ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 13, 2010

Ms. Paige C. Kyle
Walsh, Anderson, Brown, Gallegos and Green, P.C.
P.O. Box 460606
San Antonio, Texas 78246

OR2010-12353

Dear Ms. Kyle:

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# 390315.

The Northside Independent School District (the "district"), which you represent, received a request for information relating to investigations of one of its employees.[1] You state that student-identifying information has been redacted from the submitted documents pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.[2] You claim that the rest of the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.

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

[1]You state that the district requested and received clarification of the request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

[2]We note that the 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 that FERPA determinations must be made by the educational authority in possession of the education records. A copy of the DOE's letter to this office is posted on the Attorney General's website at: http://www.oag.state.tx.us/open/20060725usdoe.pdf.

Code § 552.101. This exception encompasses information that other statutes make confidential. Section 261.201 of the Family Code provides in part:

> (a) [T]he 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); *see id.* § 261.001(1) (defining "abuse" for purposes of Fam. Code ch. 261). We find that the district's police department used or developed some of the submitted information in an investigation of alleged or suspected child abuse under chapter 261 of the Family Code. Thus, that information, which we have marked, falls within the scope of section 261.201(a)(2). As you do not indicate that the district has adopted a rule that governs the release of this type of information, we assume that no such rule exists. Given that assumption, we conclude that the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (addressing predecessor statute).[3]

Section 552.101 of the Government Code also encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined that other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private).

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[3]As we are able to make this determination, we need not address the district's claims for this information.

You also claim section 552.102 of the Government Code, which 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). Section 552.102(a) protects information relating to public officials and employees. The privacy analysis under section 552.102(a) is the same as the two-part test for common-law privacy under section 552.101 and *Industrial Foundation*. *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 to Gov't Code § 552.102). Therefore, we will address your privacy claim under section 552.101.

You seek to withhold some of the remaining information on privacy grounds. We note that the information in question is related to an investigation of an alleged crime involving a public school teacher and a student of the district on district property. As this office has stated on many occasions, the public generally has a legitimate interest in information concerning public employees and their conduct in the workplace. *See, e.g.*, Open Records Decision 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), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), 329 (1982) (reasons for employee's resignation ordinarily not private).

You state that the information in question is related to an accusation that has been proven to be false. You argue that "[t]he only purpose the release of the information in question would serve would be to hold the employee up to public scorn and ridicule." You contend that "the employee may be placed in a false light" if the information is released. You also contend that the district "is required to ensure that it does not violate an individual's liberty interest" and "must not release information that would stigmatize to the point of burdening an employee with a 'badge of infamy.'" You cite to *Wells v. Hico Independent School District,* 736 F.2d 243 (5th Cir. 1984), in which the court stated that

> [t]o establish a liberty interest, an employee must demonstrate that *his governmental employer has brought false charges* against him that 'might seriously damage his standing and associations in his community,' or that impose a 'stigma or other disability' that forecloses 'freedom to take advantage of other employment opportunities.' *Board of Regents v. Roth*, 408 U.S. 564 (1972).

Id. at 256 (emphasis added; parallel citations deleted).

Having considered your arguments, we first note that false light privacy is not an actionable tort in Texas. *See Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex. 1994). Therefore,

information may not be withheld from the public merely because its release might place an individual in a false light. *See* Open Records Decision No. 579 (1990). We also note that the information in question pertains to an investigation that arose out of charges made by a student, rather than the district. Therefore, the release of this information would not implicate the employee's Fourteenth Amendment interests, and *Hico* is not relevant in this instance.

We further note that the employee concerned was accused of engaging in sexual conduct with a student. A public or private school employee commits a criminal offense if the employee engages in "sexual contact, sexual intercourse, or deviate sexual intercourse with a person who is enrolled in a public or private primary or secondary school at which the employee works and who is not the employee's spouse[.]" Penal Code § 21.12(a)(1). Moreover, you state that the student involved has been charged with a crime for making a false report. The public has a legitimate interest in knowing the general details of a crime. *See generally Lowe v. Hearst Communications, Inc.*, 487 F.3d 246, 250 (5th Cir. 2007) (noting a "legitimate public interest in facts tending to support an allegation of criminal activity" (citing *Cinel v. Connick*, 15 F.3d 1338, 1345-46 (5th Cir. 1994)); *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 186-187 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (public has legitimate interest in details of crime and police efforts to combat crime in community). Thus, we find that the public has a legitimate interest in the information you claim is private. We therefore conclude that the district may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

You also claim section 552.107(1) of the Government Code, which protects information that comes within the attorney-client privilege.[4] 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. *See* Open Records Decision No. 676 at 6-7 (2002). 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. *See* 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. *See 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 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

[4]Although you also claim the attorney-client privilege under section 552.101 of the Government Code, we note that section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-3 (2002).

government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A)-(E). 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.* 503(b)(1), 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. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). 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 documents numbered AG-0036 through AG0039 contain privileged communications between representatives of the district and the district's attorney and her staff members. You state that the communications occurred in connection with the rendition of professional legal services to the district. You have identified the parties to the communications. You also state that the communications were intended to be confidential, and you indicate that their confidential has been maintained. Based on your representations and our review of the information at issue, we conclude that the district may withhold documents AG-0036 through AG0039 under section 552.107(1) of the Government Code.

In summary: (1) the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code; and (2) the district may withhold documents AG-0036 through AG0039 under section 552.107(1) of the Government Code. The rest of the submitted information must be released.[5]

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[5]We note that the remaining information contains a telephone number that you indicate will be redacted pursuant to section 552.024(c) of the Government Code. *See* Gov't Code §§ 552.024(c) (governmental body may redact information encompassed by Gov't Code § 552.117 without requesting attorney general's decision if employee chooses not to allow public access to information). Although you note that section 552.147(b) of the Government Code and Open Records Decision No. 684 (2009) authorize a governmental body to withhold other types of information without the necessity of requesting a decision under the Act, we note that none of the remaining information falls within the scope of section 552.147(b) or Open Records Decision No. 684. *See* Gov't Code § 552.147(d) (living individual's social security number may be redacted without requesting decision); ORD 684 (authorizing all governmental bodies to withhold ten categories of information without requesting decision).

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,

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 390315

Enc: Submitted documents

c: Requestor
(w/o enclosures)