ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 22, 2006

Mr. Todd A. Clark
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
P.O. Box 2156
Austin, Texas 78768

OR2006-09681

Dear Mr. Clark:

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# 257364.

The West Orange Cove Consolidated Independent School District (the "district"), which you represent, received a request for (1) overheads used by the superintendent in a presentation at a board meeting; (2) a named individual's personnel file; and (3) all of the superintendent's leave requests during his employment by the district. The district subsequently received a second request for the same personnel file. You state that the district is releasing the overheads. You claim that the rest of the requested information is excepted from disclosure under sections 552.101, 552.102, and 552.103 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.[1]

We first note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. Gov't Code § 552.022(a)(1). Section 552.022(a)(3) provides for the required public disclosure of "information in an

[1]We note that the documents marked as Exhibit 5 appear to be submitted for this office's information and not as responsive records for which the district seeks a ruling. Therefore, this decision does not address the public availability of the documents in Exhibit 5.

account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body." *Id.* § 552.022(a)(3). Thus, the district must release the submitted employee evaluations and contracts under section 552.022, unless they contain information that is expressly confidential under other law or, in the case of the evaluations, is excepted from disclosure under section 552.108 of the Government Code. We have marked the submitted information that is subject to section 552.022. We note that the district does not raise section 552.108.

Although you seek to withhold the submitted information under section 552.103 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold any of the information that is subject to section 552.022 under section 552.103. However, we will consider your claims with respect to that information under sections 552.101 and 552.102 of the Government Code.

Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. You raise section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. Section 21.355 provides that "[a] document evaluating the performance of a teacher or administrator is confidential." 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). In Open Records Decision No. 643, we determined that for purposes of section 21.355, the word "teacher" means a person who is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code 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 determined that the word "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.*

You contend that the submitted evaluations are confidential under section 21.355. You do not inform us, however, whether the employee who is the subject of the evaluations held a teacher's certificate or permit or an administrator's certificate under subchapter B of chapter 21 of the Education Code and was performing the functions of a teacher or administrator at the time of each evaluation. Nevertheless, to the extent that the employee in question held a teacher's certificate or permit or an administrator's certificate and was functioning as a

teacher or administrator at the time of a given evaluation, any such evaluation is confidential under section 21.355 of the Education Code and must be withheld from disclosure under section 552.101 of the Government Code. *See id.* at 4. We have marked the documents that the district may be required to withhold on this basis. To the extent that the evaluations do not satisfy these criteria, they may not be withheld under section 552.101 in conjunction with section 21.355.

You also raise section 552.101 in conjunction with Texas Rule of Civil Procedure 190.3. We note, however, that rule 190.3 merely provides for a discovery deadline and limitations on the use of oral depositions and interrogatories in certain civil cases. *See* TEX. R. CIV. P. 190.3. Furthermore, the Texas Rules of Civil Procedure are not other law under which information is considered to be confidential for the purposes of section 552.101. *See* Open Records Decision No. 676 at 2 (2002). Therefore, the district may not withhold any of the information that is subject to section 552.022 under section 552.101 of the Government Code on the basis of rule 190.3.

Next, we address your privacy claims under sections 552.101 and 552.102 of the Government Code. Section 552.101 also encompasses constitutional and common-law rights to privacy. Constitutional privacy protects two types of interests. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the U.S. Supreme Court. *See Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); Open Records Decision No. 455 at 3-7. The second type of 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); Open Records Decision No. 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. *See* Open Records Decision No. 455 at 7. Constitutional privacy is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie,* 765 F.2d at 492).

The common-law right to 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). Common-law privacy protects the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation. See id.* 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 that 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). We also have determined that personal financial information that relates 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), 545 at 4 (1990), 523 at 4 (1989), 373 at 4 (1983).

Section 552.102 of the Government Code excepts from public 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). Section 552.102(a) protects information that relates to public officials and employees. 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. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor to Gov't Code § 552.102). Therefore, we will address your privacy claims under section 552.101.

In this instance, the information at issue relates to an employee of the district and her employment relationship with the district. As this office has frequently stated, such information is generally a matter of legitimate public interest. *See, e.g.*, Open Records Decision Nos. 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), 542 at 5 (1990) (information in public employee's resume not protected by constitutional or common-law privacy under statutory predecessors to Gov't Code §§ 552.101 and 552.102), 470 at 4 (1987) (job performance does not generally constitute employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees). We therefore conclude that the district may not withhold any of the remaining information that is subject to section 552.022 under section 552.101 of the Government Code in conjunction with constitutional or common-law privacy.

We note, however, that some of the submitted employment contracts contain the employee's home addresses. Section 552.117(a)(1) of the Government Code excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code.[2] 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

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[2]Unlike other exceptions to disclosure, this office will raise section 552.117 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

information that must be withheld under section 552.117(a)(1) if the employee in question requested confidentiality for the marked information under section 552.024 prior to the district's receipt of these requests for information.

With respect to the submitted information that is not subject to section 552.022, we address your claim under section 552.103 of the Government Code. This exception provides in part:

> (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
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> . . . .
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> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

You state that the rest of the submitted information relates to pending litigation. You also state, and have provided documentation demonstrating, that the district was a party to the litigation when it received these requests for information. Based on your representations and the submitted documentation, we conclude that the district may withhold the information that is not subject to section 552.022 of the Government Code under section 552.103 of the Government Code.

In reaching this conclusion, we assume that the opposing parties in the pending litigation have not seen or had access to any of the information in question. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that is related to litigation through discovery procedures. *See*

Open Records Decision No. 551 at 4-5 (1990). If the opposing parties have seen or had access to information that is related to pending litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We further note that the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary: (1) the district must withhold the marked evaluations under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code to the extent that they relate to an employee who held a teacher's certificate or permit or an administrator's certificate and was functioning as a teacher or administrator at the time of the evaluations; (2) the marked home addresses of the employee must be withheld under section 552.117(a)(1) of the Government Code if she requested confidentiality for that information under section 552.024 of the Government Code before the district received these requests for information; and (3) the submitted information that is not subject to section 552.022 of the Government Code is excepted from disclosure at this time under section 552.103 of the Government Code. The rest of the submitted information that is subject to section 552.022 must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

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

JWM/sdk

Ref: ID# 257364

Enc: Submitted documents

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