



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

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OR2020-30599A

Dear Ms. Karczewski:

This office issued Open Records Letter No. 2020-30599 (2020) on December 8, 2020. We have determined the prior ruling should be corrected. *See* Gov't Code §§ 552.306, .352. Accordingly, we hereby withdraw the prior ruling. This decision is substituted for Open Records Letter No. 2020-30599 and serves as the correct ruling. *See generally id.* § 552.011 (Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"), chapter 552 of the Government Code). This ruling was assigned ID# 809541.

The Diboll Independent School District (the "district"), which you represent, received a request for a named employee's personnel file. The district claims the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note some of the submitted information is not responsive to the request for information because the requestor excluded it from his request. This ruling does not address the public availability of any information that is not responsive to the request and the district is not required to release this information, which we have marked, in response to this request.

Next, the requestor asserts the district failed to comply with its procedural obligations 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. Section 552.301(e-1) provides the following:

A governmental body that submits written comments to the attorney general under Subsection (e)(1)(A) shall send a copy of those comments to the person who requested the information from the governmental body. If the written comments disclose or contain the substance of the information requested, the copy of the comments provided to the person must be a redacted copy.

*Id.* § 552.301(e-1). The district sent to the requestor a copy of its written comments submitted to this office pursuant to section 552.301(e)(1)(A), but redacted portions of its arguments from the copy. After review of the copy of the district's brief sent to the requestor, we conclude the district redacted information from the copy that does not disclose or contain the substance of the information requested. Therefore, we conclude the district failed to comply with the procedural requirements of section 552.301(e-1) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). We find the district has failed to establish a compelling reason to address its own arguments under section 552.108. Nevertheless, the need of a governmental body, other than the governmental body that failed to timely seek an open records decision, to withhold information under section 552.108 of the Government Code can provide a compelling reason sufficient to overcome the presumption of openness. *See* Open Records Decision No. 586 (1991). Because the district informs us, and provides documentation showing, the Angelina County Attorney's Office (the "county attorney's office") objects to the release of some of the information at issue, we will consider whether the district may withhold this information under section 552.108 of the Government Code on behalf of the county attorney's office. Additionally, because section 552.101 can provide a compelling reason to overcome the presumption of openness, we will also address the district's arguments under that section.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the information at issue relates to a criminal investigation that has concluded in a final result other than conviction or deferred adjudication. *See id.* §§ 552.108(a)(2), .301(e)(1)(A). The county attorney's office objects to the release of pages 30 and 31 of the submitted documents because this information pertains to a case that concluded in a result other than conviction or deferred adjudication. Based on this representation, we conclude the district may withhold pages 30 and 31 of the submitted documents under section 552.108(a)(2) of the Government Code on behalf of the county attorney's office.

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). This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of an administrator. *See* Open Records Decision No. 643 at 3 (1996). 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. *Id.*

The district asserts the submitted information contains evaluations of the performance of an administrator who holds the appropriate certificate for the purpose of section 21.355 and was acting as an administrator at the time of the evaluations. Upon review, we find pages 2, 4-5, 16, 21, 24, and 28 of the submitted documents are confidential under section 21.355. Therefore, the district must withhold this information under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. However, we find the district has not established any of the remaining information consists of “[a] document evaluating the performance of a teacher or administrator” as contemplated by section 21.355. Accordingly, we conclude the district has not established the remaining information is confidential under section 21.355, and the district may not withhold it under section 552.101 on that ground.

Section 552.101 of the Government Code also encompasses section 611.002 of the Health and Safety Code, which provides, in part, as follows:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see id.* § 611.001 (defining “patient” and “professional”). Upon review, we find page 27 of the submitted documents consists of a mental health record that is subject to chapter 611 of the Health and Safety Code. Therefore, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.<sup>1</sup>

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 the *Industrial Foundation* decision. *Id.* at 683. Additionally, this office has concluded some kinds of

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<sup>1</sup> As our ruling is dispositive, we do not address the arguments of the district to withhold this information.

medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we find some of the submitted information, which we have marked, satisfies the standard articulated by the Texas Supreme Court in the *Industrial Foundation* decision. Accordingly, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the district may withhold pages 30 and 31 of the submitted documents under section 552.108(a)(2) of the Government Code on behalf of the county attorney's office. The district must withhold the following: (1) pages 2, 4-5, 16, 21, 24, and 28 of the submitted documents Education Code; (2) page 27 of the submitted documents under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code; and (3) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The district must release the remaining responsive 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/gw

Ref: ID# 871628

c: Requestor