bryan Independent School District  
101 North Texas Avenue  
Bryan, Texas 77803

OR2016-28411

Dear Mr. Wright:

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# 639439.

The Bryan Independent School District (the "district") received a request for information pertaining to job performance reviews of a named district employee during a specified time. You state the district is withholding student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.<sup>1</sup> You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. Additionally, you provide documentation showing you have notified the named district employee of his right to submit comments to this office explaining why the submitted information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from the named district employee's attorney.

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<sup>1</sup>The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental or student consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. A copy of this letter may be found on the Office of the Attorney General's website: <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

*See id.* We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>2</sup>

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. This section encompasses information protected by other statutes. Section 21.355 of the Education Code provides, in relevant part, “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355(a). 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.). 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). 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. Further, in Open Records Decision No. 643, we determined an “administrator” for purposes of section 21.355 means a person who is required to, and does in fact, hold an administrator’s certificate under subchapter B of chapter 21 of the Education Code, and is performing the functions as an administrator, as that term is commonly defined, at the time of the evaluation. *Id.*

You contend portions of the submitted information consist of confidential evaluations of teachers and administrators by the district. You inform us, and provide documentation showing, the teachers and administrators at issue were certified as teachers or administrators by the State Board of Educator Certification and were acting as teachers or administrators at the time the evaluations were prepared. Accordingly, 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.<sup>3</sup> However, the remaining information at issue consists of self-evaluation forms or does not evaluate any employee for purposes of section 21.355. Thus, we find you have failed to demonstrate the remaining information at issue consists of documents evaluating the performance of a teacher or administrator for

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<sup>2</sup>We assume the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

<sup>3</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of the information at issue.

purposes of section 21.355 of the Education Code. Accordingly, none of the remaining information may be withheld under section 552.101 of the Government Code on that basis.

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, except as provided by section 552.024(a-1).<sup>4</sup> 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. 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 only be withheld under section 552.117(a)(1) 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. Therefore, to the extent the individuals 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, to the extent the individuals at issue did not timely request confidentiality under section 552.024, the district may not withhold the information we have marked under section 552.117(a)(1).

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 concluded some kinds of medical information are generally highly intimate or embarrassing. See Open Records Decision No. 455 (1987). Upon review, we find the information we marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. However, we note the information we have marked relates to an individual who may be de-identified pursuant to section 552.117 of the Government Code. In that case, this individual's privacy interest is protected and the

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<sup>4</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).

information we have marked that pertains to this individual may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. Accordingly, to the extent the information we have marked relates to an identifiable individual, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the district has failed to demonstrate the remaining information it marked is highly intimate or embarrassing and of no legitimate public interest. Thus, the district may not withhold the remaining information under section 552.101 in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. ORD 455 at 4. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). After review of the remaining information at issue, we find you have failed to demonstrate any portion of the remaining information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the district may not withhold any of the remaining information at issue under section 552.101 on the basis of constitutional privacy.

In summary, 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 individuals 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. To the extent the information we have marked relates to an identifiable individual, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. 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,

A handwritten signature in black ink, appearing to read 'Meagan J. Conway', written in a cursive style.

Meagan J. Conway  
Assistant Attorney General  
Open Records Division

MJC/eb

Ref: ID# 639439

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

CAUSE NO. D-1-GN-17-000115

DR. THOMAS A. WALLIS,  
*Plaintiff,*

v.

KEN PAXTON, ATTORNEY GENERAL  
OF THE STATE OF TEXAS, AND  
BRYAN INDEPENDENT SCHOOL  
DISTRICT  
*Defendants.*

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

345th JUDICIAL DISTRICT

Filed in The District Court  
of Travis County, Texas

DEC 20 2017 10:40 A.M.  
At Velva L. Price, District Clerk

**FINAL JUDGMENT**

On November 15, 2017, a hearing was held on the Parties' motions for summary judgment. Plaintiff Dr. Thomas A. Wallis and Defendants Ken Paxton, Attorney General of the State of Texas, and Bryan Independent School District (the District), appeared through counsel. This is a lawsuit under the Public Information Act, by which Plaintiff sought declaratory relief from Attorney General Letter Rulings OR2016-24811, OR2016-28427, and OR2017-00064 (the "Letter Rulings"). The Court, having considered the motions, responses, summary judgment evidence, and arguments of counsel, and having reviewed the information at issue submitted for in camera inspection, consisting of In Camera Exhibits A-C, enters the following declaration and orders.

IT IS THEREFORE ORDERED AND DECLARED that Plaintiff's Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART and Defendants' motions for summary judgment are GRANTED IN PART and DENIED IN PART. The Court FINDS AND CONCLUDES the following:

1. The following portions of In Camera Exhibit A are confidential under section 21.355 of the Texas Education Code and must be withheld by the District:
  - a. Part of In Camera Exhibit A-1, consisting of pages:
    - 1-10
    - 165-171
    - 225-227
    - 257-258
    - 301-304; and

b. In Camera Exhibit A-5.

2. The remaining portions of In Camera Exhibit A not designated as confidential in Section 1a and 1b, as well as the entirety of In Camera Exhibits B and C, are not excepted from public disclosure and shall be released by the District to the requestors consistent with the Letter Rulings, once this Judgment is final and no longer subject to appeal, whether by exhaustion of any possible appeal, lapse of time, petition for review, or otherwise, but in no event shall such release occur any later than 30 business days after this Judgment is final and no longer appealable.
3. Once this Judgment is final and no longer subject to appeal, whether by exhaustion of any possible appeal, lapse of time, petition for review, or otherwise, the Third Amended Temporary Injunction Order entered in this cause is hereby converted to a Permanent Injunction with respect to the documents designated as confidential in Sections 1a and 1b above, permanently enjoining the District from releasing the documents designated as confidential in Sections 1a and 1b above.
4. Once this Judgment is final and no longer subject to appeal, whether by exhaustion of any possible appeal, lapse of time, petition for review, or otherwise, the District will treat any and all future requests for information received by the District consistent with this Judgment, and shall not submit such requests to the Attorney General for a determination.
5. The Clerk of the Court is hereby directed to forthwith release Plaintiff Dr. Thomas A. Wallis' bond in the amount of \$100.00 to Dr. Thomas A. Wallis by and through his attorney of record.

All court costs and attorneys' fees are taxed against the parties incurring the same;

All relief not expressly granted is denied; and

This Order disposes of all claims between Plaintiff and Defendants in this cause and is final and appealable.

Signed this 20<sup>th</sup> day of December, 2017.


  
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JUDGE PRESIDING

**TIM SULAK**

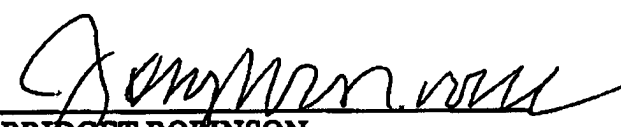
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