



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 22, 2017

Mr. Brandon S. Winchester
Staff Attorney
Spring Independent School District
16717 Ella Boulevard
Houston, Texas 77090

OR2017-05870

Dear Mr. Winchester:

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# 649691 (Ref. Nos. 446, 448, 449, 451, and 455).

The Spring Independent School District (the "district") received multiple requests from the same requestor for 1) disciplinary records of three named students and 2) personnel files for two named administrators. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.114, and 552.117 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note the United States Department of Education Family Policy Compliance Office has informed this office the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state and local

¹Although you raise section 552.026 of the Government Code as an exception to disclosure, we note this section is not an exception to public disclosure under the Act. Rather, section 552.026 provides the Act does not require the release of information contained in education records except in conformity with the Family Educational Rights and Privacy Act of 1974. Gov't Code § 552.026.

²We assume that 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.

educational authorities to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.³ 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"); *see also* Open Records Decision No. 224 (1979) (student's handwritten comments protected under FERPA because they would make identity of student easily traceable through handwriting, style of expression, or particular incidents related in the comments). You assert FERPA applies to portions of the requested documents. Because our office is prohibited from reviewing records to determine whether appropriate redactions under FERPA have been made, we do not address the applicability of FERPA. *See* 20 U.S.C. § 1232g(a)(1)(A). Such determinations under FERPA must be made by the district. Likewise, we do not address your argument under section 552.114 of the Government Code. *See* Gov't Code §§ 552.026 (incorporating FERPA into the Act), 552.114 (excepting from disclosure "student records"); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 of the Government Code and FERPA). However, we will consider your remaining arguments against disclosure of the requested information.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). We note some of the submitted information consists of a completed investigation and a completed evaluation that are subject to section 552.022(a)(1). The district must release this information unless it is excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. Although you raise section 552.103 of the Government Code, this section is discretionary in nature and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the information

³A copy of this letter may be found on the Office of the Attorney General's website at <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

subject to section 552.022(a)(1) of the Government Code may not be withheld under section 552.103 of the Government Code. However, because information subject to section 552.022(a)(1) may be withheld under section 552.108 of the Government Code, and because sections 552.101, 552.117, and 552.130 make information confidential under the Act, we will consider the applicability of these sections to the information subject to section 552.022(a)(1).⁴ We will also consider your arguments for the information not subject to section 552.022(a)(1) of the Government Code.

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses other statutes, such as section 21.355 of the Education Code, which provides that “[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 an administrator. *See* Open Records Decision No. 643 (1996). Additionally, a court 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.” *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 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. *See* ORD 643.

Upon review, we find some of the submitted information consists of a confidential evaluation of an administrator by the district. We understand the administrator at issue was performing the functions of an administrator at the time of the evaluation and was certified as an administrator under chapter 21 of the Education Code at the time of the evaluation. *See id.* 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.

Section 552.103 of the Government Code provides, in relevant part, as follows:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

⁴The 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).

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551.

This office has long held “litigation,” for purposes of section 552.103, includes “contested cases” conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, some of the factors this office considers are whether the administrative proceeding provides for discovery, evidence to be heard, factual questions to be resolved, the making of a record, and whether the proceeding is an adjudicative forum of first jurisdiction with appellate review of the resulting decision without a re-adjudication of fact questions. *See* Open Records Decision No. 588 (1991).

You claim the submitted information not subject to section 552.022 of the Government Code is excepted from disclosure under section 552.103 of the Government Code. You explain grievances filed with the district are “litigation” in that the district follows administrative procedures in handling such disputes. You state the grievant proceeds through a multi-level process wherein hearing officers initially hear the complaint and the district’s board of trustees ultimately hears the grievance. You also state the grievant is allowed to be represented by counsel and to present evidence to the district. You further state a grievant must complete the grievance process before being able to appeal to the Texas Commissioner of Education or to a court. Based on your representations, we find you have demonstrated the district’s administrative procedures for grievances are conducted in a quasi-judicial forum, and thus, constitute litigation for purposes of section 552.103. You state a Level 2 grievance pertaining to the requestor’s client was pending with the district on the date the district received the request for information. Thus, you assert on the date the district received the request for information, litigation against the district was pending. You also assert the information at issue is related to that pending litigation. Based on your representations and our review, we find the information at issue is related to litigation that was pending against the district on the date the district received the request for information. Therefore, we agree

the district may withhold the submitted information not subject to section 552.022 under section 552.103 of the Government Code.⁵

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that did not result in conviction or deferred adjudication. Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A); Open Records Decision No. 434 (1986). Although you state charges were denied in the submitted offense report, you do not inform us the offense report pertains to a closed criminal case that did not result in a conviction or deferred adjudication. Consequently, we find you have failed to sufficiently demonstrate the applicability of section 552.108(a)(2) to the submitted offense report, and the district may not withhold it under section 552.108(a)(2) of the Government Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. *Id.* 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.⁶ *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. Thus, the district must withhold all public citizens' dates of birth in the remaining information subject to section 552.022 of

⁵As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

⁶Section 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).

the Government Code under section 552.101 of the Government Code in conjunction with common-law privacy.

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)*. Section 552.117(a)(1) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See Open Records Decision No. 506 at 5-6 (1988)*. 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 in the remaining information subject to section 552.022 of the Government Code under section 552.117(a)(1) of the Government Code; however, the district may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. Conversely, to the extent the employee at issue did not timely request confidentiality under section 552.024, the district may not withhold the information under section 552.117(a)(1).

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, 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. *See Gov't Code § 552.130*. Accordingly, the district must withhold the motor vehicle record information we have marked in the remaining information subject to section 552.022 of the Government Code under section 552.130 of the Government Code.

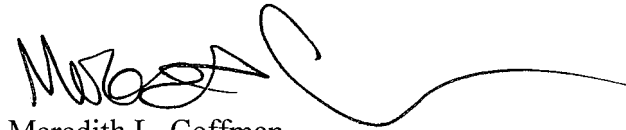
In summary, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must withhold all public citizens' dates of birth in the remaining information subject to section 552.022 of the Government Code under section 552.101 of the Government Code in conjunction with common-law privacy. The district may withhold the submitted information not subject to section 552.022 under section 552.103 of the Government Code. 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 in the remaining information subject to section 552.022 of the Government Code under section 552.117(a)(1) of the Government

Code; however, the district may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. The district must withhold the motor vehicle record information we have marked in the remaining information subject to section 552.022 of the Government Code under section 552.130 of the Government Code. The district must release the remaining information.⁷

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,



Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/bw

Ref: ID# 649691

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁷We note the remaining information contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. See Gov't Code § 552.147(b).