ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 2, 2010

Mr. Dennis J. Eichelbaum
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OR2010-16596

Dear Mr. Eichelbaum:

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# 398925.

The Killeen Independent School District (the "district"), which you represent, received a request for the personnel file of a named employee of the district and information relating to allegations of sexual harassment or sexual misconduct involving the employee. You state that some of the requested information either has been or will be released. You claim that other responsive information is excepted from disclosure under sections 552.101, 552.102, 552.117, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.[1] We also have considered the comments we received from the named employee and from an attorney for another employee of the district.[2] *See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

We first note that the United States Department of Education Family Policy Compliance Office (the "DOE") 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

[1]This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the district to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

[2]We note that both the named employee and the attorney for the other employee have submitted information for which they claim exceptions to disclosure. This decision is applicable only to the information that the district submitted to this office. *See* Gov't Code § 552.301(e)(1)(D) (governmental body must submit information it seeks to withhold or representative samples if information is voluminous).

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"). In this instance, the submitted information includes an unredacted education record. Because our office is prohibited from reviewing education records to determine the applicability of FERPA, we will not address FERPA with respect to the submitted education record. Such determinations under FERPA must be made by the educational authority in possession of the education records.[4] We will consider your exceptions to disclosure of the submitted information under the Act.

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 other statutes make confidential. The district claims section 552.101 in conjunction with section 21.355 of the Education Code, which 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 an administrator. *See* Open Records Decision No. 643 (1996). We have determined that for the 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 or a school district teaching permit under section 21.055 and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See* ORD 643 at 4. We also have determined the word "administrator" in section 21.355 means a person who is required to and does in fact hold an administrator's certificate under subchapter B of chapter 21 of the Education Code and is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.*

The district contends that some of the submitted information consists of evaluations of the named employee. The district indicates that the employee is certified as an administrator under subchapter B of chapter 21 of the Education Code and was performing the functions of an administrator when the information at issue was created.[5] Based on the district's

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

[4]In the future, if the district does obtain parental consent to submit unredacted education records and seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

[5]We note that the named employee has submitted essentially the same arguments as the district under section 21.355.

representations and our review of the information at issue, we conclude that the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. We conclude that the remaining information at issue does not evaluate the named employee's performance and may not be withheld under section 552.101 in conjunction with section 21.355.

Section 552.101 of the Government Code also encompasses constitutional and common-law rights to privacy. Constitutional privacy under section 552.101 encompasses two types of interests. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. *See* ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie,* 765 F.2d at 492).

Common-law privacy under section 552.101 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).

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). 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).

The district and the named employee contend that some of the remaining information is protected by common-law privacy under section 552.102(a). The other interested party contends that some of the same information is protected by constitutional and common-law privacy under sections 552.101 and 552.102(a). Accordingly, we will determine whether the

district must withhold any of the information at issue on the basis of constitutional or common-law privacy under section 552.101 or section 552.102(a).

Initially, we consider the district's claim that some of the submitted information is protected by common-law privacy under *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied). In *Ellen*, the court applied common-law privacy to an investigation of alleged sexual harassment in an employment context. Although the district contends that *Ellen* is applicable to some of the remaining information, we find that the information at issue does not pertain to an investigation of alleged sexual harassment. We therefore conclude that the district may not withhold any of the remaining information under section 552.101 or section 552.102(a) of the Government Code in conjunction with common-law privacy under *Morales v. Ellen*.

The district and the named employee also contend that some of the submitted information is intimate or embarrassing and of no legitimate public concern. The district and the employee argue that the information is related to investigations of allegations that were false or unfounded. The named employee contends that the release of information relating to the investigations will harm his reputation in the community and undermine his effectiveness as an educator. The other interested party contends that information relating to one of the investigations is protected by constitutional and common-law privacy. She argues that the investigation involved false allegations and that her "right to protect her privacy prevails because the public has no interest in the information."

Having considered the parties' claims, we first note that false light privacy is not an actionable tort in the State of Texas. Therefore, information may not be withheld from the public merely because its release might place an individual in a false light. *See Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex. 1994); Open Records Decision No. 579 (1990). We also note that some of the information pertains to an investigation in which the named employee was accused of an alleged crime. 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 (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).

Moreover, both the named employee and the other interested party are employed as educators in the public school system. The public generally has a legitimate interest in information concerning public employees and public employment. *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). Thus, having considered all of the parties' arguments, we find that the public has a legitimate interest in the information relating to the investigations. We therefore conclude that the district may not withhold any of the information at issue under section 552.101 or section 552.102(a) of the Government Code in conjunction with common-law privacy. Likewise, we find that the information in question does not fall within any of the constitutional zones of privacy and that the public's interest in the information outweighs the privacy interests of the named employee and the other interested party. We therefore conclude that the district may not withhold any of the submitted information under section 552.101 in conjunction with constitutional privacy.

Next, we address the other claimed exceptions to disclosure. Section 552.102(b) of the Government Code excepts from disclosure "a transcript from an institution of higher education maintained in the personnel file of a professional public school employee[.]"[6] Gov't Code § 552.102(b). This exception further provides, however, that "the degree obtained or the curriculum on a transcript in the personnel file of the employee" are not excepted from disclosure. *Id.* We agree that the district must withhold the named employee's educational transcripts under section 552.102(b) of the Government Code, except for the information that reveals the employee's name, the degree obtained, and the courses taken. *See* Open Records Decision No. 526 (1989) (addressing statutory predecessor).

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential.

The district has indicated in the submitted documents information it seeks to withhold under section 552.117(a)(1). The district states that the named employee timely requested confidentiality for the information at issue.[7] Based on the district's representations, we have marked information the district must withhold under section 552.117(a)(1) of the Government Code.

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[6]Both the district and the named employee claim section 552.102(b) for his educational transcripts.

[7]The named employee also states that he requested confidentiality for the information at issue prior to the district's receipt of this request for information.

Lastly, the district claims section 552.135 of the Government Code, which provides in 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].
>
> (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). We note that the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of civil, criminal, or regulatory law. Thus, section 552.135 protects the identity of an informer, but does not protect witness information or statements. Although the district has indicated information it seeks to withhold under section 552.135, the district has not demonstrated that any of the information at issue identifies an informer who reported a possible violation of civil, criminal, or regulatory law. We therefore conclude that the district may not withhold any of the submitted information under section 552.135 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 21.355 of the Education Code; (2) the district must withhold the educational transcripts under section 552.102(b) of the Government Code, except for the information that reveals the employee's name, the degree obtained, and the courses taken; and (3) the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The rest of the submitted information must be released. This ruling does not address the applicability of FERPA to the submitted information. Should the district determine that all or portions of the submitted information consist of "education records" that must be withheld under FERPA, the district must dispose of that information in accordance with FERPA, rather than the Act.

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,

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Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 398925

Enc: Submitted documents

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