



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 18, 2011

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

OR2011-05385

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# 414810.

The Laredo Independent School District (the "district"), which you represent, received a request for all documents related to a named district employee. You claim the submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code. You state you have notified the former employee to whom the requested information relates of his right to submit comments to this office. *See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for Attorney General ruling should or should not be released). We have considered the exception you claim and reviewed the submitted information. We have also received and considered comments submitted by the former employee. *See id.*

We first note the submitted information includes education records. The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the federal Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, 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.¹ Consequently, state and local educational authorities that

¹A copy of this letter may be found on the attorney general's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

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”). You have submitted, among other things, unredacted education records for our review. Because our office is prohibited from reviewing the submitted education records to determine the applicability of FERPA, we will not address FERPA with respect to those records. See 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3. Such determinations under FERPA must be made by the educational authority in possession of the education record.²

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. This section encompasses information protected by other statutes, such as 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 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. Further, in Open Records Decision No. 643, we determined an “administrator” for purposes of 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 as an administrator, as that term is commonly defined, at the time of the evaluation. *Id.*

The submitted information reveals the former employee held a teaching certificate or permit or administrator’s certificate under chapter 21 of the Education Code at the time of the evaluations and was engaged in the process of teaching or performing the functions of an administrator at the time of the evaluations. See ORD 643 at 4. Accordingly, 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.

Section 552.101 of the Government Code also encompasses section 825.507 of the Government Code, which provides in relevant part:

²In the future, if the district does obtain 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.

(a) Records of a participant that are in the custody of the retirement system or of an administrator, carrier, attorney, consultant, or governmental agency acting in cooperation with or on behalf of the retirement system are confidential and not subject to public disclosure in a form that would identify an individual and are exempt from the public access provisions of Chapter 552, except as otherwise provided by this section.

...

(c) The records of a participant remain confidential after release to a person as authorized by this section. This section does not prevent the disclosure or confirmation, on an individual basis, of the status or identity of a participant as a member, former member, retiree, deceased member or retiree, beneficiary, or alternate payee of the retirement system.

...

(g) In this section, "participant" means a member, former member, retiree, annuitant, beneficiary, or alternate payee of the retirement system.

Gov't Code § 825.507(a), (c), (g). The former employee claims, and the district confirms, some of the remaining information constitutes records of the former employee's participation in the retirement system. The district does not inform us the information is in the custody of the district acting in cooperation with the retirement system. To the extent the information we have marked is in the custody of the district acting in cooperation with the retirement system, we conclude this information is participant information made confidential by section 825.507 and must be withheld under section 552.101 of the Government Code on that basis. To the extent the information we have marked is not in the custody of the district acting in cooperation with the retirement system, the district may not withhold it under section 552.101 in conjunction with section 825.507.

Section 552.101 of the Government Code 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). The 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 the subject of the information does not already know the informer's identity. *See Open Records Decision No. 208 at 1-2 (1978)*. The informer's 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." *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 (1988)*.

The privilege excepts the informer's statement only to the extent necessary to protect that informer's identity. Open Records Decision No. 549 at 5 (1990).

You generally claim the informer's privilege for the remaining information. However, you do not explain how the remaining information relates to alleged conduct that 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.

The district and the former employee also contend some of the remaining information is protected by the doctrine of common-law privacy, which is also encompassed by section 552.101 of the Government Code. Common-law privacy 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 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82.

The district contends some of the remaining information is protected by common-law privacy on the basis of *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied). In *Morales v. Ellen*, the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. 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. 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.* In concluding, the *Ellen* court held "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.* We note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

Upon review, we conclude a portion of the information at issue, which we have marked, constitutes a sexual harassment investigation. We note the information at issue includes an adequate summary of the investigation into the alleged sexual harassment. The summary is not confidential; however, information within the summary identifying the alleged victim and witnesses, which we have marked, must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. Because there is an adequate summary, the district must also withhold the information we have marked under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. None of the remaining information, however, is confidential under common-law privacy and the holding in *Ellen*, and it may not be withheld under section 552.101 on that basis.

We note common-law privacy also protects other types of information. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally protected by common-law privacy. *See* Open Records Decision No. 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision No. 600 at 9 (1992) (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure); *see also* Open Decision Nos. 545 (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common law privacy), 523 (1989). Additionally, the work behavior of a public employee and the conditions for his or her continued employment are generally matters of legitimate public interest not protected by the common-law right of privacy. *See* Open Records Decision Nos. 438 (1986). Similarly, information about a public employee's qualifications, disciplinary action and background is not protected by common-law privacy. *See* Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and the circumstances of his resignation or termination), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his 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 either the constitutional or common-law right of privacy).

Upon review, we conclude some of the remaining information is highly intimate or embarrassing and of no legitimate public concern. Thus, the district must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. However, none of the remaining information is highly intimate or embarrassing and a matter of no legitimate public concern. We therefore conclude the district may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

We note some of the submitted information is subject to section 552.102(a) 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."³ 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

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

information at issue, we have marked the information that must be withheld under section 552.102(a) of the Government Code.

Section 552.102(b) of the Government Code excepts from public disclosure "a transcript from an institution of higher education maintained in the personnel file of a professional public school employee[.]" Gov't Code § 552.102(b). This exception further provides, however, "the degree obtained or the curriculum on a transcript in the personnel file of the employee" are not excepted from disclosure. *Id.*; *see also* Open Records Decision No. 526 (1989). Thus, with the exception of the employee's name, courses taken, and degree obtained, the district must withhold the college transcripts we have marked under section 552.102(b) of the Government Code.

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 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 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 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. The submitted information reflects the former employee timely elected confidentiality for his personal information. Therefore, the district must withhold this employee's information, which we have marked, under section 552.117(a)(1) of the Government Code. However, we are unable to determine whether the remaining individuals whose personal information we have marked are district employees who timely elected confidentiality under section 552.024. Therefore, to the extent the remaining personal information we have marked belongs to district employees who timely requested confidentiality under section 552.024, the district must withhold the additional information we have marked under section 552.117(a)(1).⁴ Conversely, to the extent the individuals concerned are not district employees or did not timely request confidentiality under section 552.024, the district may not withhold the remaining marked information under section 552.117(a)(1) of the Government Code.⁵

⁴Section 552.024 of the Government Code authorizes a governmental body to redact 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 without the necessity of requesting a decision from this office. Gov't Code § 552.024(c); *see id.* §§ 552.024(c-1) (requestor may appeal governmental body's decision to withhold information under section 552.024(c) to attorney general), .024(c-2) (governmental body withholding information pursuant to section 552.024(c) must provide certain notice to the requestor).

⁵We note that regardless of the applicability of section 552.117, 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).

We note portions of the remaining information are subject to section 552.136 of the Government Code. Section 552.136 provides “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see also id.* § 552.136(a) (defining “access device”). Thus, the district must withhold the bank account and routing numbers we marked under section 552.136 of the Government Code.

The remaining information contains a personal e-mail address that is subject to section 552.137 of the Government Code. Section 552.137 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 marked an e-mail address that is not of the types specifically excluded by section 552.137(c). Accordingly, the district must withhold the marked e-mail address under section 552.137, unless the owner of the e-mail address consents to its disclosure.

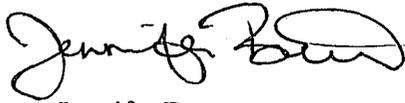
In summary, this ruling does not address the applicability of FERPA to the submitted information. The district must withhold (1) the evaluations we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code; (2) the information we have marked under section 552.101 of the Government Code in conjunction with section 825.507 of the Government Code, to the extent the records we have marked are in the custody of the district acting in cooperation with the retirement system; (3) the information we have marked under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*; (4) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (5) the information we have marked under section 552.102(a) of the Government Code; (6) the transcripts we have marked under section 552.102(b) of the Government Code, with the exception of the employee’s name, courses taken, and degree obtained; (7) the former employee’s information under section 552.117(a)(1) of the Government Code; (8) the remaining personal information we have marked under section 552.117(a)(1), to the extent this information belongs to district employees who timely elected confidentiality under section 552.024 of the Government Code; (9) the bank account and routing numbers we have marked under section 552.136 of the Government Code; (10) and the e-mail address we have marked under section 552.137 of the Government Code, unless the owner consents to its disclosure. The remaining information must be released.⁶

⁶We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including bank account and routing numbers under section 552.136 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.

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,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/uf

Ref: ID# 414810

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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