



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 28, 2017

Mr. Roland Hernandez
Superintendent of Schools
Corpus Christi Independent School District
P. O. Box 110
Corpus Christi, Texas 78403-0110

OR2017-09126

Dear Mr. Hernandez:

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# 653556.

The Corpus Christi Independent School District (the "district") received a request for information relating to a named former employee. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the Nueces County District Attorney's Office (the "district attorney's office"). *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

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 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.¹ Consequently,

¹A copy of this letter may be found on the Office of the Attorney General's website at <http://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

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”). We understand the district has redacted some of the submitted information, including the entirety of Exhibit F, pursuant to FERPA. Because our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records. *See* 20 U.S.C. § 1232g(a)(1)(A). Such determinations under FERPA must be made by the educational authority in possession of the education records. *See* 20 U.S.C. § 1232g(a)(1)(A). However, we will consider your arguments against disclosure of the remaining information.

In addition to redactions made pursuant to FERPA, we note you have redacted motor vehicle record information pursuant to section 552.130(c) of the Government Code.² However, the district has also redacted additional information pertaining to a district employee. You do not assert, nor does our review of our records indicate, the district is authorized to withhold the remaining redacted information without first seeking a ruling from this office. *See* Gov’t Code § 552.301(a); Open Records Decision No. 673 (2000) (previous determinations). Information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we are able to discern the nature of the information that has been redacted; thus, being deprived of that information does not inhibit our ability to make a ruling. Nevertheless, be advised that a failure to provide this office with the requested information generally deprives us of the ability to determine whether information may be withheld and leaves this office with no alternative other than ordering the redacted information be released. *See* Gov’t Code §§ 552.301(e)(1)(D) (governmental body must provide this office with copy of “specific information requested”), .302. Thus, in the future, the district should refrain from redacting, without authorization, any information it submits to this office in seeking an open records ruling.

We note the district seeks to withhold a portion of the submitted information based on the assertion that the district expressly indicated that the information at issue would not be shared publicly. However, we note information is not confidential under the Act simply because the party that submits the information anticipates or requests it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act by agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541

²Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov’t Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e).

at 3 (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information did not satisfy requirements of statutory predecessor to Gov’t Code § 552.110). Consequently, unless the information falls within an exception to disclosure, the district must release it, notwithstanding any expectations or agreement specifying otherwise.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses 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. In Open Records Letter No. 643, this office interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, we concluded a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* In addition, the Third Court of Appeals has held 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.).

You state Exhibits C and D consist of evaluations that pertain to an individual who was employed by the district as a teacher when his performance was evaluated. You also state this individual held the appropriate certification under subchapter B of the Education Code at the time of the evaluations. Based on your representations and our review, we find the district must withhold Exhibits C and D under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.³

Section 552.108(a) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must explain how and why release of the requested information would interfere with the detection, investigation, or prosecution of crime. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by any proper custodian of information relating to a pending investigation or prosecution of criminal conduct. *See Open Records Decision No. 474 at 4-5 (1987)*. Where a non-law enforcement agency has custody of information that

³As our ruling is dispositive, we need not address the district’s remaining argument against disclosure of the information at issue.

would otherwise qualify for exception under section 552.108 as information relating to the pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a demonstration that the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld.

The district attorney's office informs us that Exhibit E relates to a pending prosecution, and release of this information would interfere with the prosecution of the case. Based on this representation, we conclude that the district may withhold Exhibit E on behalf of the district attorney's office under section 552.108(a)(1) of the Government Code.⁴ See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976).

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.

...

(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). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is 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. *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). The governmental body must

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

meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

The district contends the remaining information is protected by section 552.103 of the Government Code because the information is relevant to both an investigation by the district attorney's office and the Texas Education Agency. Thus, we understand the district to argue it reasonably anticipates litigation in the matter at issue. However, we note the district is not a party to the anticipated litigation. Therefore, the district does not have a litigation interest in the matter for purposes of section 552.103. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). In such a situation, we require an affirmative representation from the governmental body with the litigation interest that the governmental body wants the information at issue withheld from disclosure under section 552.103(a). However, the district has not provided this office with an affirmative representation from any governmental body with a litigation interest explaining that it seeks to withhold the information at issue pursuant to section 552.103(a). Therefore, the district may not withhold the remaining information under section 552.103(a) of the Government Code.

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. Section 552.101 of the Government Code encompasses common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *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 has 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, the district must withhold the date of birth we have marked under section 552.102(a) of the Government Code. However, we find no portion of the remaining information is subject to section 552.102(a) of the Government Code, and the district may not withhold any of the remaining information on that basis.

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 marked under section 552.117(a)(1).

In summary, the district must withhold Exhibits C and D under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district may withhold Exhibit E on behalf of the district attorney's office under section 552.108(a)(1) of the Government Code. The district must withhold the date of birth we have marked under section 552.102(a) 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 under section 552.117(a)(1) of the Government Code. The remaining 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

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).

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 "Kaelan A. Henze". The signature is fluid and cursive, with a prominent initial "K" and a long, sweeping underline.

Kaelan A. Henze
Assistant Attorney General
Open Records Division

KAH/eb

Ref: ID# 653556

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)