



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 30, 2009

Ms. Marianna M. McGowan
Abernathy Roeder Boyd & Joplin, P.C.
Attorney for Mansfield Independent School District
P.O. Box 1210
McKinney, Texas 75070-1210

OR2009-16815

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# 362524.

The Mansfield Independent School District (the "district"), which you represent, received two requests for a specified special examiner hearing report and information pertaining to a specified district board hearing, including the transcript and audio recordings from the hearing. You state the district has redacted student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(g).¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.116, and 552.135 of the Government Code.² You also state you have notified the

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA 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/open/20060725usdoe.pdf>.

²Although you initially raised section 552.107 of the Government Code, you have not submitted arguments explaining how this exception applies to the submitted information. Therefore, we presume that you have withdrawn this exception. See Gov't Code §§ 552.301, .302.

individual whose information is at issue of this request for information and of his right to submit arguments to this office as to why the submitted 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). We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have not submitted the requested audio recordings. Therefore, to the extent information responsive to this portions of the request existed at the time the district received the request for information, we assume you have released it to the requestor. If you have not released any such information, you must do so at this time. *See id.* §§ 552.301(a), .302; Open Records Decision No. 664 (2000) (noting that if a governmental body concludes that no exceptions apply to the requested information, it must release information as soon as possible under circumstances).

Next, you acknowledge that a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). The information we have marked consists of a completed investigation made of, for, or by the district. The district raises section 552.116 of the Government Code which is a discretionary exception to disclosure that a governmental body may waive. *See id.* § 552.007; Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.116 is not other law that makes information expressly confidential for purposes of section 552.022. Therefore, the district may not withhold the information we have marked under section 552.116 of the Government Code. However, you claim that some of the information subject to section 552.022 is protected from disclosure under section 552.101 in conjunction with the common-law informer's privilege. The common-law informer's privilege is other law for the purpose of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *Tex. Comm'n on Env'tl. Quality v. Abbott*, No. GV-300417 (126th Dist. Ct., Travis County, Tex.). Additionally, because sections 552.101, 552.102, and 552.135 of the Government Code are other laws for purposes of section 552.022, we will consider your arguments under these exceptions. We will also address your arguments for the remaining information not subject to section 552.022(a)(1) of the Government Code.

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, including section 21.355 of the Education Code. You contend that the information at issue consists of evaluative information regarding a teacher and should therefore be withheld from disclosure under section 21.355, which provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. 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. *See* Open Records Decision No. 643 (1996). In Open Records Decision No. 643, we concluded that a “teacher” for purposes of section 21.355 means a person who (1) is required to, and does in fact, hold a certificate or permit required under chapter 21 of the Education Code and (2) is teaching at the time of his or her evaluation. *See id.* In addition, the Third Court of Appeals has held that 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.). However, the submitted information consists of information pertaining to an investigation of alleged wrongdoing by the teacher at issue. This information does not constitute an evaluation of the individual’s performance as a teacher for the purposes of section 21.355. Thus, the district may not withhold any of the submitted information under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses section 48.101 of the Human Resources Code, which pertains to the disclosure of reports of abuse, neglect, or exploitation of elderly and disabled persons in certain facilities. Section 48.101 provides in pertinent part as follows:

(a) The following information is confidential and not subject to disclosure under Chapter 552, Government Code:

- (1) a report of abuse, neglect, or exploitation made under this chapter;
- (2) the identity of the person making the report; and
- (3) except as provided by this section, all files, reports, records, communications, and working papers used or developed in an investigation made under this chapter or in providing services as a result of an investigation.

(b) Confidential information may be disclosed only for a purpose consistent with this chapter and as provided by department or investigating state agency rule and applicable federal law.

Hum. Res. Code § 48.101(a), (b). The only entities authorized to conduct an investigation under chapter 48 of the Human Resources Code are the Department of Family and Protective Services (“DFPS”) and certain other state agencies, depending on the circumstances surrounding the incident. *See id.* §§ 48.151, .152, .252, .301. Thus, records of a school district investigation are not subject to section 48.101. The submitted information reflects that it was created by the district pursuant to its own investigation. Thus, we conclude no portion of the submitted information was used or developed in an investigation made under

chapter 48 of the Human Resources Code. Therefore, it may not be withheld under section 552.101 of the Government Code on this basis.

You assert the submitted information is excepted under section 552.101 of the Government Code in conjunction with common-law privacy and section 552.102 of the Government Code. 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, Inc.*, 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled the test to be applied to information protected under section 552.102 is the same test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. Accordingly, we will consider your privacy claims under both sections 552.101 and 552.102.

Common-law privacy 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. See *Indus. Found.*, 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. The types 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. In addition, this office has found certain kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 470 (1987), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). Although you claim portions of the submitted information are excepted from disclosure under section 552.101 in conjunction with common-law privacy and the ruling in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the submitted information does not concern an investigation of sexual harassment. Therefore, we find that *Ellen* is not applicable in this instance. Further, the submitted information pertains to allegations of wrongdoing in the course of the named individual's employment. Therefore, we conclude there is a legitimate public interest in this information. Accordingly, the district may not withhold any of the submitted information under section 552.101 or section 552.102(a) of the Government Code in conjunction with common-law privacy.

You also assert that the submitted information is excepted from disclosure pursuant to section 552.101 in conjunction with the common-law informer's privilege and section 552.135 of the Government Code. 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); *Hawthorne v. State*, 10 S.W.2d 724,

725 (Tex. Crim. App. 1928). The common-law informer's privilege protects from disclosure 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. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). You state the submitted information pertains to violations of provisions of the Texas Administrative Code regarding professional ethics and the district's policy on employee standards of conduct. However, you do not inform us that the alleged conduct is a violation of a criminal or civil statute. Further, witnesses who provide information in the course of an investigation but do not make the initial report of the violation are not informants for the purposes of claiming the informer's privilege. We conclude that the district has failed to demonstrate the applicability of the common-law informer's privilege in this instance. Thus, the district may not withhold any of the submitted information pursuant to section 552.101 of the Government Code in conjunction with the informer's privilege.

Section 552.135 of the Government Code 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.

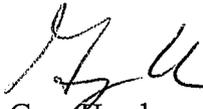
(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

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 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). Additionally, individuals who provide information in the course of an investigation, but do not make the initial report are not informants for purposes of section 552.135 of the Government Code. In this instance, you state some of the submitted information reveals the identities of witnesses. Although you generally raise section 552.135 for the identities of witnesses who were questioned during the investigation at issue, you have not identified the remaining individuals whose identities you seek to withhold under section 552.135. *See id.* §§ 552.301(e)(1)(A), .135. Further, we note that section 552.135 protects an informer's identity, but it does not generally encompass protection for witness statements. Upon review, we find that the district has failed to demonstrate how the submitted information reveals the identity of an informer for the purposes of section 552.135. Thus, the district may not withhold any portions of the submitted information under section 552.135 of the Government Code. As no further exceptions to disclosure are raised, the submitted 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,



Greg Henderson
Assistant Attorney General
Open Records Division

GH/rl

Ref: ID# 362524

Enc. Submitted documents

c: Requestors (2)
(w/o enclosures)