



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 23, 2011

Ms. Bertha Bailey Whatley
Chief Legal Counsel
Fort Worth Independent School District
100 North University Drive
Fort Worth, Texas 76107

OR2011-12176

Dear Ms. Whatley:

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# 427798.

The Fort Worth Independent School District (the “district”) received a request for information relating to a named employee. You claim some of the requested information is excepted from disclosure under sections 552.101, 552.102, and 552.135 of the Government Code.¹ We have considered the exceptions you claim and reviewed the information you submitted.²

Initially, we address your representations regarding criminal history records. You state the district “no longer maintains written copies of the criminal records history of certified

¹We note the district did not claim section 552.135 within the ten-business-day period prescribed by section 552.301 of the Government Code. See Gov’t Code § 552.301(a)-(b). Nevertheless, we will address this exception, as its applicability can provide a compelling reason for non-disclosure under section 552.302 of the Government Code. See *id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982).

²To the extent the submitted information consists of representative samples of responsive information, this letter ruling assumes any such information is 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).

employees.” You explain the district accesses this information through the Fingerprint-based Applicant Clearinghouse of Texas and the district’s access to such information is restricted to “view only.” We note the Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

We next note, and you acknowledge, the submitted information includes education records. 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 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”). Although you state you have redacted information that identifies students from the submitted documents, we note some of the documents contain unredacted student-identifying information. Because this office is prohibited from reviewing an education record for the purpose of determining whether appropriate redactions have been made under FERPA, we will not address the applicability of FERPA to the submitted information. 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 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. You claim section 552.101 in conjunction with section 21.355 of the Education Code, which provides in part that “[a] document evaluating the performance of a teacher or administrator is confidential.” *See* Act of May 25, 2011, 82nd Leg., R.S., H.B. 2971, § 1 (to be codified at Educ. Code § 21.355(a)). 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 “teacher,” for purposes of section 21.355, 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

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

⁴If in the future 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.

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. Additionally, a court 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.” *See North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

You have marked the information you contend is confidential under section 21.355. You have provided documentation reflecting the employee concerned holds the appropriate certification under chapter 21 of the Education Code. Based on your representations and our review of the information at issue, we have marked the submitted information the district must withhold under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. We conclude the remaining information at issue does not constitute an evaluation of a teacher for purposes of section 21.355. Therefore, the district may not withhold the remaining information on that basis under section 552.101.

You also claim section 552.101 in conjunction with section 261.201 of the Family Code, which 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 [the Family 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 [chapter 261 of the Family Code] 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 [chapter 261 of the Family Code] or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You also have marked the information you contend is confidential under section 261.201. We find some of the submitted information constitutes a report of possible child abuse, so as to fall within the scope of section 261.201(a)(1). *See id.* § 261.101 *et seq.* The district must withhold that information, which we have marked, under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. We conclude the remaining information you have marked is not confidential under section 261.201 and may not be withheld on that basis under section 552.101.

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 held to be intimate or embarrassing in *Industrial Foundation*. See 540 S.W.2d 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 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).

You also have marked the information you seek to withhold on privacy grounds. You contend the information at issue involves “highly inflammatory allegations that were not substantiated.” You assert that “[a]s a public educator, the subject of these allegations would endure public cens[ure] from parents and students.” To the extent you contend release of this information might place the educator in a “false light,” we note false-light privacy is not an actionable tort in Texas. See *Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex. 1994); Open Records Decision No. 579 (1990). Therefore, the district may not withhold any information on that basis. We also note the information at issue pertains to educators employed by the district and their conduct in the workplace. As this office has stated on many occasions, the public generally has a legitimate interest in public employment and public employees. See Open Records Decision Nos. 562 at 10 (1990) (personnel information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 473 at 3 (1987) (fact that public employee received less than perfect or even very bad evaluation not private), 470 at 4 (1987) (job performance does not generally constitute public employee’s private affairs). We have marked highly intimate or embarrassing information that is not a matter of legitimate public interest. The district must withhold that information under section 552.101 of the Government Code in conjunction with common-law privacy. We find the remaining information at issue is not highly intimate or embarrassing and of no legitimate public interest and may not be withheld on privacy grounds under section 552.101.

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 (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. 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 purposes of the common-law informer’s privilege.

You also have marked information you contend is protected by the common-law informer's privilege. You have not demonstrated, however, that any individual whose identity you seek to withhold reported a violation of a criminal or civil law the district is authorized to enforce. We therefore conclude the district may not withhold any of the remaining information under section 552.101 on the basis of the common-law informer's privilege.

You also claim 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." Gov't Code § 552.102(a). On review, we conclude none of the remaining information is excepted from disclosure under section 552.102(a) of the Government Code. Accordingly, none of the information may be withheld on that basis.

Next, we address your claim under 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 the legislature limited the applicability 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. You have not identified any current or former student or employee of the district who reported a violation of civil, criminal, or regulatory law to the district or a proper regulatory authority. We therefore conclude the district may not withhold any of the remaining information under section 552.135 of the Government Code.

Lastly, we note section 552.117 of the Government Code may be applicable to some of the remaining information at issue.⁵ Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, 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* Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). We note section 552.117(a)(1) encompasses a current or former official or employee's personal cellular telephone number if the employee pays for the cellular telephone service with his or her personal funds. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to Gov't Code § 552.117 not applicable to numbers for cellular mobile phones installed in county officials' and employees' private vehicles and intended for official business). 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 confidentiality under section 552.024. We have marked information the district must withhold under section 552.117(a)(1) of the Government Code to the extent the information consists of the home address, home telephone number, personal cellular telephone number, or family member information of a current or former official or employee who timely requested confidentiality for the information under section 552.024 of the Government Code.

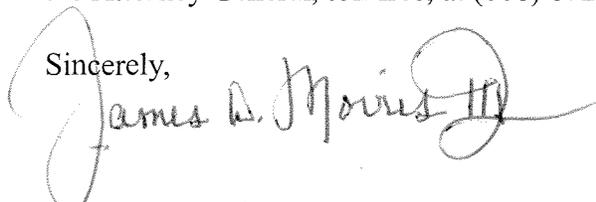
In summary, the district must withhold (1) the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code; (2) the information we have marked under section 552.101 in conjunction with section 261.201 of the Family Code; (3) the information we have marked under section 552.101 in conjunction with common-law privacy; and (4) the information we have marked under section 552.117(a)(1) of the Government Code to the extent the information consists of the home address, home telephone number, personal cellular telephone number, or family member information of a current or former official or employee who timely requested confidentiality for the information under section 552.024 of the Government Code. The district must release the rest of the submitted information. This decision does not address the applicability of FERPA to the submitted information. Should the district determine 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.

⁵This office will raise section 552.117 on behalf of a governmental body, as this section is a mandatory exception to disclosure. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

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,

A handwritten signature in cursive script that reads "James W. Morris, III". The signature is written in dark ink and is positioned to the right of the word "Sincerely,".

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

JWM/em

Ref: ID# 427798

Enc: Submitted documents

c: Requestor
(w/o enclosures)