



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 25, 2012

Ms. Leticia D. McGowan
School Attorney
Dallas Independent School District
3700 Ross Avenue
Dallas, Texas 75204

OR2012-05931

Dear Ms. McGowan:

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# 451446 (ORR #10900).

The Dallas Independent School District (the “district”) received a request for any Office of Professional Responsibility (“OPR”) reports “regarding allegations of grade manipulations or any unethical practices or conduct in the grading or scoring of ACP or any district-wide testing” and “[a]ll OPR finalized reports completed and or submitted to the district administration in calendar year 2011 and January 2012.” You state information will be redacted from the requested records pursuant to Open Records Decision No. 684 (2009).¹ You state some of the requested information either has been or will be released. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108 and 552.135 of the Government Code and privileged under Texas Rule of Evidence 503.² We have considered your arguments and reviewed the submitted information.

¹Open Records Decision No. 684 is a previous determination issued by this office authorizing all governmental bodies to withhold ten categories of information without the necessity of requesting an attorney general decision. *See* ORD 684 at 14-15.

²Although you raise section 552.116 of the Government Code as an exception to disclosure, you have provided no arguments in support of this exception; therefore, we assume you have withdrawn it. *See* Gov’t Code §§ 552.301, .302. Further, although you raise section 552.101 of the Government Code with Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

Initially, we note that the United States Department of Education Family Policy Compliance Office 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.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”). You state you have redacted FERPA information. However, we note you have also submitted unredacted education records for our review. 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 However, we will consider your exceptions to disclosure under the Act.

Next, we note portions of the submitted information were the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2012-05544 (2012), 2012-05871 (2012) and 2011-18161 (2011). We have no indication that the law, facts, or circumstances on which these prior rulings were based have changed. Accordingly, to the extent the submitted information is identical to the information previously requested and ruled upon by this office in the prior rulings, the district must continue to rely on those prior rulings as previous determinations and withhold or release the previously ruled upon information in accordance with Open Records Letter Nos. 2012-05544, 2012-05871, and 2011-18161. *See* Open Records Decision No. 673 at 6-7 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We consider your arguments against release for the information not encompassed by the previous rulings.

Additionally, the submitted information reveals the district may have voluntarily released portions of the remaining information. We note section 552.007 of the Government Code provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by

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.

law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). You seek to withhold the information at issue under Texas Rule of Evidence 503. However, pursuant to section 552.007, the district may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential by law. Texas Rule of Evidence 503 is discretionary in nature does not make information confidential by law. *See* Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under section 552.107(1) or rule 503 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Accordingly, to the extent any portion of the information at issue was released to a member of the public, the district may not now withhold such information under rule 503.

We next note the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in relevant part:

[T]he following categories of information are public information and not excepted from required disclosure unless made confidential under [the Act] or other law:

...

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, the submitted information contains of completed reports subject to section 552.022(a)(1). This information must be released unless it is made confidential under the Act or other law. *See id.* The Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 337 (Tex. 2001). Therefore, we will consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence. We will also consider your claims under section 552.108 of the Government Code, and under sections 552.101, 552.102, and 552.135 of the Government Code, which are confidentiality provisions for purposes of section 552.022(a)(1).

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state some of the submitted information consists of communications between attorneys for and representatives of the district and investigations conducted at the request of and for district attorneys that were made in furtherance of the rendition of professional legal services to the district. You inform us the communications in question were not intended to be, and have not been, disclosed to non-privileged parties. Based on your representations and our review of the information at issue, we find you have established some of the information you seek to withhold, which we have marked, consists of privileged attorney-client communications. Therefore, we conclude the district may withhold the information we have marked under Texas Rule of Evidence 503.⁵ However, we find you have not established the remaining information at issue consists of privileged attorney-client communications; therefore, the district may not withhold the remaining information under rule 503.

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

⁵As our ruling is dispositive, we need not address your remaining arguments for this information.

Code § 552.101. This exception encompasses information other statutes make confidential. You claim section 552.101 of the Government Code in conjunction with the federal Health Insurance Portability and Accountability Act of 1996 (“HIPAA”). *See* 42 U.S.C. §§ 1320d-1320d-8. 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* Health Insurance Portability and Accountability Act of 1996, 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. *See id.* § 164.502(a). This office has addressed the interplay of the Privacy Rule and the Act. In Open Records Decision No. 681 (2004), we noted section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that 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 disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for purposes 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; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Thus, because the Privacy Rule does not make information that is subject to disclosure under the Act confidential, protected health information may be withheld from the public only if the information is confidential under other law or an exception in subchapter C of the Act applies.

Section 552.101 of the Government Code also encompasses section 6103 of title 26 of the United States Code, which makes certain federal tax returns and tax return information confidential. *See* 26 U.S.C. § 6103(a); *see also id.* § 6103(b)(1)–(2) (defining “return” and “return information”). However, section 6104 of title 26 provides for the disclosure of tax return information in certain situations:

(d) Public inspection of certain annual returns[.]–

(1) In general.–In the case of an organization described in subsection (c) or (d) of section 501 and exempt from taxation under section 501(a) or an organization exempt from taxation under section 527(a) –

(A) a copy of –

(i) the annual return filed under section 6033 . . . by such organization,

...

shall be made available by such organization for inspection during regular business hours by any individual at the principal office of such organization and . . .

(B) upon request of an individual made at such principal office . . . a copy of such annual return . . . shall be provided to such individual without charge other than a reasonable fee for any reproduction and mailing costs.

...

(2) 3-year limitation on inspection of returns.—Paragraph (1) shall apply to an annual return filed under section 6011 or 6033 only during the 3-year period beginning on the last day prescribed for filing such return (determined with regard to any extension of time for filing).

Id. § 6104(d)(1)–(2); *see* 26 C.F.R. § 301.6104(d)-1(a). Thus, a section 501(c) or (d) tax-exempt organization must generally make its annual returns available for public inspection for a period of three years from the last day prescribed for filing. The public disclosure requirement of section 6104(d) for a section 501(c) or (d) organization also applies to certain other specified tax filings in addition to the annual return. *See* 26 U.S.C. § 6104(d)(1)(A).

We understand the entity that submitted the Form 990 at issue is a section 501(c) tax-exempt organization. The date of filing for the Form 990 was less than three years prior to the date the district received the request for information. Thus, we determine the three-year inspection period has not lapsed regarding the Form 990. Therefore, the submitted Form 990 is subject to required public disclosure pursuant to section 6104 of title 26 of the United States Code and must be released.

You also claim section 552.101 of the Government Code 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 this 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 contend some of the remaining information is confidential under section 261.201. We note the district is not an agency authorized to conduct an investigation under chapter 261 of the Family Code. *See id.* § 261.103 (listing agencies that may conduct child abuse investigations). You explain, however, the district has on its staff an employee who is shared with the Texas Department of Family and Protective Services (“DFPS”) to receive and investigate claims of child abuse. You also state the information at issue was obtained by the Dallas Police Department, the DFPS, and/or district police officers who are commissioned peace officers to investigate claims of child abuse. Based on your representations and our review, we find the information we have marked was used or developed in investigations by one or more authorized entities under chapter 261 of the Family Code, so as to fall within the scope of section 261.201(a). *See id.* §§ 101.003(a) (defining “child” for purposes of Fam. Code title 5), 261.001(1), (4) (defining “abuse” and “neglect” for purposes of Fam. Code ch. 261). Thus, we conclude the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.⁶ *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute). Although you also seek to withhold portions of the remaining information on this basis, we find you have not demonstrated the remaining information at issue was used or developed in investigations under chapter 261 of the Family Code. We therefore conclude the district may not withhold any of the remaining information under section 552.101 on the basis of section 261.201 of the Family Code.

Section 552.101 also encompasses section 58.007 of the Family Code, which protects the law enforcement records of juveniles. The relevant language of section 58.007 reads as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult files and records;

⁶As our ruling is dispositive, we need not address your remaining arguments for this information.

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

Fam. Code § 58.007(c). For purposes of section 58.007(c), “child” means a person who is ten years of age or older and under seventeen years of age at the time the conduct occurred. *See id.* § 51.02(2). Juvenile law enforcement records relating to juvenile delinquent conduct or conduct indicating a need for supervision that occurred on or after September 1, 1997 are confidential under section 58.007(c). *See id.* § 51.03(a), (b) (defining “delinquent conduct” and “conduct indicating a need for supervision”). Section 58.007(c) applies only to information that relates to a juvenile as a suspect or offender, not as a complainant, victim, witness, or other involved party. Upon review, we find none of the remaining information at issue pertains to a juvenile suspect or offender engaged in delinquent conduct or conduct indicating a need for supervision for purposes of section 58.007. Thus, we conclude the district may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code.

You also claim section 552.101 of the Government Code 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.” 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 for purposes of section 21.355, “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 or a 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. We also have determined “administrator” in 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 of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.* 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.” *See North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

You contend some of the remaining information is confidential under section 21.355. You state the information at issue consists of evaluations of administrators and teachers employed by the district who were functioning as administrators or teachers and were required to and did hold the appropriate certifications under subchapter B of the Education Code when they were evaluated. However, we conclude you have not demonstrated any of the remaining information evaluates the performance of a teacher or administrator for purposes of

section 21.355. Accordingly, none of the remaining information may be withheld under section 21.355 of the Education Code in conjunction with section 552.101 of the Government Code.

You also claim section 552.101 of the Government Code in conjunction with the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code, which governs access to medical records. Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides in part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(b)-(c). Although you contend the MPA is applicable in this instance, we find none of the remaining information at issue consists of medical records governed by the MPA. We therefore conclude the district may not withhold any of the remaining information on the basis of the MPA.

Section 552.101 also encompasses chapter 411 of the Government Code. Criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. Gov’t Code § 411.083(a); Open Records Decision No. 565 (1990). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 at 7 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI the Department of Public Safety (“DPS”) maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083. A school district may obtain CHRI from DPS as authorized by section 411.097 and subchapter C of chapter 22 of the Education Code; however, a school district may not release CHRI except as provided by section 411.097(d). *See id.* § 411.097(d); Educ. Code § 22.083(c)(1) (authorizing school district to obtain from any law enforcement or criminal justice agency all CHRI relating to school district employee); *see also* Gov’t Code § 411.087. Section 411.087 authorizes a school district to obtain CHRI from the Federal Bureau of Investigation or any other criminal justice agency in this state. Gov’t Code § 411.087. Thus, any CHRI the district obtained from DPS or any other criminal justice agency in this state must be withheld under section 552.101 of the Government Code in conjunction with section 411.097(d) of the Government Code. *See* Educ. Code § 22.083(c)(1). We note section 411.083 does not apply to active warrant information or other information pertaining

to one's current involvement with the criminal justice system. *See* Gov't Code § 411.081(b) (police department allowed to disclose information pertaining to person's current involvement in the criminal justice system). We further note CHRI does not include driving record information. *Id.* § 411.082(2)(B). The district must withhold the CHRI we have marked in the remaining information under section 552.101 of the Government Code in conjunction with section 411.097 of the Government Code and federal law.⁷ However, none of the remaining information constitutes CHRI and it may not be withheld under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code.

Section 552.101 of the Government Code also encompasses the constitutional and common-law rights to privacy. Common-law privacy 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). To demonstrate the applicability of common law privacy, both elements of the test must be established. *Id.* at 681-82. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court applied common-law privacy to records of an investigation of alleged sexual harassment. The information at issue in *Ellen* included witness statements, an affidavit in which the individual accused of misconduct responded to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *See* 840 S.W.2d at 525. The court upheld the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating the disclosure of such documents sufficiently served the public's interest in the matter. *Id.* But the court concluded "the public does 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, the identities of the victims and witnesses in an investigation of alleged sexual harassment must be withheld from the public under common-law privacy and the decision in *Ellen*. We note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context. The identity of the individual accused of sexual harassment is not protected from public disclosure, because 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. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

You contend some of the remaining information falls within the scope of *Ellen*. Based on your representations and our review, we find some of the information at issue consists of records of an investigation of sexual harassment. We also find the records in question contain an adequate summary of the investigation and statements of persons accused of sexual harassment. Therefore, the district must release the investigation summary and the statements of the accused persons we have marked, except for the marked portions of those

⁷As our ruling is dispositive, we need not address your remaining arguments for this information.

records that identify the victims and witnesses in the investigations. The district must withhold the marked information that identifies the victims and witnesses and the remaining records of the investigations, which we also have marked, under section 552.101 of the Government Code in conjunction with common-law privacy and *Ellen*. However, you have not demonstrated the remaining information at issue consists of a sexual harassment investigations. Therefore, we find the district may not withhold any portion of the remaining information at issue under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*.

Common-law privacy under section 552.101 also encompasses the specific types of information the Texas Supreme Court 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). Additionally, this office has found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. See Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). This office has also found common-law privacy generally protects the identifying information of juvenile victims of abuse or neglect. See Open Records Decision No. 394 (1983); cf. Fam. Code § 261.201. Further, we have also determined financial information related only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. See Open Records Decision Nos. 600 at 9-12 (1992) (identifying public and private portions of certain state personnel records), 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (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).

We note the submitted information consists of investigations of the conduct of officials and employees of the district. Information concerning public employees and public employment is generally not private because the public has a legitimate interest in such information. 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), 444 at 5 (1986) (public has legitimate interest in knowing reasons for public employee's dismissal, demotion, or promotion), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), 329 (1982) (reasons for employee's resignation ordinarily not private).

Nevertheless, we have marked medical, child abuse victim identifying, and personal financial information the district must withhold under section 552.101 of the Government Code in conjunction with common-law privacy. The remaining information is of legitimate public interest or is not intimate or embarrassing. We therefore conclude the district may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

Constitutional privacy protects two kinds of interests. See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5, 478 at 4 (1987), 455 at 3-7. The first is the interest in independence in making certain important decisions relating to the “zones of privacy” pertaining to marriage, procreation, contraception, family relationships, and child rearing and education the United States Supreme Court has recognized. See *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. See *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual’s privacy interest against the public’s interest in the information. See *id.* at 7. Constitutional privacy under section 552.101 is reserved for “the most intimate aspects of human affairs.” *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492). In this instance, you have not demonstrated how constitutional privacy applies to the remaining information. Consequently, the district may not withhold the remaining information under section 552.101 in conjunction with constitutional privacy.

You also contend some of the submitted information is private under 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). In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. The Texas Supreme Court has expressly disagreed with *Hubert’s* interpretation of section 552.102(a), however, and has held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. See *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336, 342 (Tex. 2010). The Supreme Court then considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Id.* We have marked information the district must withhold under section 552.102(a) of the Government Code. We find none of the remaining information is excepted under section 552.102(a), and it may not be withheld on that basis.

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 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 protection 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. We note this section does not protect the identity of an individual who planned, initiated, or participated in a possible violation of law. *See id.* § 552.135(c)(3). You indicate some of the remaining information identifies employees and students of the district who reported potential violations of criminal or civil laws. You state these individuals have not consented to public disclosure of their entities. Based on your representations and our review, we have marked information the district must withhold under section 552.135 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, 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 under section 552.024 of the Government Code.⁸ *Id.* § 552.117(a). We note section 552.117(a)(1) encompasses an official's or employee's personal cellular telephone or pager number if the cellular telephone or pager service is not paid for by a governmental body. *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). Information may only be withheld under section 552.117(a)(1) on behalf of a current or

⁸The 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).

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. Thus, the information we have marked under section 552.117 must be withheld on the basis of section 552.117(a)(1) to the extent it pertains to a current or former district official or employee who timely requested confidentiality for the information under section 552.024 of the Government Code, including cellular telephone numbers if the cellular telephone service is not paid for by a governmental body.

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

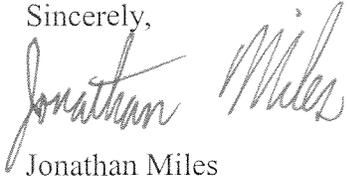
In summary, the district (1) must withhold or release the information we previously ruled upon in accordance with Open Records Letter Nos. 2012-05544, 2012-05871, and 2011-18161; (2) may not withhold any information previously released to a member of the public under Texas Rule of Evidence 503; (3) may otherwise withhold the information we have marked under Texas Rule of Evidence 503; (4) must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code; (5) must withhold the CHRI we have marked in the remaining information in conjunction with section 411.097 of the Government Code; (6) must withhold the victim, witness and other information related to the sexual harassment investigations we have marked under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*; (7) must withhold the medical, child abuse victim, and personal financial information we have marked under section 552.101 in conjunction with common-law privacy; (8) must withhold the information we have marked that identifies informers under section 552.135 of the Government Code; (9) must withhold the information we have marked under section 552.117(a)(1) to the extent it pertains to a current or former district official or employee who timely requested confidentiality for the information under section 552.024 of the Government Code, including cellular telephone numbers if the cellular telephone service is not paid for by a governmental body; and (10) must withhold the information we marked under section 552.130 of the Government Code. The district must release the rest of the submitted 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,

A handwritten signature in cursive script that reads "Jonathan Miles". The signature is written in black ink and is positioned to the right of the word "Sincerely,".

Jonathan Miles
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 451446

Enc. Submitted documents

c: Requestor
(w/o enclosures)