



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 24, 2011

Mr. John A. Kazen
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P.O. Box 6237
Laredo, Texas 78042-6237

OR2011-01141

Dear Mr. Kazen:

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# 406899.

The Laredo Independent School District (the "district"), which you represent, received a request for documents related to possible reprimands and grievances filed against a specified district administrator.¹ You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.135 of the Government Code. You also state you have notified individuals whose privacy interests may be implicated by this request of their right to submit arguments to this office as to why the submitted information should not be released.² 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.

¹You state the district sought and received clarification regarding this request. See Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if 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); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010) (where governmental body seeks clarification or narrowing of request for information, ten-day period to request attorney general decision is measured from the date request is clarified or narrowed).

²As of the date of this letter, we have not received comments from any interested third parties.

Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. You raise section 552.101 in conjunction with the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") for Exhibit B. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* HIPAA, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. *Id.* § 164.502(a).

This office has addressed the interplay of the Privacy Rule and the Act. Open Records Decision No. 681 (2004). In that decision, we noted section 164.512 of title 45 of the Code of Federal Regulations provides a covered entity may use or disclose protected health information to the extent such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted the Act "is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public." *See* ORD 681 at 8; *see also* Gov't Code §§ 552.002, .003, .021. We therefore held the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v Tex Dep't of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9 (2004); *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the district may not withhold any portion of the information at issue on this basis.

You also raise section 552.101 in conjunction with section 611.002(a) of the Health and Safety Code for the information in Exhibit B. Section 611.002(a) provides "[c]ommunications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential." Health & Safety Code § 611.002(a). Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). These sections permit disclosure of mental health records to a patient, a person authorized to act on

the patient's behalf, or a person who has the written consent of the patient. *See* Health & Safety Code §§ 611.004, .0045. Upon review, we find none of the information at issue consists of communications or records made confidential by section 611.002 of the Health and Safety Code. Therefore, none of the information submitted as Exhibit B may be withheld under section 552.101 on that basis.

We note the submitted information includes information that is excepted from disclosure under section 552.102(a) of the Government Code.³ Section 552.102(a) 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). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex. & The Dallas Morning News, Ltd.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010) (Dec. 20, 2010, motions for reconsideration and rehearing pending). Having carefully reviewed the information at issue, we have marked the information that must be withheld under section 552.102(a) of the Government Code.

Next, we address your arguments under common-law privacy, which is also encompassed by section 552.101 of the Government Code. The doctrine of 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. This office has found that the public has a legitimate interest in the qualifications and work conduct of employees of governmental bodies. *See* Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow).

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment in an employment context. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.*

³The Office of the Attorney General will raise a mandatory exception like section 552.102 on behalf of a governmental body, but ordinarily will not raise other exceptions.

In concluding, the *Ellen* court held that “the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released.” *Id.*

Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released under *Ellen*, along with the statement of the accused, but the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. *See* Open Records Decision Nos. 393 (1983), 339 (1982). If no adequate summary of the investigation exists, then all of the information relating to the investigation ordinarily must be released, with the exception of information that would identify the victims and witnesses. We note that supervisors are not witnesses for purposes of *Ellen*, and thus supervisors’ identities may generally not be withheld under section 552.101 and common-law privacy. In addition, since common-law privacy does not protect information about a public employee’s alleged misconduct on the job or complaints made about a public employee’s job performance, the identity of the individual accused of sexual harassment is not protected from public disclosure. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

We note the submitted information pertains to a sexual harassment investigation and is subject to the ruling in *Ellen*. Upon review, we note that there is no adequate summary of this investigation. Because the submitted information does not include an adequate summary of the investigation, it must generally be released. However, the district must withhold the information we have marked that identifies the alleged sexual harassment victim and witnesses pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy and the holding in *Ellen*.⁴ The remaining information related to that investigation is not intimate or embarrassing and is of legitimate public interest. Thus, none of the remaining information at issue may be withheld pursuant to section 552.101 in conjunction with common-law privacy under *Ellen*.

You assert some of 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

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

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 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. 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 some of the remaining information, pertaining to a sexual harassment investigation, is excepted from disclosure under the common-law informer's privilege. However, you do not inform us that the alleged conduct is a violation of a criminal or civil statute. 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.

You also raise section 552.135 of the Government Code, which 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 indicate some of the remaining information reveals the identities of district employees who participated in an investigation of alleged sexual harassment. 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 the district has failed to demonstrate how any of the remaining information reveals the identities 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 remaining information under section 552.135 of the Government Code.

We note some of the remaining information may be subject to section 552.117(a)(1) of the Government Code.⁵ 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 that this information be kept confidential under section 552.024 of the Government Code. *See id.* §§ 552.117(a)(1), .024. We note that section 552.117 also encompasses personal cellular telephone numbers, provided that the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 670 at 6 (2001). 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 has made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. You do not inform us that the individuals whose information is at issue elected to withhold their personal information under section 552.024 prior to the date of this request. Therefore, if the employees whose information is at issue timely elected to keep their personal information confidential under section 552.024, the district must withhold the information we have marked pursuant to section 552.117(a)(1); however, the district may only withhold the personal cellular telephone number we have marked if the cellular service was paid for with the employee's own funds. If the employees at issue did not make a timely request for confidentiality, the information at issue must be released.⁶

In summary, the district must withhold the information we have marked under section 552.102(a) of the Government Code. The district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the common-law right to privacy and the holding in *Ellen*. If the employees whose information is at issue timely elected to keep their personal information confidential under section 552.024 of the Government Code, the district must withhold the information we have marked pursuant to section 552.117(a)(1) of the Government Code; however, the district may only withhold the personal cellular telephone number we have marked if the cellular service was paid for with the employee's own funds. The remaining information must be released to the requestor.

⁵The 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).

⁶Regardless of the applicability of section 552.117 of the Government Code, section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147(b).

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,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/tf

Ref: ID# 406899

Enc. Submitted documents

c: Requestor
(w/o enclosures)