ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 6, 2008

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

OR2008-10720

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# 318016.

The Lovejoy Independent School District (the "district"), which you represent, received a request for information related to any investigation in which the requestor's name has been mentioned.[1] You also state, and provide documentation showing, that you notified certain individuals of the request and of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).[2] You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.107, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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[1]We note that the district sought and received clarification of this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see also* Open Records Decision No. 663 (1999) (discussing tolling of deadlines during period in which governmental body is awaiting clarification).

[2]As of the date of this decision, this office has received no correspondence from the individuals in question.

Initially, we note that some of the submitted documents are not responsive to the instant request for information because they were created after the date of the request. We have marked the non-responsive documents. 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 that information in response to the request.

Next, we note that the submitted information includes education records. The United States Department of Education Family Policy Compliance Office has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, 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 purpose of our review in the open records ruling process under the Act.[3] 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"). However, if the district obtains parental consent to submit unredacted education records, and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly. Because our office is prohibited from reviewing education records to determine the applicability of FERPA, we will not address FERPA with respect to the requested information, other than to note that parents have a right of access to their own child's education records. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3. We further note that the DOE also has informed this office that if a state law prohibits a school district from providing a parent with access to the education records of his or her child and an opportunity to inspect and review the record, then the state statute conflicts with FERPA, and an educational agency or institution must comply with FERPA if it wishes to continue to receive federal education funds. Letter advisement from Ellen Campbell, Family Compliance Office, U.S. Department of Education to Robert Patterson, Open Records Division, Office of the Texas Attorney General (April 9, 2001). *See Equal Employment Opportunity Comm'n v. City of Orange*, 905 F. Supp 381, 382 (E.D. Tex. 1995); Open Records Decision No. 431 (1985) (FERPA prevails when in conflict with state law). Because the educational authority in possession of the education records is now responsible for determining the applicability of FERPA, we will only address your claimed exceptions to the disclosure of the requested information.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

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[3]A copy of this letter may be found on the attorney general's website, *available at* http://www.oag.state.tx.us/open/20060725usdoe.pdf.

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.*, meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5).

Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You contend that the submitted information includes communications between representatives of and attorneys for the district that were made in furtherance of the rendition of professional legal services to the district. You also assert the communications were intended to be confidential and that their confidentiality has been maintained. You have identified some of the parties to the communications. Based on your representations and our review of the information at issue, we agree that section 552.107 is applicable to the information we have marked, and it may be withheld on that basis.[4] However, you have not explained how the remaining information constitutes privileged attorney-client communications. Therefore, the district may not withhold any of the remaining information under section 552.107 of the Government Code.

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

Next, we address your arguments under section 552.101 of the Government Code for the remaining information. Section 552.101 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 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. In addition, the court has concluded a written reprimand constitutes an evaluation for purposes of section 21.355 because "it reflects the principal's judgment regarding [a teacher's] actions, gives corrective direction, and provides for further review." *North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). This office has 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). Additionally, this office has determined that an administrator is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is serving as an administrator at the time of the evaluation. *Id.*

You contend that the remaining information contains evaluative documentation and information regarding an investigation of a district employee. Having considered the submitted arguments and reviewed the information at issue, we find that none of the information at issue consists of an evaluation or a written reprimand as contemplated by section 21.355 or as interpreted by *North East Independent School District*. Accordingly, the district may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Section 552.101 also encompasses the common-law informer's privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer's privilege protects 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. *See* 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." *See* 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). The privilege excepts the informer's statement only to the extent necessary to protect the informer's identity. *See* Open Records Decision No. 549 at 5 (1990).

You claim that the information at issue must be withheld in its entirety to protect the identities of witnesses and informers. However, you have not identified a violation that could result in the imposition of a civil or criminal penalty by the district. Accordingly, you

have not demonstrated that the informer's privilege is applicable to any portion of the remaining information. Thus, we conclude that the district may not withhold any information under section 552.101 of the Government Code in conjunction with the 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 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*, the court ruled that the test to be applied to information claimed to be protected under section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Tex. Industrial Accident Board* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Act. *See Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (citing *Indus. Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). We will therefore consider your common-law privacy claim under section 552.101 of the Government Code.

Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found.*, 540 S.W.2d at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Generally, however, the public has a legitimate interest in information that relates to public employment and public employees, and information that pertains to an employee's actions as a public servant generally cannot be considered beyond the realm of legitimate public interest. *See* Open Records Decisions Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern); 542 (1990); 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees); 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees); 423 at 2 (1984) (scope of public employee privacy is narrow). The submitted information pertains to public employees and their conduct within the workplace. Therefore, we conclude that there is generally 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*, we note that the information at issue is not related to an investigation of alleged 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 note, however, that common-law privacy protects other types of information, including: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Accordingly, the district must withhold the information that we have marked under section 552.101 in conjunction with common-law privacy.

Next, you contend that some of the remaining information is excepted 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].
>
> (c) Subsection (b) does not apply:
>
> > (1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or
> >
> > (2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or
> >
> > (3) if the informer planned, initiated, or participated in the possible violation.

Gov't Code § 552.135(a)-(c). Because the legislature limited the protection 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 the 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), .135(a). You state that the allegations specifically contain complaints regarding alleged violations of provisions of the Texas Administrative Code regarding professional ethics and the district's policy on employee standards of conduct. However, we find that you have not identified any specific civil, criminal, or regulatory law that is alleged to have been violated. We therefore conclude that the district may not withhold any of the submitted information under section 552.135 of the Government Code.

We note that the submitted information contains employees' personal information. Section 552.117 of the Government Code excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024.[5] Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, the district must withhold the information we have marked under 552.117 if the employees at issue elected to keep such information confidential prior to the receipt of this request. If the employees at issue did not elect to keep such personal information confidential, the marked information must be released.

The remaining information also contains an e-mail address that is subject to section 552.137 of the Government Code. Section 552.137 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). *See* Gov't Code § 552.137(a)-(c). We note that the requestor has a right of access to her own e-mail address. *Id.* § 552.023 (person or person's authorized representative has special right of access to information relating to person and protected from public disclosure by laws intended to protect that person's privacy interest). The e-mail address we have marked in the remaining information is not of a type specifically excluded by section 552.137(c). Therefore, the district must withhold the e-mail address we have marked in accordance with section 552.137 unless the district receives consent for its release.

In summary, the district must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. The district may withhold the information we have marked under section 552.107(1) of the Government Code. The district must withhold the information we have marked under section 552.117 of the Government Code if the employees at issue elected to keep such information confidential prior to the receipt of this request. The e-mail address we have marked must be withheld under section 552.137 of the Government Code unless the owner consents to its release. The remaining responsive 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

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[5]The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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). If the governmental body does not file suit over 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).

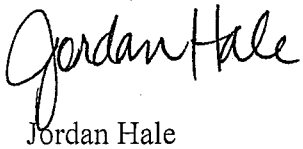
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Jordan Hale
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JH/jb