



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 11, 2008

Ms. Mari M. McGowan
Abernathy, Roeder, Boyd & Joplin P.C.
P.O. Box 1210
Plano, Texas 75070-1210

OR2008-07958

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# 312424.

The Plano Independent School District (the "district"), which you represent, received a request for an investigation report regarding an employee on administrative leave. You state that the district has released some of the information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.135 of the Government Code. In addition, you note that the release of the submitted information may implicate the privacy interests of third parties. Accordingly, you state that you have notified the individuals whose privacy interests are at issue of the request and of their right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.204 (providing that interested parties may submit comments stating why information should or should not be released). We have considered the exceptions you claim 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. This section encompasses information protected by other statutes. Section 21.355 of the Education Code provides that "[a] document evaluating the performance of a teacher or administrator is confidential." 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. *See* Open Records Decision No. 643 at 3 (1996). We also determined that a "teacher" for purposes of section 21.355 means a person who (1)

is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and (2) is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4; *Abbott v. North East Independent School District*, 212 S.W.3d 364, 367 (Tex. App.—Austin 2006, no pet.) (holding that a document evaluates a teacher when it “reflects the principal’s judgment regarding [the teacher’s] actions, gives corrective direction, and provides for further review.”). The submitted information consists of an investigation of alleged wrongdoing by the employee at issue. This information does not constitute an evaluation of the employee’s performance. Thus, you may not withhold the submitted information under section 552.101 in conjunction with section 21.355 of the Education Code.

Section 552.101 also encompasses the informer’s privilege, which has long been recognized by Texas courts. *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). The informer’s privilege 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 (1998), 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).

Although you raise the informer’s privilege for the identity of the complainant in the submitted information, you have not identified the alleged violation of law to which the reported incident pertains, nor have you explained whether the alleged violation carries civil or criminal penalties. Further, you have failed to establish that the complaint was made to officials having a duty of inspection or law enforcement. Accordingly, the district has not met its burden in demonstrating that the informer’s privilege is applicable to the submitted information. *See* Gov’t Code § 552.301(e)(1)(A), Open Records Decision Nos. 542 (1990) (concluding that Act places on governmental body burden of establishing why and how exception applies to requested information), 532 (1989), 515 (1988), 252 (1980). Thus, we conclude that the district may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with the informer’s privilege.

Section 552.102 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). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546, 550 (Tex.App.—Austin 1983, writ ref’d n.r.e.), the court ruled that the test to be applied to information protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas*

Industrial Accident Board, 540 S.W.2d 668, 685 (Tex. 1976), for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Act. Accordingly, we will consider your privacy claim under both sections 552.101 and 552.102.

For information to be protected from public disclosure by the common law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses is excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We have marked the medical information that must be withheld under common law privacy. However, information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and therefore is generally not protected from disclosure under common law privacy. See Open Records Decision Nos. 470 (public employee's job performance does not generally constitute employee's private affairs), 455 (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). The information at issue pertains to allegations of wrongdoing in the course of the named individual's employment. Therefore, we conclude that there is a legitimate public interest in this information. Further, although you claim that the submitted information is excepted from disclosure under section 552.101 in conjunction with common law privacy and the ruling in *Morales v. Ellen*, the submitted investigation does not concern sexual harassment. See *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). Therefore, we find that *Ellen* is not applicable in this instance. We also note that none of the individuals you notified have submitted comments regarding why the requested information should not be released. Thus, we have no additional basis to conclude that the release of any portion of the requested information would implicate the privacy interests of these individuals. Consequently, the district may not withhold any of the remaining information from public disclosure based on the common law right to privacy.

Finally, we address your claim that the submitted information may be withheld under section 552.135 of the Government Code. This section provides in relevant part:

- (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). You state that the allegations "contain complaints that provisions of the Texas Administrative Code, with regard to professional ethics[,] and the [d]istrict's policy on employee standards of conduct have been violated." However, upon review, we find that you have not identified the specific civil, criminal, or regulatory law that is alleged to have been violated. *See id.* We therefore conclude that the district may not withhold any of the submitted information under section 552.135 of the Government Code.¹

In summary, the district must withhold the marked medical information under section 552.101 of the Government Code in conjunction with common law privacy. The remaining submitted information must be released to the requestor.

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

¹We note that the submitted information contains a social security number. Section 552.147(b) of the Government Code authorizes a government 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.

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,



Olivia A. Maceo
Assistant Attorney General
Open Records Division

OM/mcf

Ref: ID# 312424

Enc. Submitted documents

c: Ms. Staci Hupp
Education Reporter
The Dallas Morning News
Collin County Bureau
P.O. Box 940567
Plano, Texas 75094
(w/o enclosures)