



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 6, 2017

Mr. Matthew M. Coleman
Counsel for the Mineral Wells Independent School District
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Austin, Texas 78727

OR2017-02600

Dear Mr. Coleman:

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# 644720.

The Mineral Wells Independent School District (the "district"), which you represent, received a request for information related to a named former employee. You state the district will release some information. You state you will withhold certain information pursuant to section 552.147 of the Government Code, as well as Open Records Decision No. 684 (2009).¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.² We have also received and considered comments submitted by an interested party. *See Gov't*

¹Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number 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 a Form 1-9 and attachments under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code and W-4 forms under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code, without the necessity of seeking a decision from the attorney general. *See ORD 684.*

²We 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 that those records contain substantially different types of information than that submitted to this office.

Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we must address the interested party's assertion the district failed to comply with its procedural requirements under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *Id.* § 552.301(b). Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e). The district informs us it received the request for information on November 7, 2016. The district states, and submits its school calendar demonstrating, it was closed for business from November 21, 2016 through November 25, 2016. However, the interested party asserts the district was not closed on November 21 and November 22, 2016. Whether the district was closed for business on November 21 and November 22, 2016, is a question of fact. This office is unable to resolve disputes of fact in the open records ruling process. Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Accordingly, we must rely upon the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernable from the documents submitted for our inspection. *See* ORD 522 at 4. Therefore, based on the district's representations that it was closed for business on November 21 and November 22, 2016, the district's ten-business-day deadline under section 552.301(b) was November 28, 2016, and its fifteen-business-day deadline under section 552.301(e) was December 5, 2016. The envelope containing the information required by section 552.301(b) is meter-marked November 22, 2016, and the envelope containing the information required by section 552.301(e) is meter-marked December 5, 2016. *See* Gov't Code § 552.308. Thus, we find the district complied with the procedural requirements mandated by section 552.301. Accordingly, we will address the district's arguments against disclosure of the submitted information.

Next, you state portions of the submitted information are not responsive because they do not pertain to the named former employee. Accordingly, the submitted information which does not pertain to the named former employee is not responsive to this request. This ruling does not address the public availability of the non-responsive information and the district need not release it to the requestor.³

³As our ruling is dispositive, we need not address your argument against disclosure of this 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. This section encompasses section 21.355 of the Education Code. Section 21.355(a) provides “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355(a). Additionally, the Third Court of Appeals has concluded that a written reprimand constitutes an evaluation for purposes of section 21.355 as it “reflects the principal’s judgment regarding [a teacher’s] actions, gives corrective direction, and provides for further review.” *N. E. Indep. Sch. Dist. v. Abbott*, 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. *See* Open Records Decision No. 643 at 3 (1996). We also determined a “teacher” for purposes of section 21.355 means a person who (1) 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 (2) is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4. We note section 21.355 does not apply to evaluations relating to an individual’s duties as a coach. *See* Educ. Code § 21.353 (teachers shall be appraised only on basis of classroom teaching performance and not in connection with extracurricular activities).

You contend Exhibit C is confidential because it consists of evaluations of a certified teacher under Chapter 21 of the Education Code. You have submitted documentation demonstrating the individual at issue held the appropriate teacher certification at the time of the evaluations. Upon review, we find some of the information at issue, which we have marked, consists of confidential evaluations under section 21.355 of the Education Code. Accordingly, the district must withhold the information we have marked in Exhibit C under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. However, the remaining information at issue consists of an evaluation of the employee in his capacity as a coach. We find the district has failed to demonstrate the remaining information in Exhibit C evaluates the performance of a teacher for purposes of section 21.355. Accordingly, the district may not withhold the remaining information in Exhibit C under section 552.101 of the Government Code on that basis.

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 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) (employee’s 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), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). However, information concerning financial transactions between an employee and a public employer is generally of legitimate public interest. ORD 545. We note the payroll deductions for federal withholding tax are protected by common-law privacy and must be withheld under section 552.101, but the payroll deductions for social security, mandatory retirement, and Medicare are not protected by common-law privacy and may not be withheld under section 552.101. *See, e.g.*, ORDs 600 at 9-12 (participation in TexFlex), 545 at 3-5; *see also* Attorney General Opinion GA-0572 at 4 (2007) (public employee's net salary protected by common-law privacy, but gross salary is not).

Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the district must generally withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, it is not clear whether the listed payroll deductions and benefits reflect mandatory participation by the employee or are the employee's voluntary financial decisions. Thus, to the extent this information reflects the employee's voluntary allocation of salary to optional investment, retirement, or other financial programs offered by the district, the district must withhold it under section 552.101 of the Government Code in conjunction with common-law privacy. However, to the extent the information at issue reflects the employee's mandatory participation in the district's retirement program or benefits paid by the district, this information is not confidential and may not be withheld on that basis.⁴ In any event, we find you have not demonstrated any of the remaining information is highly intimate or embarrassing and not of legitimate concern to the public. Thus, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

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). 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 district must withhold the date of birth you have marked under section 552.102(a) of the Government Code.

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

⁴As our ruling is dispositive for the information at issue, we need not address your remaining argument against disclosure.

school employee[.]” Gov’t Code § 552.102(b). This exception further provides, however, “the degree obtained or the curriculum on a transcript in the personnel file of the employee” are not excepted from disclosure. *Id.* Upon review, we find the district must withhold the educational transcripts submitted as Exhibit E under section 552.102(b) of the Government Code, except for the information that reveals the employee’s name, the degree obtained, and the courses taken. *See* Open Records Decision No. 526 (1989) (addressing statutory predecessor).

We note some of the remaining information may be subject to section 552.117 of the Government Code.⁵ 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. *See* Gov’t Code § 552.117(a)(1). 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. Therefore, to the extent the employee 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 employee 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 552.136(b) 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); *see id.* § 552.136(a) (defining “access device”). You state the funding account numbers at issue are used by the district to track, monitor, and transfer money. You inform us the account numbers can be used, alone and/or in conjunction with another access device, to obtain money or other things of value from the district. Upon review, we agree the district must withhold the responsive funding account numbers you have marked under section 552.136 of the Government Code.

In summary, the district must withhold the information we have marked in Exhibit C under section 552.101 of the Government Code in conjunction with section 21.355 of the

⁵The 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 No. 481 (1987), 480 (1987), 470 (1987).

Education Code. The district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; however, the payroll information we have marked may only be withheld if it reflects the employee's voluntary allocation of salary to optional investment, retirement, and other financial programs offered by the district. The district must withhold the date of birth you have marked under section 552.102(a) of the Government Code. The district must withhold the educational transcripts submitted as Exhibit E under section 552.102(b) of the Government Code, except for the information that reveals the employee's name, the degree obtained, and the courses taken. To the extent the employee 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. The district must withhold the funding account numbers you have marked under section 552.136 of the Government Code. The remaining responsive information must be released.

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,



Erin Groff
Assistant Attorney General
Open Records Division

EMG/som

Ref: ID# 644720

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)