



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 17, 2009

Ms. Bertha Bailey Whatley
Chief Legal Counsel
Fort Worth Independent School District
100 North University Drive
Fort Worth, Texas 76107

OR2009-17920

Dear Ms. Whatley:

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# 364565.

The Fort Worth Independent School District (the "district"), which you represent, received a request for three categories of information pertaining to a named district employee. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the United States Department of Education Family Policy Compliance Office has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, 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.¹ See 20 U.S.C. § 1232g(b); see also *id.* § 1232g(a)(4)(A) (defining "education records"); Open Records Decision No. 462 at 15 (1987). 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

¹A copy of this letter may be found on the Office of the Attorney General's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). You have submitted redacted and unredacted education records for our review. Because our office is prohibited from reviewing an education record to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records. Such determinations under FERPA must be made by the educational authority in possession of the education records.² However, to the extent you determine the information you have submitted is not protected by FERPA, we will consider your other arguments against disclosure.

Next, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022 states in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). Upon review, we find the submitted information is part of a completed investigation made by the district. Pursuant to section 552.022(a)(1) of the Government Code, a completed investigation is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. Section 552.116 of the Government Code is a discretionary exception that protects a governmental body's interest and may be waived. *See* 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 confidential for the purposes of section 552.022. Thus, the district may not withhold any portion of the submitted information on this basis. 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 section 552.101 is other law for purposes of section 552.022, we will consider your other arguments under this exception.

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

²In 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.

Code § 552.101. Section 552.101 encompasses information protected by other statutes, such as 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 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). In that opinion, this office also concluded that a teacher is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* In addition, the Third Court of Appeals 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.).

You argue that some of the submitted information consists of evaluations or written reprimands of an educator subject to section 21.355. You inform us that the employee at issue is a certified teacher. Based on your representations and our review, we conclude the information we have marked is confidential under section 21.355 of the Education Code. Therefore, the district must withhold the marked evaluations and letter of reprimand under section 552.101 of the Government Code. However, you have failed to explain how the remaining information you seek to withhold consists of evaluations or written reprimands as contemplated by section 21.355 of the Education Code or as interpreted by *North East Indep. Sch. Dist.* See Educ. Code § 21.353 (teachers shall be appraised only on basis of classroom teaching performance and not in connection with extracurricular activities). Accordingly, the district may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Next, you assert some of the remaining information is excepted from disclosure under section 552.101 of the Government Code 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). For information to be protected from public disclosure by the common-law right of privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976). In *Morales v. Ellen*, the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. Here, however, the submitted information does not relate to an allegation of sexual harassment. Because the allegations do not concern sexual harassment, we find that *Ellen* is not applicable in this instance. Consequently, the district may not withhold any of the submitted information under section 552.101 in conjunction with common-law privacy on the basis of *Morales v. Ellen*.

You also contend that some of the remaining information is excepted from public disclosure under constitutional privacy, which is also encompassed by section 552.101 of the Government Code. 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. *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 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. ORD 455 at 4. 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.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)).

Upon review, we find the district has not demonstrated how the remaining information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the district may not withhold any of the remaining information under section 552.101 on the basis of constitutional privacy.

Next, you raise section 552.101 of the Government Code in conjunction with the informer's privilege for portions of the remaining information. Section 552.101 encompasses information protected by the informer's privilege, which has long been recognized by Texas courts. *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." 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 Roviario v. United States*, 353 U.S. 53, 60 (1957); Open Records Decision No. 549 at 5 (1990).

Although you raise the informer's privilege for some of the remaining information, you have not identified the laws that were allegedly violated, nor have you explained whether the alleged violations carry any civil or criminal penalties. Further, you have not sufficiently demonstrated that a violation of law was reported to an official having a duty of inspection or of law enforcement. We also note 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. Accordingly, we find you have failed to demonstrate the informer's privilege is applicable to the information at issue. Thus, the district may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with the informer's privilege.

Finally, we note that a portion of the remaining information may be subject to section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the current 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 this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Whether 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). Pursuant to section 552.117(a)(1), the district must withhold the social security number, home address, home telephone number, and family member information of a current or former district employee who elected, prior to the district's receipt of the request for information, to keep such information confidential. We have marked the information subject to section 552.117. If the employee at issue timely elected to withhold his personal information, the district must withhold the information we have marked pursuant to section 552.117(a)(1) of the Government Code. If the employee did not make a timely election to keep his personal information confidential, it must be released.

In summary, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. If the employee at issue timely elected to withhold his personal information, the district must withhold the information we have marked pursuant to section 552.117(a)(1) of the Government Code. The remaining 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,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/sdk

Ref: ID# 364565

Enc. Submitted documents

c: Requestor
(w/o enclosures)