



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

April 10, 2019

Ms. Sarah S. Flournoy  
Chief Legal Counsel  
Irving Independent School District  
P.O. Box 152637  
Irving, Texas 75015-2637

OR2019-09634

Dear Ms. Flournoy:

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# 758719 (IISD File No. I000641-011719).

The Irving Independent School District (the "district") received a request for personnel records and information pertaining to the requestor's client. The district states it has redacted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g(a).<sup>1</sup> The district states it will release some information. The district claims some of the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.117, 552.130, 552.136, and 552.137 of the Government Code.<sup>2</sup> You also state you notified the Texas Education Agency of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released.<sup>3</sup>

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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 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. The DOE has determined FERPA determinations must be made by the educational authority in possession of the educational records. We have posted a copy of the letter from the DOE on the Attorney General's website at <https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/open-government/20060725-USDOE-FERPA.pdf>.

<sup>2</sup>Although you do not raise sections 552.130, 552.136, and 552.137 of the Government Code in your brief, we understand you to claim these exceptions based on your markings in the submitted information. Although you also raise section 552.115 of the Government Code for the submitted information, you provide no arguments explaining how this exception is applicable to the information at issue. Therefore, we assume you no longer assert this exception. See Gov't Code §§ 552.301, .302.

<sup>3</sup>As of the date of this letter, we have not received any comments from the Texas Education Agency explaining why any portion of the submitted information should not be released to the requestor.

See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the claimed exceptions and reviewed the submitted 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.” 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 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. See ORD 643.

You assert the information you marked consists of written evaluations that are confidential under section 21.355. You inform us, and have submitted documentation reflecting, the teacher at issue held the appropriate certification at the time of the evaluations. Based on your representations and our review, we agree the documents we have marked constitute evaluations as contemplated by section 21.355. Accordingly, the district must withhold these documents under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.<sup>4</sup> However, we find you have failed to demonstrate how any of the remaining information at issue constitutes an evaluation for the purposes of section 21.355 of the Education Code. Therefore, the district may not withhold the remaining information at issue under section 552.101 of the Government Code in conjunction with section 21.355 of the Education 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. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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

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<sup>4</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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 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. *See id.* at 348. The remaining information includes the date of birth of the requestor's client. Because section 552.102 protects personal privacy, the requestor has a right of access to the date of birth of his client under section 552.023 of the Government Code and it may not be withheld from him under section 552.102(a). *See Gov't Code* § 552.023(a) (governmental body may not deny access to person to whom information relates or person's agent on ground that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Accordingly, the district may not withhold the date of birth of the requestor's client under section 552.102(a) of the Government Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which is subject to the two-part test discussed above. *Indus. Found.*, 540 S.W.2d at 685. 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. *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.). However, the requestor has a right of access to his client's private information. Further, the requestor's client is the authorized representative of her minor children, and may also be the authorized representative of her husband. *See Gov't Code* § 552.023(a); ORD 481 at 4. Thus, the requestor has a right of access to some of the marked information that would otherwise be confidential under common-law privacy. The district may not withhold a date of birth to which the requestor has a right of access under section 552.101 of the Government Code on the basis of common-law privacy. Thus, with the exception of any dates of birth to which the requestor has a right of access, the district must withhold the public citizens' dates of birth, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy.<sup>5</sup> However, we find none of the remaining information at issue is highly intimate or embarrassing information and of no legitimate public interest, and it may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code applies to records held by a governmental body in an employment capacity and excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member

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<sup>5</sup>In this instance, as our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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 552.024(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 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. However, section 552.117 protects personal privacy. Pursuant to section 552.023 of the Government Code the requestor has a right of access to his client's private information. *See* Gov't Code § 552.023(b); ORD 481 at 4. Accordingly, the district may not withhold the information belonging to the requestor's client under section 552.117(a)(1) of the Government Code. Further, upon review, we find the remaining information the district marked does not consist of the home address, telephone number, emergency contact information, social security number, or family member information of a current or former employee of the district, and the district may not withhold the remaining information it marked 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. However, we note section 552.130 protects personal privacy. Accordingly, the requestor has a right of access to his client's motor vehicle record information under section 552.023 of the Government Code. *See id.* § 552.023(b); ORD 481 at 4. Accordingly, the district may not withhold the requestor's client's motor vehicle record information pursuant to section 552.130.

Section 552.136 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"). We note section 552.136 protects personal privacy. Accordingly, the requestor has a right of access to his client's employee number and bank account numbers under section 552.023 of the Government Code. *See id.* § 552.023(b); ORD 481 at 4. Accordingly, the district may not withhold this information under section 552.136 of the Government Code.

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). Gov't Code § 552.137(a)-(c).

We note the information you have marked is the requestor's client's personal e-mail address, to which he has a right of access under section 552.137(b) of the Government Code. *See id.* § 552.137(b) (personal e-mail address of member of public may be disclosed if owner of address affirmatively consents to its disclosure). Accordingly, this information may not be withheld from him under section 552.137. Accordingly, the district may not withhold the e-mail address you marked under section 552.137 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. With the exception of any dates of birth to which the requestor has a right of access, the district must withhold the public citizens' dates of birth, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy. The district must release the remaining information.<sup>6</sup>

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](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/mo

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<sup>6</sup>We note the information being released 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 an attorney general decision under the Act. *See Gov't Code* § 552.147(b). However, the requestor has a right of access to his client's and her minor children's social security numbers, and they may not be withheld from him under 552.147 of the Government Code. *See id.* § 552.023(a); ORD 481 at 4. Further, the requestor's client may be the authorized representative of her husband. Thus, the requestor may have a right of access to the information at issue that would otherwise be private. The district may not withhold a social security number to which the requestor has a right of access under section 552.147.

Ref: ID# 758719

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Third Party  
(w/o enclosures)