



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

April 18, 2011

Mr. Mike Leasor
Abernathy, Roeder, Boyd & Joplin, P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2011-05370

Dear Mr. Leasor:

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# 414748 (KXAS PIR Code RCISD-011611-013111).

The Royse City Independent School District (the "district"), which you represent, received a request for information relating to a teacher being investigated for having an inappropriate relationship with a student.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.116, 552.117, 552.135, and 552.137 of the Government Code.² You also state release of the submitted information may implicate the privacy interests of certain individuals. Accordingly, you have notified these individuals of the requests and of their right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted representative sample of information.³ We have also received and considered comments from the requestor. *See id.*

¹You provide documentation showing the district sought and received a clarification of the information requested. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, ten-day period to request an attorney general ruling is measured from date request is clarified or narrowed).

²We note the district received a request for this information from a second requestor. You provide documentation showing the second requestor has subsequently withdrawn his request for information.

³We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

You state the district has redacted educational records that are confidential pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232(g) of title 20 of the United States Code. We note the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit a state educational agency or institution to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.⁴ See 34 C.F.R. § 99.3 (defining "personally identifiable information"). You have submitted both redacted and unredacted education records for our review. Because our office is prohibited from reviewing education records to determine whether appropriate redactions under FERPA should be made, we will not address the applicability of FERPA to any of the submitted records. Such determinations must be made by the educational authority in possession of the education record. We will consider your arguments for the submitted information.

Next, we must address the requestor's contention the district did not comply with section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request for information. See Gov't Code § 552.301(b). Under section 552.301(d), a governmental body must provide the requestor with (1) a written statement that the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general, and (2) a copy of the governmental body's written communication to the attorney general within ten business days of receiving the request for information. Gov't Code § 552.301(d). Section 552.301(e-1) requires a governmental body that submits written comments to the attorney general under subsection (e)(1)(A) to send a copy of those comments to the person who requested the information from the governmental body within fifteen business days of receiving the request for information. *Id.* § 552.301(e-1).

The requestor states he submitted the request on January 16, 2011, which was not a business day. We note January 17, 2011 was a state holiday. Therefore, the first business day the district could have received the request was January 18, 2011. This office does not count the date the request was received or holidays for the purpose of calculating a governmental body's deadlines under the Act. You state the district received the request on January 18, 2011. You further inform this office the district was closed due to inclement weather on February 1, February 2, February 3, and February 4, 2011. Thus, the district's ten-business-day deadline was February 7, 2011. The district's request for a ruling from this office was postmarked February 7, 2011. See *id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail). Therefore, the district complied with section 552.301(b) of the Government Code. Additionally, the submitted information reflects that the requestor was mailed a copy of the district's request for a ruling concurrent with the district's timely submission to this office. Accordingly, the district

⁴We 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>.

complied with subsection (d). Furthermore, the request for a ruling that was copied to the requestor included written comments stating the reasons why the stated exceptions apply. Consequently, the district complied with subsection (e-1). We therefore conclude the district complied with the procedural requirements of section 552.301, and we will address your arguments against disclosure.

Next, we note a portion of the submitted information, which we have marked, is not responsive to the present request for information because it was created after the district received the present request. This decision does not address the public availability of the non-responsive information, and the district need not release that information in response to this request.

Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information made confidential by other statutes, such as section 1324a of title 8 of the United States Code. This section provides that an Employment Eligibility Verification I-9 Form "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). The submitted information contains an I-9 form. Release of this document in this instance would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we find the submitted I-9 form, which we have marked, is confidential under section 1324a of title 8 of the United States Code and must only be released in compliance with the federal laws and regulations governing the employment verification system.

Section 552.101 also encompasses section 21.355 of the Education Code, which provides "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. The Third Court of Appeals has concluded a written reprimand constitutes an evaluation for purposes of section 21.355 as 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 an administrator. *See* Open Records Decision No. 643 (1996). In Open Records Decision No. 643, we concluded a "teacher" for purposes of section 21.355 means a person who (1) is required to and does in fact hold a certificate or permit required under chapter 21 of the Education Code and (2) is teaching at the time of his or her evaluation. *See id.* at 4.

You assert the information you have marked relates to a teacher who held the appropriate teaching certificate and was teaching at the time of the evaluations. Based on your representation and our review, we agree a portion of the information, which we have marked, constitutes evaluations as contemplated by section 21.355. Accordingly, the district must withhold this information under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. However, we find you have failed to

demonstrate how the remaining information constitutes an evaluation as contemplated by section 21.355. Accordingly, the district may not withhold any of the remaining information under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that (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 type 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. 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. 405 at 2-3 (1983) (public has interest in manner in which public employee performs job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under common-law right of privacy); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). This office has also found personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, are protected under common-law privacy), 373 at 4 (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). Whether information is subject to a legitimate public interest and therefore not protected by common-law privacy must be determined on a case-by-case basis. *See* Open Records Decision No. 373 (1983). Common-law privacy also protects certain types of information relating to an investigation of alleged sexual harassment in the workplace. *See Morales v. Ellen*, 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). Upon review, we find the district has failed to demonstrate how the remaining information was used in an investigation of alleged sexual harassment. However, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. None of the remaining information, however, is highly intimate or embarrassing, or it is of legitimate public interest. Therefore, the district may not withhold any of the remaining information under section 552.101 on that basis.

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 informer's privilege protects 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. *See* 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 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 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 district claims the informer's privilege for information relating to alleged violations of the educators' code of ethics, section 247.2 of title 19 of the Texas Administrative Code, and district policy. We note witnesses who provide information in the course of an investigation but do not make the initial report of a violation are not informants for the purposes of the common-law informer's privilege. Further, we note you contend the allegations made involve a violation of the educators' code of ethics. We note the code is enforced by the Texas State Board for Educator Certification (the "SBEC"). *See* 19 T.A.C. § 247.1. You do not inform us the district reported any violation of the educators' code of ethics to the SBEC or that the district is authorized to enforce the code of ethics. Likewise, you do not inform us of any alleged violation of a district policy that would be punishable by a civil or criminal penalty. *See* ORD 582, 515. We, therefore, conclude the district may not withhold any of the information at issue under section 552.101 on the basis of the common-law informer's privilege.

Section 552.135 of the Government Code 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 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). 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). In this instance, you state the remaining information involves possible violations of section 247.2 of title 19 of the Texas Administrative Code and district policy. *See* Educ. Code § 21.041(b) (TEA shall propose rules providing for disciplinary proceedings); 19 T.A.C. § 247.2 (Code of Ethics and Standard Practices for Texas Educators). However, you have not identified as reporting parties the individuals whose identities you seek to withhold under section 552.135. Further, we note section 552.135 protects an informer's identity, but it does not generally encompass protection for witness statements. Upon review, we find you have 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, have not demonstrated the submitted information reveals the identity of an informer for 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.

You claim a portion of the submitted information is excepted from disclosure under section 552.102 of the Government Code. 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.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). 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. The remaining information is not excepted under section 552.102(a) and may not be withheld on that basis.

A portion of the remaining information consists of the transcript of a district teacher that is excepted from disclosure under section 552.102(b) of the Government Code. Section 552.102(b) excepts from disclosure all information from transcripts of professional public school employees other than the employee's names, the courses taken, and the degrees obtained. Gov't Code § 552.102(b); Open Records Decision No. 526 (1989). Thus, with the exception of the teacher's name, courses taken, and degree obtained, which must be released to the requestor, the district must withhold the transcript pursuant to section 552.102(b) of the Government Code.

You also raise section 552.116 of the Government Code, which provides:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. For purposes of section 552.116, a school district must establish an audit is authorized by a resolution or other action of a board of trustees of the school district. *Id.* § 552.116(b)(1). You state the remaining information is related to an investigation conducted pursuant to section 21.041 of the Education Code and section 249.14 of title 19 of the Texas Administration Code. We note section 21.041 of the Education Code and section 249.14 of title 19 of the Texas Administration Code authorize the Texas Education Agency, and not the district, to investigate an educator. *See* Educ. Code § 21.041; 19 T.A.C. ch. 249. You have not identified what statute authorized or required the district to conduct an audit. Thus, we conclude you have failed to establish section 552.116 of the Government Code is applicable to any of the remaining information, and it may not be withheld under this exception.

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 this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). 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 information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former 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 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. You inform us the employee at issue made a timely request for confidentiality under section 552.024. Therefore, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code.⁵

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license or driver's license issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1). Therefore, the district must withhold the Texas driver's license information we have marked under section 552.130 of the Government Code.

Section 552.137 of the Government Code provides "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). We have marked the e-mail addresses that are not the types specifically excluded by section 552.137(c) of the Government Code. Accordingly, the district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owner consents to disclosure.

In summary, the district may release the submitted I-9 form, which we have marked, only in compliance with the federal laws and regulations governing the employment verification system. 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. 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 information we have marked under section 552.102(a) of the Government Code. With the exception of the teacher's name, courses taken, and degree obtained, which must be released, the district must withhold the transcript pursuant to section 552.102(b) of the Government Code. The district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The district must withhold the Texas driver's license information we have marked under section 552.130 of the Government Code. The district must withhold the e-mail addresses we have marked under section 552.137 of

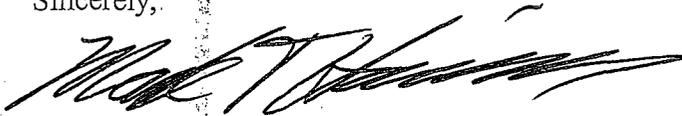
⁵As our ruling on this information is dispositive, we need not address your remaining argument under section 552.147 of the Government Code.

the Government Code, unless the owner consents to disclosure.⁶ The district must release the remaining information.

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,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/em

Ref: ID# 414748

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁶We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including I-9 forms and attachments under section 552.101 of the Government Code in conjunction with section 1342a of title 8 of the United States Code, a Texas license driver's license number under section 552.130 of the Government Code, and 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.