



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 4, 2009

Ms. Leticia D. McGowan
School Attorney
Dallas Independent School District
3700 Ross Avenue
Dallas, Texas 75204

OR2009-17203

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# 363250.

The Dallas Independent School District (the "district") received a request for: 1) information pertaining to the code of conduct for the district's police department and 2) information regarding a specified investigation. You state you have released information responsive to the first category of information. You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, 552.117, 552.1175, 552.130, 552.135, 552.136, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we observe that you have redacted a portion of the submitted information. You do not assert, nor does our review of our records indicate, that you have been authorized to withhold any such information without seeking a ruling from this office. *See Gov't Code* § 552.301(a); Open Records Decision No. 673 (2000). As such, this type of information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. Because we are able to discern the

¹Although you cite to section 552.131 of the Government Code in your brief, we understand you to raise section 552.135 for the informer's privilege, as that is the proper section for the substance of your argument.

nature of the redacted information, we will address its public availability. In the future, the district should refrain from redacting responsive information that it submits to this office in connection with a request for an open records ruling that it is not authorized to redact. Failure to do so may result in the presumption that the redacted information is public. *See* Gov't Code § 552.302.

You claim portions of the submitted information are excepted under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section 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 [.]” *Id.* § 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.

Common-law privacy protects information that (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. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *See 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. *See id.* at 683. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate and embarrassing. *See* Open Records Decision No. 545 (1990). 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 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 either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. 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. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

Upon review of the information at issue, we find that it does not contain an adequate summary of the sexual harassment investigation. Because there is no adequate summary of the investigation, the information pertaining to the sexual harassment investigation must generally be released. However, the information contains the identity of the alleged sexual harassment victim. Accordingly, we conclude the district must withhold the information 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 also find that portions of the remaining information are highly intimate or embarrassing and not of legitimate public interest. Therefore, the district must withhold the information we have marked under section 552.101 in conjunction with common-law privacy and section 552.102. However, although a portion of the remaining records consists of information that is intimate or embarrassing, these records consist of evidence used in an investigation of a public employee's conduct and qualifications. Further, you have failed to demonstrate any portion of the remaining information is intimate or embarrassing and not of legitimate public interest. Accordingly, none of the remaining information may be withheld under either section 552.101 in conjunction with common-law privacy or section 552.102(a).

Section 552.101 also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal

matters. ORD 455 at 4. The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5; *see Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985). Upon review, we conclude that in this instance the individuals' privacy interests are outweighed by the public interest in the conduct and qualifications of public employees, and thus, no portion of the remaining information is confidential under constitutional privacy. Therefore, the district may not withhold any information under section 552.101 on that ground.

Section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone number, social security number, and the family member information of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure, regardless of whether the officer requested confidentiality under section 552.024 or section 552.1175 of the Government Code. *See Gov't Code* § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. In this instance, portions of the submitted information concern an officer who may no longer be employed by the district's police department, and it is unclear whether this individual is currently a licensed peace officer as defined by article 2.12 of the Code of Criminal Procedure. Therefore, to the extent the individual whose information is at issue is a licensed peace officer as defined by article 2.12, the district must withhold the personal information we have marked under section 552.117(a)(2) of the Government Code.

If the former district officer whose information is at issue is no longer a licensed peace officer, then we will address the applicability of section 552.117(a)(1) to his information, as well as information pertaining to the other district employees. Section 552.117(a)(1) of the Government Code excepts from disclosure the 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 of the Government Code. *See id.* §§ 552.117(a)(1), .024. We note that section 552.117 also encompasses personal cellular telephone numbers, provided that the cellular telephone service is not paid for by a governmental body. *See Open Records Decision No. 670 at 6 (2001)*. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. The district may only withhold information under section 552.117(a)(1) on behalf of a former or current employee who has made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. You do not inform us that the individuals whose information is at issue elected to withhold their personal information under section 552.024 prior to the date of this request. Therefore, if the employees whose information is at issue timely elected to keep their

personal information confidential under section 552.024, the district must withhold the information we have marked pursuant to section 552.117(a)(1); however, the district may only withhold the personal cellular telephone numbers we have marked if the cellular service was paid for with the employees' own funds. If the employees at issue did not make a timely request for confidentiality, the information at issue must be released.²

You assert some of the remaining information is excepted from public disclosure under section 552.130 of the Government Code, which provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). The district must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code.

You raise section 552.135 of the Government Code for portions of the remaining information. Section 552.135 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.

Id. § 552.135(a)-(c). 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

²As our ruling is dispositive of this information, we need not address your argument under section 552.1175 of the Government Code.

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 assert some of the remaining information reveals the identities of witnesses. However, you have not identified the 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 remaining information reveals the identity of an informer for the purposes of section 552.135. Thus, the district may not withhold the remaining information under section 552.135 of the Government Code.

Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). We have marked bank account and credit card numbers that the district must withhold under section 552.136 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). The e-mail addresses, which we have marked, are not a type specifically excluded by section 552.137(c). You state the owners of the e-mail addresses at issue have not consented to their release. Accordingly, the district must withhold the marked e-mail addresses under section 552.137 of the Government Code.

We note that some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the district must withhold the information we have marked under section 552.101 in conjunction with common-law privacy and section 552.102 of the Government Code. To the extent the information we have marked pertains to a licensed peace officer as defined by article 2.12, the district must withhold this information under section 552.117(a)(2) of the Government Code. If this individual is not a licensed peace officer, then the district must withhold the information we have marked under

section 552.117(a)(1), if this individual and the remaining district employees timely elected to keep their personal information confidential; however, the district may withhold the marked cellular telephone numbers under section 552.117(a)(1) only if the district did not pay for the cellular service. The district must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code. The district must withhold the bank account and credit card numbers we have marked under section 552.136 of the Government Code. The district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. The remaining information must be released, but only in accordance with copyright law.

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,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/cc

Ref: ID# 363250

Enc. Submitted documents

cc: Requestor
(w/o enclosures)