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ATTORNEY GENERAL OF TEXAS

July 26, 2017

Ms. Kristi Godden
Counsel for Hidalgo Independent School District
O'Hanlon, McCollom & Demerath
808 West Avenue
Austin, Texas 78701

OR2017-16837

Dear Ms. Godden:

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# 667953 (ID# HISD-016).

The Hidalgo Independent School District (the "district"), which you represent, received a request for the job posting and all submitted applications for the district's superintendent position. You state you have released some information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.126 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. Additionally, you provide documentation showing you have notified individuals of the right to submit comments to this office why some of the submitted information should not be released.¹ *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Section 552.126 of the Government Code excepts from disclosure the "name of an applicant for the position of superintendent of a public school district . . . except that the board of trustees must give public notice of the name or names of the finalists being considered for the position at least 21 days" before a vote or final action is taken. *Id.* § 552.126. Furthermore, this protection from disclosure extends not only to the name of the individual, but also to any information tending to identify the individual. *See* Open Records Decision

¹As of the date of this letter, this office has not received comments from any third party explaining why any of the submitted information should not be released.

No. 540 (1990) (interpreting section 552.123—which, in language similar to section 552.126, protects identities of applicants for chief executive officer of institution of higher education—as applying to identities, rather than just names of applicants). This office has previously held the type of information that identifies individuals in such cases includes, but is not limited to, resumes, professional qualifications, membership in professional organizations, dates of birth, current positions, publications, letters of recommendation, or any other information that can be uniquely associated with a particular applicant. *Id.* at 4.

The district asserts the requested information consists of information pertaining to the applicants for the district's superintendent position. You state prior to the date of the instant request, the district named a lone finalist for the position. Thus, the district may not withhold the information that identifies or tends to identify the lone finalist. However, we agree the remaining requested information, which we have indicated, identifies or tends to identify other candidates for the position of superintendent. Therefore, the district may withhold the remaining requested information that identifies or tends to identify other candidates for the position of superintendent under section 552.126 of the Government Code.

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 information protected by other statutes. Section 552.101 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(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 concluded that a “teacher” for purposes of section 21.355 means a person who (1) is required to and does in fact hold a certificate or permit required under chapter 21 of the Education Code and (2) is teaching at the time of his or her evaluation, and that an “administrator” means a person who (1) is required to and does in fact hold an administrator's certificate required under subchapter B of chapter 21 of the Education Code and (2) is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *See* ORD 643.

You claim the remaining information constitutes evaluations of teachers or administrators that are confidential under section 21.355 of the Education Code. However, upon review, we find none of the remaining information consists of evaluations. Thus, we find you have failed to demonstrate any of the information at issue consists of “[a] document evaluating the performance of a teacher or administrator” as contemplated by section 21.355. Accordingly, the district has not established the information at issue is confidential under section 21.355,

and may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

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 public school employee[.]” Gov’t Code § 552.102(b). This exception further provides, however, that “the degree obtained or the curriculum on a transcript in the personnel file of the employee” are not excepted from disclosure. *Id.*; *see also* Open Records Decision No. 526 (1989). We note section 552.102(b) applies only to transcripts contained in personnel files maintained by the public school that received the request for information. In this instance, the individual whose transcript information is at issue is an employee of a school district other than the district and was merely an applicant for the position specified in the request. Thus, because the information at issue is not maintained in a personnel file of the district, you have failed to demonstrate the applicability of section 552.102(b) of the Government Code to the information at issue and the information at issue may not be withheld on this 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. The Third Court of Appeals has concluded public citizens’ dates of birth are protected by common-law privacy pursuant to section 552.101. *See 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.). Thus, the district must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. Upon review, we find you have not demonstrated any of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Thus, none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

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).² Gov’t Code § 552.137(a)-(c). The e-mail address at issue is not a type specifically excluded by section 552.137(c) of the Government Code. Accordingly, the district must withhold the e-mail address we marked

²The 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).

under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to its disclosure.

In summary, with the exception of the information pertaining to the lone finalist, the district must withhold the remaining information, which we have indicated, under section 552.126 of the Government Code. The district must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The district must withhold the e-mail address we marked under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to its disclosure. 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,



D. Michelle Case
Attorney
Open Records Division

DMC/sdk

Ref: ID# 667953

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Parties
(w/o enclosures)