



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 7, 2011

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

OR2011-12894

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# 429025.

The Fort Worth Independent School District (the "district") received a request for a named district employee's personnel records to include her "original application, her former employees, her educational qualifications, her evaluations, if available, and any grievances that have been filed against her in the past five years as well as the resolution of those grievances." You claim portions of the submitted information are 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 submitted information.

Initially, we address your assertion the district does not maintain the requested criminal history records. You state the district "no longer maintains written copies of the criminal records history of certified employees[.]" You explain the district accesses this information through the Fingerprint-based Applicant Clearinghouse of Texas and that the district's access to such information is restricted to "view only." 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

¹Although you raise section 552.305 of the Government Code, we note section 552.305 is not an exception to public disclosure under the Act. *See Gov't Code* § 552.305. Rather, this section addresses the procedural requirements for notifying third parties their interests may be affected by a request for information. *See id.*

(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).

Next, we note the United States Department of Education Family Policy Compliance Office (the “DOE”) has informed this office 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.² 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”). You have submitted redacted and unredacted records for our review. Because our office is prohibited from reviewing this record to determine whether appropriate redactions under FERPA should be made, we will not address the applicability of FERPA to this record. Such determinations under FERPA must be made by the educational authority in possession of such records.³ We will, however, address the applicability of the claimed exceptions to the responsive information.

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. Section 552.101 encompasses information made confidential by other statutes, such as section 21.355 of the Education Code, which provides that “[a] document evaluating the performance of a teacher or administrator is confidential.” Act of May 25, 2011, 82nd Leg., R.S., H.B. 2971, § 1 (to be codified at 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). Additionally, 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.” *N.E. Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). In Open Records Decision No. 643, we determined for the purposes of section 21.355, the word “teacher” means a person who is required to, and does in fact, hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. ORD 643.

You assert the documents you have marked constitute evaluations of the named district employee who held a teacher’s certificate under chapter 21 of the Education Code and was

²A copy of this letter may be found on the Office of the Attorney General’s website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

³In the future, if the district does obtain parental consent to submit unredacted education records and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

performing the functions of a teacher at the time of the evaluations. Based on your representations and our review, we find some of these documents, which we have marked, constitute evaluations for purposes of section 21.355 of the Education Code. Accordingly, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355. However, we find the remaining information you seek to withhold consists of interviewer rating sheets, references to a memorandum, and references to grievances that do not evaluate a teacher for purposes of section 21.355. Therefore, the district may not withhold this information under section 552.101 in conjunction with section 21.355.

You also claim section 552.101 in conjunction with section 261.201 of the Family Code, which provides in part:

(a) Except as provided by Section 261.203, the following information is confidential, is not subject to public release under [the Act], 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 in conjunction with section 261.201. 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.

We now address your arguments under common-law privacy, which is also encompassed by section 552.101 of the Government Code. 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. *See Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. 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. In addition, this office has found certain kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). However, this office has stated, in numerous decisions, 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. 470 (public employee's job performance does not generally constitute employee's private affairs), 455 (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow).

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). However, upon review, we find portions of the remaining responsive information are highly intimate or embarrassing and not of legitimate public interest. Accordingly, the district must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy. However, none of the remaining information you seek to withhold is highly intimate or embarrassing information that is of no legitimate public interest. Thus, the district may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

You also assert portions of the remaining information are excepted from disclosure pursuant to section 552.101 of the Government Code 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 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 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 the information you have marked identifies reporters of an "alleged irregularity." However, you do not inform us what criminal or civil statute was reported to be violated. Further, witnesses who provide information in the course of an investigation but do not make the initial report of the violation are not informants for the purpose of claiming the informer's privilege. 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 at issue pursuant to section 552.101 of the Government Code in conjunction with the informer's privilege.

You claim some of the remaining 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). Upon review, we find none of the remaining information is excepted under section 552.102(a), and none of it may be withheld on that basis.

Section 552.135 of the Government Code 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. As noted above you state the information you have marked identifies reporters of an alleged irregularity. However, you do not inform us what civil, criminal, or regulatory law is alleged to have been violated. Further, we note section 552.135 protects an informer's identity, but it does not generally encompass protection for witness statements. Thus, we find you have failed to demonstrate how the remaining information reveals the identity 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 submitted information under section 552.135.

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.⁴ 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)(1)). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). 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. We have marked personal information of district employees, including telephone numbers. To the extent the employees whose information is at issue timely requested confidentiality under section 552.024, the district must withhold the information we have marked under section 552.117(a)(1); however, the district may only withhold the telephone numbers we marked if they are home telephone numbers or cellular telephone numbers if the district does not pay for the cellular telephone service. Conversely, to the extent the employees concerned did not timely request confidentiality under section 552.024, the telephone numbers are not home telephone numbers, or are cellular telephone numbers for which services are paid for by the district, the district may not withhold the information we have marked under section 552.117(a)(1).

In summary, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with (1) section 21.355 of the Education Code, (2) section 261.201 of the Family Code, and (3) common-law privacy. To

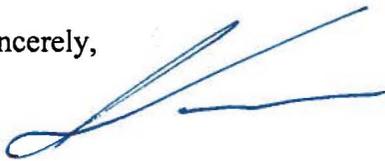
⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

the extent the employees whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the district may only withhold the telephone numbers we marked if they are home telephone numbers or cellular telephone numbers if the district does not pay for the cellular telephone service. The remaining responsive information must be released.

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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/agn

Ref: ID# 429025

Enc. Submitted documents

c: Requestor
(w/o enclosures)