



ATTORNEY GENERAL OF TEXAS
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July 3, 2013

Mr. John A. Kazen
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OR2013-11391

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# 492088.

The Laredo Independent School District (the "district"), which you represent, received two requests from the same requestor for certain information pertaining to a specified investigation and all documents pertaining to a named principal. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.116, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We also received comments from the Texas Education Agency ("TEA") and a representative of the named principal. *See* Gov't Code § 552.304 (any interested party may submit comments stating why information at issue should or should not be released).

Initially, we must address the district's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). The district received the first request

for the information at issue on April 11, 2013. Accordingly, you were required to provide the information required by section 552.301(e) by May 2, 2013. Although the district timely submitted some of the responsive information on May 2, 2013, we note the district submitted additional information that is responsive to the first request on May 14, 2013, in response to the second request for information. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Accordingly, we conclude the district failed to comply with the procedural requirements mandated by section 552.301 of the Government Code with respect to the additional responsive information submitted on May 14, 2013.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *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, 381-82 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Generally, a governmental body may demonstrate a compelling reason to withhold information by showing the information is made confidential by another source of law or affects third party interests. *See* ORD 630. You seek to withhold portions of the additional responsive information submitted on May 14, 2013, under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. Because the purpose of the common-law informer's privilege is to protect the flow of information to a governmental body, rather than to protect a third person, the informer's privilege, unlike other claims under section 552.101, may be waived. *See* Open Records Decision No. 549 at 6 (1990). Thus, in failing to comply with the procedural requirements of section 552.301, the district has waived its claim under section 552.101 of the Government Code in conjunction with the common-law informer's privilege for the additional responsive information submitted on May 14, 2013. However, because your other claims under section 552.101 and your claims under sections 552.102 and 552.135 can provide compelling reasons for non-disclosure, we consider the applicability of these exceptions to the information at issue.

Section 552.116 of the Government Code provides as follows:

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

(b) In this section:

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

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

(A) intra-agency and interagency communications; and

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

Gov't Code § 552.116. TEA claims section 552.116 for a portion of the submitted information. TEA explains the information at issue consists of documents the district has submitted or will submit to TEA. TEA asserts these documents are audit working papers prepared or maintained by TEA's Student Assessment Division Security Task Force in conducting a pending investigation of testing irregularities in the administration of statewide assessment instruments. TEA states this investigation is authorized by section 39.057(a)(8) of the Education Code, which permits the commissioner of education to authorize a special accreditation investigation to be conducted in response to a possible violation of assessment instrument security procedures. *See* Educ. Code § 39.057(a) (listing instances in which the commissioner "shall" authorize investigations). Based on TEA's representations and our review of the information at issue, we conclude the information at issue, which we have marked, constitutes audit working papers the district may withhold on behalf of TEA under section 552.116 of the Government Code.¹

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 other statutes make confidential, such as the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), which make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). However, you cite no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the district to obtain or maintain a social security number. Consequently, you have failed to demonstrate the applicability of section 405 of title 42 of the United States Code to any social security numbers within the submitted

¹As we are able to make this determination, we need not address the remaining arguments against disclosure of the information at issue.

documents, and no portion of the submitted information may be withheld under section 552.101 of the Government Code on that basis. We caution, however, section 552.353 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing a social security number, you should ensure it was not obtained or is not maintained by the district pursuant to any provision of law enacted on or after October 1, 1990.²

Section 552.101 of the Government Code also encompasses section 21.355 of the Education Code. Section 21.355(a) provides 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 id.* at 4. We also have determined that “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 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 evaluates the performance of a certified teacher or administrator. You state the employee at issue was acting in this capacity when the evaluative documents were created. You have provided documentation of the employee’s certification. Based on your representations and our review, we conclude 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. However, we find you have failed to demonstrate how the remaining information constitutes evaluations of the teacher’s or administrator’s performance as contemplated by section 21.355 of the Education Code. Accordingly, the district may not withhold the remaining information under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses section 21.048 of the Education Code, which provides, in relevant part, the following:

²We note section 552.147(b) of the Government Code authorizes a governmental body to redact the social security number of a living person without the necessity of requesting a decision from this office under the Act. *See* Gov’t Code § 552.147(b).

The results of an examination administered under this section are confidential and are not subject to disclosure under Chapter 552, Government Code, unless:

- (1) the disclosure is regarding notification to a parent of the assignment of an uncertified teacher to a classroom as required by Section 21.057; or
- (2) the educator has failed the examination more than five times.

Educ. Code § 21.048(c-1). Upon review, we find the information we have marked reflects the results of an examination administered under section 21.048 of the Education Code. We have no indication subsections 21.048(c-1)(1) and (2) are applicable in this instance. Accordingly, the district must withhold the information we have marked under section 552.101 in conjunction with section 21.048(c-1) of the Education Code.

Section 552.101 of the Government Code also encompasses the common-law right of privacy, which 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. *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 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. *Id.* 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.*

Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released under *Ellen*, but the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. *See* Open Records Decision Nos. 393 (1983), 339 (1982). If no adequate summary of the investigation exists, then all of the information relating to the investigation ordinarily must be released, with the exception of information that would identify the victims and witnesses. We note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context. Further, since 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, the identity of the individual accused of sexual harassment is not protected

from public disclosure. See Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

A portion of the remaining information pertains to a claim of sexual harassment. Upon review, we find the information at issue includes an adequate summary of the investigation into the alleged sexual harassment. Thus, pursuant to the ruling in *Ellen*, this information is not confidential under common-law privacy. However, the district must withhold the remaining records of the sexual harassment investigation, which we have marked, under section 552.101 in conjunction with common-law privacy and the court's holding in *Ellen*.³ We find the remaining information does not identify the complainants or the witnesses in the investigation. We therefore conclude the district may not withhold the remaining information under section 552.101 in conjunction with common-law privacy and *Ellen*.

Common-law privacy under section 552.101 of the Government Code 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). This office has found 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 Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). On the other hand, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. See ORD 600 at 9 (information revealing employee participates in group insurance plan funded partly or wholly by governmental body not excepted from disclosure); see also Open Records 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). Whether financial information is subject to a legitimate public interest and therefore not protected by common-law privacy must be determined on a case-by-case basis. See Open Records Decision No. 373 (1983). Generally, however, the public has a legitimate interest in information that relates to public employment and public employees. See Open Records Decision No. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern). 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 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal,

³As our ruling is dispositive, we need not address the remaining arguments for this information.

demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow).

Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public interest. Accordingly, the district must generally withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy. You have not identified whether the listed payroll deductions and benefits reflect mandatory participation by the employee or are the employee's voluntary financial decisions. Thus, to the extent the information we have marked reflects the employee's voluntary allocation of salary to optional investment, retirement, and other financial programs offered by the district, the district must withhold these deduction amounts under section 552.101 in conjunction with common-law privacy. However, to the extent the this information reflects the employee's mandatory participation in the district's retirement and investment programs or benefits paid by the district, the deduction amounts are not confidential and must be released. Further, we find no portion of the remaining information is highly intimate or embarrassing and of no legitimate public interest. Accordingly, no portion of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.102(a) of the Government Code 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). We understand you to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code, which is discussed above. *See Indus. Found.*, 540 S.W.2d at 685. 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. However, the Texas Supreme Court has expressly disagreed with *Hubert's* interpretation of section 552.102(a), and 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 (Tex. 2010). The Supreme Court also 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. *See id.* at 348. Upon review, we find the district must withhold the dates of birth we have marked under section 552.102(a) of the Government Code. However, we find you have failed to demonstrate the applicability of section 552.102(a) to any of the remaining information at issue, and the district may not withhold any of it on this basis.

You claim Exhibit C is subject to section 552.102(b) of the Government Code, which excepts from disclosure all information in transcripts of a professional public school employee other than the employee's name, the courses taken, and the degree obtained. Gov't Code § 552.102(b); 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 information in Exhibit C under section 552.102(b) 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 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 Gov't Code § 552.117(a)(1). We note an individual's personal post office box number is not a "home address" and therefore may not be withheld under section 552.117. *See id.*; ORD 622 at 4 (legislative history makes clear that purpose of section 552.117 is to protect public employees from being harassed *at home*) (citing House Committee on State Affairs, Bill Analysis, H.B. 1979, 69th Leg. (1985)) (emphasis added). 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. You have provided documentation showing that prior to the date of the request, the named principal elected to keep his personal information confidential. We note, however, this election does not cover emergency contact information. Accordingly, the district must withhold the information we have marked pertaining to the named principal under section 552.117(a)(1) of the Government Code. We note the remaining information contains the personal information of other district employees. Thus, to the extent the individuals concerned timely requested confidentiality under section 552.024 for the personal information we have marked under section 552.117, the information must be withheld under section 552.117(a)(1) of the Government Code.

Section 552.130 of the Government Code excepts from disclosure information related to a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country. Gov't Code § 552.130(a)(1). Therefore, the district must withhold the information we have marked under section 552.130 of the Government Code.

In summary, the district may withhold the information we have marked under section 552.116 of the Government Code on behalf of TEA. 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 of the Government Code in conjunction with section 21.048(c-1) of the Education Code; (3) the sexual harassment investigation records we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and the court's holding in *Ellen*; (4) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, to the extent the payroll information we have marked reflects the employee's voluntary allocation of salary to optional investment, retirement, and other financial programs offered by the district; (5) the dates of birth we have marked under section 552.102(a) of the Government Code; (6) the information in Exhibit C under section 552.102(b) of the

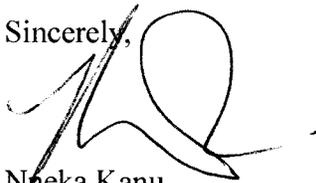
⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

Government Code, with the exception of the employee's name, courses taken, and degree obtained; and (7) the information we have marked pertaining to the named principal under section 552.117(a)(1) of the Government Code. To the extent the other district employees whose personal information we have marked timely requested confidentiality under section 552.024 of the Government Code, the district must withhold this information under section 552.117(a)(1) of the Government Code. The district must also withhold the information we have marked under section 552.130 of the Government Code. The remaining 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,



Nneka Kanu
Assistant Attorney General
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NK/bhf

Ref: ID# 492088

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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