



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 19, 2007

Ms. Marianna M. McGowan
Abernathy Roeder Boyd Joplin P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2007-16837

Dear Ms. McGowan:

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# 297703.

The Mansfield Independent School District (the "district"), which you represent, received three requests for information pertaining to a specified incident and one request for the personnel file of a named former district teacher. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.108, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹ We have also considered comments submitted by interested third parties. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note that recently the United States Department of Education Family Policy Compliance Office (the "DOE") informed this office that the Family Education Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purposes of our review in the

¹We 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.

open records ruling process under the Act.² 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”). A portion of the information that you have marked under FERPA includes police reports and records created and maintained by the district’s police department. We note, however, that FERPA is not applicable to law enforcement records maintained by the district’s police department that were created by the department for a law enforcement purpose. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3, 99.8. Further, you have submitted, among other things, redacted education records for our review. You state you will withhold the identifying information of students from the requested documents pursuant to FERPA.³ Accordingly, we will address the applicability of the claimed exceptions to the remainder of 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. This section encompasses information protected by other statutes. Section 261.201(a) of the Family Code provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). Exhibit B relates to an investigation of alleged or suspected abuse of a child conducted by the district’s police department and is therefore subject to section 261.201. *See id.* §§ 101.003(a) (defining “child” for purposes of section 261.201 as “person under 18 years of age who is not and has not been married or who has not had the

²A copy of this letter may be found on the Office of the Attorney General’s website: http://www.oag.state.tx.us/opinopen/og_resources.shtml.

³Because FERPA is dispositive, we need not address the district’s remaining arguments against disclosure for student identifying information.

disabilities of minority removed for general purposes”), 261.001(1)(E) (definition of child abuse includes sexual assault or aggravated sexual assault under Penal Code sections 22.011 and 22.021). You do not indicate that the district’s police department has adopted a rule that governs the release of this type of information. We therefore assume no such rule exists. Given this assumption, we conclude that Exhibit B is confidential pursuant to section 261.201 of the Family Code and must therefore be withheld in its entirety pursuant to section 552.101 of the Government Code.⁴ See Open Records Decision No. 440 at 2 (1986) (predecessor statute).

We now turn to your arguments against disclosure of the remaining information. Section 552.101 also encompasses section 21.355 of the Education Code which provides, “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355. This office interpreted this section 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, this office concluded that 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.* You state the named individual was certified under chapter 21 of the Education Code and, thus, a teacher for purposes of section 21.355 at the time the submitted information was created. See *id.* However, upon review, we find that the remaining information does not evaluate the performance of the teacher as contemplated by section 21.355 of the Education Code. Thus, the district may not withhold any of the remaining information on this basis.

Section 552.101 also encompasses the common law informer’s privilege, which has long been recognized by Texas courts. See *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer’s identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer’s privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to “administrative officials having a duty of inspection or of law enforcement within their particular spheres.” Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. See Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988).

You argue that the remaining information may be withheld under section 552.101 of the Government Code in conjunction with the informer’s privilege. Upon review, however, we

⁴As this ruling is dispositive, we need not address your remaining arguments against the disclosure of this information.

find that none of the remaining information indicates or documents any individual reporting violations of statutes as contemplated by the informer's privilege. Accordingly, we conclude that you have failed to demonstrate the applicability of the common law informer's privilege to the remaining information. Therefore, the remaining information may not be withheld under section 552.101 in conjunction with the common law informer's privilege.

Section 552.101 of the Government Code also encompasses the doctrine of common law privacy. Section 552.102(a) of the Government Code excepts from public 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). Section 552.102 is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). The privacy analysis under section 552.102(a) is the same as the common law privacy standard under section 552.101. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor). We will therefore consider the applicability of common law privacy under section 552.101 together with your claim regarding section 552.102.

In *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), the Texas Supreme Court held that information is protected by common law privacy 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 a legitimate concern to the public. To demonstrate the applicability of common law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. However, information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and therefore generally not protected from disclosure under common law privacy. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow). In addition, this office has found that a compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public.

You also seek to withhold the identities and statements of the complainant and witnesses in the remaining information under common law privacy in conjunction with *Morales v.*

Ellen, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied). In *Ellen*, the court addressed the applicability of the common law privacy doctrine to files of an investigation of allegations of sexual harassment.

We have reviewed the remaining information and we find that it is either not intimate or embarrassing or is of a legitimate public interest. Therefore, none of the remaining information is confidential under the doctrine of common law privacy, and it may not be withheld under either section 552.101 or section 552.102(a).

Finally, you assert that the remaining information is excepted from disclosure under section 552.135 of the Government Code, which provides the following:

(a) “Informer” means a student or former student or an employee or former employee of a school district who has furnished a report of another person’s or persons’ possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer’s name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

Gov’t Code § 552.135(a), (b). Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of “law,” a school district that seeks to withhold information under that exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See id.* § 552.301(e)(1)(A). Additionally, we note that individuals who provide information in the course of an investigation but do not make the initial report are not informants for the purposes of claiming section 552.135 of the Government Code. You argue that the submitted information contains identifying information of district employees who reported possible violations of criminal and regulatory law to the district. We note, however, that the incident that is the basis of the investigation at issue was actually reported to the district by a student who is not identified in the submitted information. Upon review, we find that you have not demonstrated that any of the individuals actually identified in the submitted information are informants for purposes of section 552.135(a). Therefore, none of the remaining information may be withheld under section 552.135(b).

We note that Exhibit C contains a W-4 form. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms). Section 6103(b) defines the term “return information” as “a taxpayer’s identity, the nature, source, or amount of income, payments, tax withheld, deficiencies, overassessments or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return . . . or the determination of the existence, or possible existence, of

liability . . . for any tax . . . penalty, . . . , or offense[.]” *See* 26 U.S.C. § 6103(b)(2)(A). Accordingly, the district must withhold the marked W-4 form pursuant to federal law.

We note that Exhibit C also includes college transcripts. Section 552.102(b) of the Government Code exempts 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). Thus, except for those portions of the documents that reveal the degree obtained and the courses taken, the district must withhold the transcripts, which we have marked, under section 552.102(b) of the Government Code.

Some of the remaining information may be confidential under sections 552.117 and 552.137 of the Government Code.⁵ Section 552.117(a)(1) exempts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely elect to keep this information confidential pursuant to section 552.024 of the Government Code. *Id.* § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the district may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. We have marked certain personal information under section 552.117. If the individual to whom the information relates timely elected to keep his personal information confidential, the district must withhold the information we have marked pursuant to section 552.117(a)(1). If, however, the former district employee did not timely elect to keep his information confidential, the district may not withhold this information under section 552.117(a)(1).⁶

Section 552.137 exempts 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). *See* Gov’t Code § 552.137(a)-(c). The e-mail addresses in the remaining information are not a type specifically excluded by

⁵This office will raise mandatory exceptions to disclosure on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁶We note that 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.

section 552.137(c). As such, these e-mail addresses must be withheld under section 552.137 unless the owners of the addresses have affirmatively consented to their release. *See id.* § 552.137(b).

In summary: (1) this ruling does not address the applicability of FERPA to the submitted information. Should the district determine that all or portions of those documents consist of “education records” that must be withheld under FERPA, the district must dispose of that information in accordance with FERPA, rather than the Act; (2) the district must withhold Exhibit B under section 552.101 in conjunction with section 261.201 of the Family Code; (3) the district must withhold the marked W-4 form under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code; (4) except for the information that reveals the employee’s name, the degree obtained, and the courses taken, the district must withhold the marked transcripts under section 552.102(b) of the Government Code; (5) if the individual at issue timely elected to keep his personal information confidential, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code; and (6) the district must withhold the marked e-mail addresses under section 552.137 of the Government Code unless the owners of the e-mail addresses have affirmatively consented to their public disclosure. The remaining information must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general’s Open Government Hotline,

toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Paige Savoie
Assistant Attorney General
Open Records Division

PS/ma

Ref: ID# 297703

Enc. Submitted documents

c: Mr. Fil Alvarado
FOX TV
400 N. Griffin Street
Dallas, Texas 75202
(w/o enclosures)

Ms. Eva-Marie Ayala
Fort Worth Star-Telegram
P.O. Box 915006
Fort Worth, Texas 76115
(w/o enclsoures)

Mr. Giles Hudson
Assignment Editor
CBS-11 TV
c/o Ms. Marianna M. McGowan
Abernathy Roeder Boyd Joplin P.C.
P.O. Box 1210
McKinney, Texas 75070-1210
(w/o enclsoures)

Ms. Kristi Gaye Underwood
1419 Danbury Drive
Mansfield, Texas 76063
(w/o enclsoures)

Ms. Marie Tapia
2311 Bear Run Road
Arlington, Texas 76001
(w/o enclsoures)