



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 7, 2008

Mr. Dennis J. Eichelbaum
Schwartz & Eichelbaum, P.C.
7400 Gaylord Parkway, Suite 200
Frisco, Texas 75034

OR2008-00224

Dear Mr. Eichelbaum:

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# 298988.

The Killeen Independent School District (the "district"), which you represent, received a request for thirteen categories of information, including personnel records, testing results and reports, and parent complaints. You state that the district is withholding some information pursuant to the Family Educational Rights and Privacy Act ("FERPA").¹ You state that the district will release some of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.107,

¹We note that the United States Department of Education Family Policy Compliance Office (the "DOE") informed this office that FERPA, 20 U.S.C. § 1232(a), 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. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: http://www.oag.state.tx.us/opinopen/og_resources.shtml.

Accordingly, we do not address your arguments under section 552.114 of the Government Code. *See* Gov't Code §§ 552.026 (incorporating FERPA into the Act), .114 (excepting from disclosure "student records"); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 of the Government Code and FERPA).

552.135, and 552.147 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

Initially, we must address the district's obligations under section 552.301 of the Government Code. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Subsection 552.301(e) provides that the governmental body must submit to this office, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. Gov't Code § 552.301(e)(1)(A)-(D).

You inform us that the district received the written request for information on October 15, 2007. However, the district did not submit a copy of the written request for information until November 8, 2007. Furthermore, the district states that it has identified responsive attorney-client correspondence, which it has not submitted for our review.⁴ Thus, the district did not comply with section 552.301 in requesting this decision.

If a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). This statutory

²You also raise section 552.305 of the Government Code. Section 552.305 permits a governmental body to rely on an interested third party to raise and explain the applicability of an exception to disclosure under the Act. Gov't Code § 552.305. Accordingly, this section is not an exception to disclosure.

Although you additionally raised section 552.122 of the Government Code, you have not submitted arguments explaining how this exception applies to the requested information. Therefore, we presume you have withdrawn this exception. *See* Gov't Code §§ 552.301, .302.

³We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

⁴You inform us that this information was not submitted because it is confidential under the attorney-client privilege and may not be disclosed. We note, however, that section 552.3035 expressly prohibits this office from disclosing information that is the subject of a request for an attorney general decision. *See* Gov't Code § 552.3035 (attorney general may not disclose to requestor or public any information submitted under section 552.301(e)(1)(D)). Accordingly, this office routinely receives and reviews information that governmental bodies seek to withhold under the Act.

presumption can generally be overcome when the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). You indicate that the information you have not submitted is excepted from disclosure under section 552.107 of the Government Code, which pertains to information within the attorney-client privilege. However, section 552.107 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). By failing to submit the responsive correspondence, the district waived section 552.107 and may not withhold any of the responsive correspondence on that basis. The responsive correspondence must be released. The district raises sections 552.101, 552.102, 552.117, 552.135, and 552.147 of the Government Code for the information it has submitted. As these exceptions can provide compelling reasons to withhold information, we will address the district's arguments under these exceptions.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 21.355 of the Education Code provides that "[a] document evaluating the performance of a teacher or administrator is confidential."⁵ 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 an "administrator" for purposes of section 21.355 means a person who (1) is required to and does in fact hold an administrator's certificate under subchapter B of chapter 21 of the Education Code and (2) is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.*; *see Abbott v. North East Indep. Sch. Dist.*, No. 03-04-00744-CV, 2006 WL 1293545 (Tex. App.—Austin May 12, 2006, no pet.) (concluding that written reprimand constitutes evaluation for purposes of Educ. Code § 21.355). You contend that the submitted documents contain information that is confidential under section 21.355 of the Education Code. Upon review of the documents at issue, we agree that some of the information evaluates the performance of an administrator and is subject to section 21.355 of the Education Code. Accordingly, the district must withhold the information we have marked on this basis. However, we find the remaining information does not evaluate the performance of an administrator for the purposes of section 21.355 and therefore may not be withheld on this basis.

⁵While you cite section 21.356 of the Education Code for your argument to withhold documents evaluating the performance of an administrator, we understand you to raise section 21.355 of the Education Code, as section 21.355 is the proper exception for the substance of your argument.

In addition, the requested information contains transcripts that you claim are subject to section 552.102 of the Government Code. Section 552.102(b) excepts from disclosure “a transcript from an institution of higher education maintained in the personnel file of a professional public school employee.” Gov’t Code § 552.102(b). This section further provides, however, that “the degree obtained or the curriculum on a transcript in the personnel file of the employee” are not excepted from disclosure. Thus, with the exception of the employee’s name, the courses taken, and the degree obtained, the district must withhold the submitted transcripts that we have marked pursuant to section 552.102(b).

Additionally, section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. Section 552.102(a) 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 is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee’s employment and its terms constitutes information relevant to person’s employment relationship and is part of employee’s personnel file). The privacy analysis under section 552.102(a) is the same as the common-law privacy standard under section 552.101. *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). We will therefore consider the applicability of common-law privacy under section 552.101 together with your claim regarding section 552.102.

In *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), the Texas Supreme Court held that information is protected by common-law privacy 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 a legitimate concern to the public. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. However, 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, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow).

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. *Ellen*, 840 S.W.2d 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 that “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.*

When there is an adequate summary of a sexual harassment investigation, the summary must be released along with the statement of the accused, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure. However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of witnesses and victims must still be redacted from the statements. In this instance, a portion of the submitted information contains documents relating to allegations of sexual harassment. Because there is no adequate summary of the investigation, the documents relating to the sexual harassment investigation must generally be released. However, a portion of this information, which we have marked, reveals the identities of the alleged victims and witnesses. Accordingly, we conclude that the district must withhold the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy and the holding in *Ellen*. We have reviewed the remaining information and find that it is either not intimate or embarrassing or is of legitimate public interest. Therefore, none of the remaining information is confidential under the doctrine of common-law privacy, and it may not be withheld under either section 552.101 or section 552.102(a).

We note that some of the remaining information may be subject to section 552.117 of the Government Code.⁶ Section 552.117(a)(1) excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Gov't Code § 552.117(a)(1). Section 552.117(a)(1) also encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cellular telephone number. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular mobile phone numbers paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request is received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). Therefore, pursuant to section 552.117(a)(1), the district must withhold the information we have marked if the individual at issue elected under section 552.024, prior to the district's receipt of this request, to keep that information confidential. The district may not withhold this information under section 552.117(a)(1) if the individual did not make a timely election.

⁶The Office of the Attorney General will raise a mandatory exception like section 552.117 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

You contend that some of the remaining information is excepted under section 552.135 of the Government Code, which provides the following:

(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.

(d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or prosecutor upon proper request made in compliance with applicable law and procedure.

(e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be constitutional, statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.

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 that 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). Upon review, we find you have failed to demonstrate that any of the remaining information identifies an informer for purposes of section 552.135 of the Government Code. Thus, the district may not withhold any of the remaining information on that basis.

Finally, you raise section 552.147 of the Government Code. Section 552.147 provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act.⁷ Therefore, the district may withhold the social security number contained in the remaining information under section 552.147.

In summary, the district must withhold the information we have marked under section 552.101 in conjunction with section 21.355 of the Education Code. The district must also withhold the information we have marked under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. With the exception of the employee’s name, the courses taken, and the degree obtained, the district must withhold the submitted transcripts under section 552.102(b) of the Government Code. Pursuant to section 552.117(a)(1), the district must withhold the information we have marked if the individual at issue elected under section 552.024, prior to the district’s receipt of this request, to keep that information confidential. The district may withhold the marked social security number under section 552.147 of the Government Code. The remaining information 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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,

⁷Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act. Gov’t Code § 552.147.

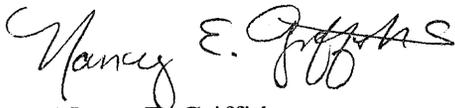
toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge 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,



Nancy E. Griffiths
Assistant Attorney General
Open Records Division

NEG/jb

Ref: ID# 298988

Enc. Submitted documents

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