ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 20, 2010

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

OR2010-00930

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# 367470.

The Tioga Independent School District (the "district"), which you represent, received a request for the resignation letters of two named district officials. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.111, and 552.135 of the Government Code. You also state that release of the submitted information could implicate the privacy rights of individuals who are at issue. As of the date of this letter, we have not received any arguments from interested third parties regarding the information at issue. *See* Gov't Code § 552.304 (interested party 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 exception encompasses information made confidential by statute. Section 21.355 of the Education Code provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. 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 administrator. *See* Open Records Decision No. 643 (1996). In Open Records Decision No. 643, we determined that for purposes of section 21.355, the word "teacher" means a person who is required to and does

in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4. Similarly, an "administrator" is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is administering at the time of his or her evaluation. *Id.* We note that under chapter 21 of the Education Code, a person employed as a librarian, counselor, education aide, or nurse is required to hold the appropriate certificate, permit, or state-issued license. *See* Educ. Code § 21.003.

You contend that the submitted letters evaluate the job performance of a district administrator. However, the submitted comments of the former district officials do not evaluate of the performance of a superintendent or any other district teacher or administrator. Thus, we conclude that this information is not confidential under section 21.355 of the Education Code, and may not be withheld under section 552.101 on this basis.

You also assert the submitted information is excepted under section 552.101 of the Government Code in conjunction with common-law privacy and section 552.102 of the Government 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). In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled the test to be applied to information protected under section 552.102 is the same test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. Accordingly, we will consider your privacy claims under sections 552.101 and 552.102 together.

Common-law privacy 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. *See 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. The types 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. Although you claim portions of the submitted information are excepted from disclosure under section 552.101 in conjunction with common-law privacy and the ruling in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), you have failed to show how the submitted information concerns an investigation of alleged sexual harassment. Therefore, we find that *Ellen* is not applicable in this instance. Additionally, this office has held the public has a legitimate interest in the performance of public servants and in the reasons for their dismissal, demotion, promotion, or resignation. *See* Open

Records Decision Nos. 470 (1987), 444 (1986), 423 at 2 (1984). The submitted information pertains to allegations of wrongdoing in the course of the named officials' tenure and to the reasons for the named employees' resignations. Therefore, we conclude there is a legitimate public interest in this information. Accordingly, the district may not withhold any of the submitted information under section 552.101 or section 552.102(a) of the Government Code in conjunction with common-law privacy.

You also assert that the submitted information is excepted from disclosure pursuant to section 552.101 in conjunction with the common-law informer's privilege and section 552.135 of the Government 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); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The common-law 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 (1988), 208 at 1-2 (1978). You state the submitted information pertains to "allegations regarding School District employees." However, you do not inform us that the alleged conduct is a violation of a criminal or civil statute. We conclude that the district has failed to demonstrate the applicability of the common-law informer's privilege in this instance. Thus, the district may not withhold any of the submitted information pursuant to section 552.101 of the Government Code in conjunction with the informer's privilege.

Section 552.135 of the Government Code 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. 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 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). As noted above, you do not inform this office of any law that is alleged to have been violated in the submitted letters. Accordingly, we find that the district has failed to demonstrate how the submitted information reveals the identity of an informer for the purposes of section 552.135. Thus, the district may not withhold any portions of the submitted information under section 552.135 of the Government Code.

You also raise section 552.111 of the Government Code for the submitted information. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't § 552.111. In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body. ORD 615 at 5-6. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You state that the submitted information consists of the advice, opinions, and recommendations regarding the district's decision making process. Upon review, we find the submitted letters pertain to internal administrative and personnel matters. Moreover, we find the district has failed to demonstrate how any of the information at issue constitutes the district's advice, opinion, or recommendation reflecting its policymaking process. Therefore, the district may not withhold the submitted information under section 552.111 and the deliberative process privilege.

We note portions of the submitted information may be subject to section 552.117(a)(1) of the Government Code.[1] Section 552.117(a)(1) excepts 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 request this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code §§ 552.117(a)(1), .024. 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). The district may only withhold information under section 552.117(a)(1) on behalf of a former or current employee who made a request for confidentiality under section 552.024 prior to the date on which the request for information

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

was made. We have marked information that is subject to section 552.117. You do not indicate whether the district officials whose information is at issue elected to keep their personal information confidential prior to the district receiving the instant request for information. We therefore rule conditionally. If the officials whose personal information we have marked timely elected to withhold such information under section 552.024, the district must withhold the marked information under section 552.117(a)(1) of the Government Code. As no further exceptions to disclosure have been raised, the remaining information must be released. If the officials did not timely elect confidentiality, the district may not withhold the marked information under section 552.117(a)(1), and must release the submitted information in its entirety.

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/eeg

Ref: ID# 367470

Enc. Submitted documents

c: Requestor
(w/o enclosures)