ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 16, 2008

Ms. Mari M. McGowan
Abernathy, Roeder, Boyd & Joplin, P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2008-12737

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# 321802.

The Lovejoy Independent School District (the "district"), which you represent, received a request for information pertaining to a named teacher who was recently terminated. You state that you will provide the requestor with some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.135 of the Government Code. You also state, and provide documentation showing, that you notified certain individuals of the request and of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).[1] We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that portions of the requested information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2008-10720 (2008). With regard to the submitted information that is identical to the information previously requested and ruled upon by this office in this prior ruling, we conclude that, as we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, the district must continue to rely on Open Records Letter No. 2008-10720 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (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

[1]As of the date of this decision, this office has received no correspondence from the individuals in question.

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). To the extent that the submitted information is not encompassed by the previous ruling, we will address the submitted arguments.

Next, we note the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that 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 purposes of our review in the open records ruling process under the Act.[2] Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). You have submitted for our review, among other information, unredacted education records.[3] Because our office is prohibited from reviewing education records, we will not address the applicability of FERPA to the information at issue. Such determinations under FERPA must be made by the educational authority in possession of the education record.

Section 552.101 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 section 21.355 of the Education Code, which provides, "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. In addition, the court 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." *North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). This office has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). Additionally, this office has determined that an administrator is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is serving as an administrator at the time of the evaluation. *Id.*

You contend the submitted documents contain evaluative and assessment information regarding the teacher's performance and should therefore be withheld from disclosure under section 21.355. You state that the teacher was required and did hold a teaching certificate,

---

[2]A copy of this letter may be found on the attorney general's website, *available at* http://www.oag.state.tx.us/open/20060725usdoe.pdf.

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

and indicate that she was teaching at the time of the evaluations. Based on your representations and our review, we conclude that some of the submitted information is subject to section 21.355. Accordingly, the district must withhold the information we have marked under section 552.101 in conjunction with section 21.355 of the Education Code. However, you have failed to show how the remaining information evaluates the performance of a teacher for the purposes of section 21.355. Thus, the district may not withhold any of the remaining information under section 552.101 on that basis.

Section 552.101 also encompasses the common-law informer's privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer's privilege protects the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. *See* Open Records Decision Nos. 515 at 3 (1998), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." *See* Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). The privilege excepts the informer's statement only to the extent necessary to protect the informer's identity. *See* Open Records Decision No. 549 at 5 (1990).

You claim that the information at issue must be withheld in its entirety to protect the identities of witnesses and informers. However, you have not identified a violation that could result in the imposition of a civil or criminal penalty by the district. Accordingly, you have not demonstrated that the informer's privilege is applicable to any portion of the submitted information. Thus, we conclude that the district may not withhold any information under section 552.101 of the Government Code in conjunction with the informer's privilege.

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 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*, the court ruled that the test to be applied to information claimed to be protected under section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Tex. Industrial Accident Board* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Act. *See Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (citing *Indus. Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). We will therefore consider the applicability of common-law privacy under section 552.101 together with your claim under section 552.102.

Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found.,* 540 S.W.2d at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Generally, however, the public has a legitimate interest in information that relates to public employment and public employees, and information that pertains to an employee's actions as a public servant generally cannot be considered beyond the realm of legitimate public interest. *See* Open Records Decisions 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 (1990); 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees); 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees); 423 at 2 (1984) (scope of public employee privacy is narrow). The submitted information pertains to public employees and their conduct within the workplace. Upon review, we have marked information that must be withheld under sections 552.101 and 552.102 in conjunction with common-law privacy. We find, however, that none of the remaining information constitutes highly intimate or embarrassing information of no legitimate concern to the public. Therefore, none of the remaining information may be withheld under either section 552.101 or section 552.102 on the basis of common-law privacy.

Next, you contend that some of the submitted 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.

Gov't Code § 552.135(a)-(c). Because the legislature limited the protection section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under the exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See id.* §§ 552.301(e)(1)(A), .135(a). You state that the allegations specifically contain complaints regarding alleged violations of provisions of the Texas Administrative Code regarding professional ethics and the district's policy on employee standards of conduct. However, we find that you have not identified any specific civil, criminal, or regulatory law that is alleged to have been violated. We therefore conclude that the district may not withhold any of the remaining information under section 552.135 of the Government Code.

We note that the submitted information contains employees' personal information. Section 552.117 of the Government Code 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.[4] Gov't Code § 552.117(a)(1). We note that section 552.117 also encompasses a personal cellular telephone number, provided that the service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular phone numbers provided and paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, to the extent that the information that we have marked under section 552.117 is the home telephone or personal cell phone number, home address, or family member information of a current or former employee of the district, such information must be withheld under section 552.117(a)(1) if the individual to whom it pertains timely requested confidentiality for the information under section 552.024. The district may not withhold information under section 552.117(a)(1) on behalf of a current or former employee who did not make a timely election to keep the information confidential.

In summary, to the extent any of the submitted information is identical to the information previously requested and ruled upon by this office in Open Records Letter No. 2008-10720, the district must continue to rely on this ruling as a previous determination and withhold or release the identical information in accordance with that ruling. The district must withhold the information we have marked under section 21.355 of the Education Code in conjunction with section 552.101 of the Government Code. The district must also withhold the information we have marked under sections 552.101 and 552.102 in conjunction with

[4]The 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).

common-law privacy. To the extent that the information that we have marked under section 552.117 of the Government Code is the home telephone or personal cell phone number, home address, or family member information of a current or former district employee, such information must be withheld under section 552.117(a)(1) if the individual to whom it pertains timely requested confidentiality for the information under section 552.024 of the Government Code. The remaining submitted 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). If the governmental body does not file suit over 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 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,

Paige Savoie

Paige Savoie
Assistant Attorney General
Open Records Division

PS/ma

Ref: ID# 321802

Enc. Submitted documents

c: Ms. Sandy Harman
c/o Ms. Mari M. McGowan
Abernathy, Roeder, Boyd & Joplin, P.C.
P.O. Box 1210
McKinney, Texas 75070-1210
(w/o enclosures)

Ms. Laura Goodson
12 Brookhaven
Lucas, Texas 75002
(w/o enclosures)

Mr. Ted Moore
Superintendent
Lovejoy Independent School District
259 Country Club Road
Allen, Texas 75002
(w/o enclosures)

Mr. Gavan Goodrich
Lovejoy Independent School District
259 Country Club Road
Allen, Texas 75002
(w/o enclosures)

Ms. Tonya Vining
Lovejoy Independent School District
259 Country Club Road
Allen, Texas 75002
(w/o enclosures)

Ms. Laura Hendrix
Lovejoy Independent School District
259 Country Club Road
Allen, Texas 75002
(w/o enclosures)

Ms. Judy Hise
Lovejoy Independent School District
259 Country Club Road
Allen, Texas 75002
(w/o enclosures)

Ms. Tania Vaughn
Lovejoy Independent School District
259 Country Club Road
Allen, Texas 75002
(w/o enclosures)