



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 28, 2010

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

OR2010-09502

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# 384451.

The Plano Independent School District (the "district"), which you represent, received a request for a specified investigation and three specified personnel files.¹ You state you have released some of the requested information with redactions agreed upon by the requestor. You also state the district has redacted student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.² You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.117, 552.135, and 552.137 of the Government Code. You also state you have notified the

¹You state the district sought and received clarification from the requestor regarding the request for information. See Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

²The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA 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. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

individuals whose information is at issue of this request for information and of their right to submit arguments to this office as to why the submitted information should not be released.³ 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.

Initially, we note the requestor has specifically excluded social security numbers from the request. Thus, any such information is not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

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 exception encompasses information made confidential by statute. Section 21.355 of the Education Code 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 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 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.*

You assert the submitted internal investigations are confidential under section 21.355. Upon review, however, we find you have not demonstrated, nor do the documents reflect, how the internal investigations are evaluations of teachers or administrators for purposes of section 21.355. 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.

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

³As of the date of this letter, we have not received comments from any interested third parties.

“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 or 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. In addition, this office has found certain kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 470 (1987), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). Furthermore, in *Morales v. Ellen*, the court determined the identities of witnesses to and victims of sexual harassment in the workplace are highly intimate and embarrassing and not of legitimate public interest. See 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (public had legitimate interest in affidavit of person under investigation and conclusions of board of inquiry, but not in identities of individual witnesses and details of their personal statements beyond information contained in documents ordered released). However, this office has stated, in numerous decisions, that 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).

Upon review, we find portions of the submitted information to be highly intimate or embarrassing and not of legitimate public interest. Accordingly, the district must withhold this information, which we have marked, under section 552.101 in conjunction with common-law privacy. However, as the remaining information deals with the work conduct of public employees, we find this information is of legitimate concern to the public.

Accordingly, the district may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy or section 552.102(a) of the Government Code.

You also assert the remaining information is excepted from disclosure pursuant to section 552.101 in conjunction with the common-law informer's privilege. 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). The 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. 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 state the submitted information pertains to violations of provisions of the Texas Administrative Code regarding professional ethics and the district's policy on employee standards of conduct. However, you do not inform us that the alleged conduct is a violation of a criminal or civil statute. Further, witnesses who provide information in the course of an investigation but do not make the initial report of the violation are not informants for the purpose of claiming the informer's privilege. Upon review, we conclude 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 remaining 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 a former student or an employee or former employee of a school district who has furnished a report of another person's 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). Additionally, individuals who provide information in the course of an investigation, but do not make the initial report are not informants for purposes of section 552.135 of the Government Code. In this instance, you assert some of the remaining information reveals the identities of witnesses. However, you have not identified the individuals whose identities you seek to withhold under section 552.135. *See id.* §§ 552.301(e)(1)(A), .135. Further, we note that section 552.135 protects an informer's identity, but it does not generally encompass protection for witness statements. Upon review, we find that the district has failed to demonstrate how the remaining information reveals the identity of individuals who reported another person's possible violation of criminal, civil, or regulatory law and, thus, has not demonstrated the remaining information reveals the identity of an informer for the purposes of section 552.135. Therefore, the district may not withhold any portion of the submitted information under section 552.135 of the Government Code.

Section 552.117(a)(1) of the Government Code 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 id.* §§ 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 was made. We have marked information that is subject to section 552.117. You state two of the individuals at issue have elected confidentiality for their personal information. Therefore, the district must withhold the personal information pertaining to these two individuals, which we have marked, under section 552.117(a)(1). You do not indicate whether the remaining district employees 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 remaining employees whose personal information we have marked timely elected to withhold such information under section 552.024, the district must withhold their marked information under section 552.117(a)(1) of the Government Code. If the remaining employees did not timely elect confidentiality, the district may not withhold their marked information under section 552.117(a)(1).

Section 552.137 of the Government Code 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). Gov't Code § 552.137(a)-(c).

We note this exception is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. You do not inform us the owners of the e-mail addresses we have marked have consented to the release of their information. Therefore, the district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless an owner of an e-mail address has affirmatively consented to its release.⁴

In summary, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The district must withhold the personal information pertaining to the two individuals who timely elected confidentiality under section 552.117(a)(1) of the Government Code. If the remaining employees whose personal information we have marked timely elected to withhold such information under section 552.024, the district must also withhold their information under section 552.117(a)(1) of the Government Code. The district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless an owner of an e-mail address has affirmatively consented to its release. The remaining information must be released.

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,



Sarah Casterline
Assistant Attorney General
Open Records Division

⁴We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

SEC/eeg

Ref: ID# 384451

Enc. Submitted documents

c: Requestor
(w/o enclosures)