



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 7, 2010

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

OR2010-04912

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# 375104.

The Van Alstyne Independent School District (the "district"), which you represent, received 44 requests from the same requestor for information involving four current or former administrators of the district and a named attorney. You state that some of the requested information has been released. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.111, 552.116, 552.117, and 552.135 of the Government Code.¹ You also inform us that two of the individuals to whom the submitted information pertains were notified of these requests for information and of their right to submit comments to this office as to why the information should or should not be released. *See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released). We received arguments for an attorney for one of the individuals

¹We note that the requestor authorizes the district to redact credit card, debit card, charge card, and access device numbers pursuant to section 552.136 of the Government Code, private e-mail addresses pursuant to section 552.137 of the Government Code, and social security numbers pursuant to section 552.147 of the Government Code. Therefore, those types of information are not responsive to these requests, and thus we need not address the district's assertion of section 552.137.

who were notified.² We have considered all of the submitted arguments and reviewed the information you submitted.

Initially, we must determine whether the district complied with section 552.301 of the Government Code in requesting this decision. 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. *See id.* § 552.301(a). Section 552.301(b) provides that a governmental body must ask for the attorney general's decision and claim its exceptions to disclosure no later than the tenth business day after the date of its receipt of the written request for information. *See id.* § 552.301(b). 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; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

You inform us that the district received the instant requests for information on January 11, 2010. You also inform us that the district sent a request for clarification of these requests on January 18 and received the requestor's response on January 20. *See Gov't Code* § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). As we have no indication that the district acted in bad faith in seeking clarification in this instance, we consider the district's ten-business-day period for requesting a decision under section 552.301(b) to have begun on January 20, 2010, the date of the district's receipt of the requestor's response to the request for clarification. *See City of Dallas v. Abbott*, No. 07-0931, 2010 WL 571972, at *3 (Tex. Feb. 19, 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). Thus, we consider the district's request for this decision, which was sent by United States Mail meter-marked January 28, 2010, to have been timely.³

We note that the submitted information includes education records. The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the 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 purpose of our review in the open records

²We note that the individual's attorney's claims generally correspond to arguments the district has submitted under sections 552.101, 552.102, 552.107, 552.111, and 552.116 of the Government Code. We will consider the attorney's claims under those exceptions in the course of our consideration of the district's arguments.

³We note that the district timely completed its submissions under section 552.301 by submitting the information at issue via United States Mail meter-marked February 2, 2010. *See Gov't Code* § 552.301(e).

ruling process under the Act.⁴ 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”). In this instance, the submitted information includes education records in both redacted and unredacted form. Because our office is prohibited from reviewing education records to determine the applicability of FERPA, we will not address FERPA with respect to the submitted education records. Such determinations under FERPA must be made by the educational authority in possession of the education records.⁵ We will consider your exceptions to disclosure of the submitted information under the Act.

We also note that the submitted information includes notices and minutes of meetings of the district’s board of trustees. Notices and minutes of a governmental body’s public meetings are specifically made public under provisions of the Open Meetings Act, chapter 551 of the Government Code. *See* Gov’t Code §§ 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body’s chief administrative officer or officer’s designee), 551.041 (governmental body shall give written notice of date, hour, place, and subject of each meeting), 551.043 (notice of meeting of governmental body must be posted in place readily accessible to general public for at least 72 hours before scheduled time of meeting). As a general rule, the exceptions to disclosure found in the Act do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the meeting notices and minutes we have marked must be released.

We next note that some of the remaining information falls within the scope of section 552.022 of the Government Code. Section 552.022(a) provides in part that

the following categories of information are public information and not excepted from required disclosure under [the Act] 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 [of the Government Code];

....

⁴A copy of this letter may be found on the attorney general’s website, <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

⁵In the future, if the district does obtain parental consent to submit unredacted education records and seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(17) information that is also contained in a public court record; and

(18) a settlement agreement to which a governmental body is a party.

Gov't Code § 552.022(a)(1), (3), (17)-(18). The submitted information includes completed investigations of a former employee's grievances and of complaints about behavior at a staff meeting; completed evaluations of the former employee; an employment contract with the former employee; documents that were filed with a court; and a settlement agreement between the district and the former employee. Those records are subject to section 552.022(a) and must be released, unless they are expressly confidential under other law or subject to section 552.022(a)(1) but excepted from disclosure under section 552.108 of the Government Code. The district does not claim an exception under section 552.108. Although the district does claim sections 552.107(1), 552.111, and 552.116 of the Government Code, those sections are discretionary exceptions that protect a governmental body's interests and may be waived. *See id.* § 552.007; Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under Gov't Code § 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived); 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.107(1), 552.111, and 552.116 do not make information expressly confidential for the purposes of section 552.022(a). Therefore, none of the submitted information encompassed by section 552.022(a) may be withheld under sections 552.107(1), 552.111, or 552.116.⁶

The Texas Supreme Court has held, however, that the Texas Rules of Evidence and Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege, which is encompassed by section 552.107(1), also is found at Texas Rule of Evidence 503. The attorney work product privilege, which is encompassed by section 552.111, also is found at Texas Rule of Civil Procedure 192.5. Accordingly, we will determine whether any of the information that is subject to section 552.022(a) may be withheld under rule 503 or rule 192.5. Additionally, we will determine whether any of the information that is not subject to section 552.022(a) may be withheld under section 552.107(1) or section 552.111. We also will address sections 552.101, 552.102, 552.117, and 552.135 of the Government Code, which are other law that makes information confidential for the purposes of section 552.022(a).

⁶As section 552.022 encompasses all of the information for which the district claims section 552.116, this decision does not address that exception.

Texas Rule of Evidence 503 enacts the attorney-client privilege and provides in part:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You have marked information encompassed by section 552.022(a) for which the district claims the attorney-client privilege. We note that the information at issue includes a report of an investigation conducted by an attorney for the district that would ordinarily be privileged under rule 503. The submitted information reflects, however, that the district has provided a copy of the attorney's report to the Texas Workforce Commission (the "TWC"), which is not a privileged party under rule 503. We find that, in doing so, the district has waived the attorney-client privilege with respect to the report. *See* TEX. R. EVID. 511;

Axelson, Inc. v. McIlhany, 798 S.W.2d 550, 554 (Tex. 1990) (attorney-client and work product privileges were waived when privileged information was disclosed to Federal Bureau of Investigation, Internal Revenue Service, and Wall Street Journal); *Jordan v. Fourth Supreme Judicial Dist.*, 701 S.W.2d 644, 649 (Tex.1986). We therefore conclude that the district may not withhold the attorney's report under rule 503. We also conclude that the district has not demonstrated that the attorney-client privilege is applicable to any other information encompassed by section 552.022(a). Therefore, none of the remaining information may be withheld under Texas Rule of Evidence 503.

Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. For the purposes of section 552.022(a), information is confidential under rule 192.5 only to the extent that the information implicates the core work product aspect of the work product privilege. *See* ORD 677 at 9-10. Rule 192.5 defines core work product as the work product of an attorney or an attorney's representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. *See* TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate that the material was (1) created for trial or in anticipation of litigation and (2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *Id.*

The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat'l Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. The second part of the work product test requires the governmental body to show that the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney's or an attorney's representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided that the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d at 427.

The district claims the attorney work product privilege for some of the remaining information that is subject to section 552.022(a). Having considered your arguments, we find that you have not demonstrated that any of the information at issue reveals the mental impressions, opinions, conclusions, or legal theories of an attorney for the district or an attorney's representative. We also find that the information for which the district claims the attorney work product privilege has generally been disclosed to non-privileged parties. *See* TEX. R.

EVID. 511; *Axelson, Inc. v. McIlhany*, 798 S.W.2d at 554. We therefore conclude that the district may not withhold any of the remaining information encompassed by section 552.022(a) under Texas Rule of Civil Procedure 192.5.

Next, we address the district's claims for the information that is not subject to section 552.022(a). We begin with sections 552.107 and 552.111 of the Government Code, as those are the district's most inclusive exceptions to disclosure. Section 552.107(1) protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A)-(E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You contend that some of the remaining information consists of privileged attorney-client communications. You have identified some of the parties to the communications. You also state that the communications "were made in confidence and have not been shared or distributed to others." Based on your representations and our review of the information at issue, we have marked information that may generally be withheld under section 552.107(1).

We note, however, that both of the e-mail strings we have marked contain communications with a non-privileged party. To the extent that those communications, which we also have marked, exist separate and apart from the e-mail strings, they may not be withheld under section 552.107(1) and must be released. We find that the district has not demonstrated that any of the remaining information at issue either consists of or documents communications between or among privileged parties. *See* TEX. R. EVID. 503(b)(1)(A)-(E). We therefore conclude that the district may not withhold any of the remaining information under section 552.107(1).

Section 552.111 of the Government Code excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. This exception encompasses the attorney work product privilege found at Texas Rule of Civil Procedure 192.5. *See* TEX. R. CIV. P. 192.5; *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); ORD 677 at 4-8. Rule 192.5 defines attorney work product as consisting of

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX.R.CIV.P. 192.5. A governmental body that seeks to withhold information on the basis of the attorney work product privilege under section 552.111 bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. *See id.*; ORD 677 at 6-8. In order for this office to conclude that information was created or developed in anticipation of litigation, we must be satisfied that

(a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and (b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat’l Tank Co. v. Brotherton, 851 S.W.2d at 207. A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204; ORD 677 at 7.

You contend that some of the remaining information constitutes attorney work product. You have not demonstrated, however, that any of the information at issue consists of material prepared, mental impressions developed, or communications made in anticipation of litigation or for trial. *See* TEX.R.CIV.P. 192.5. Moreover, the information at issue has generally been disclosed to non-privileged parties. *See* TEX. R. EVID. 511; *Axelson, Inc. v. McIlhany*, 798 S.W.2d at 554. We therefore conclude that the district may not withhold any of the remaining information on the basis of the attorney work product privilege under section 552.111 of the Government Code.

Turning to the district's other claims, 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 exception encompasses information that other statutes make confidential. You claim section 552.101 in conjunction with section 21.355 of the Education Code, which provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. 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). We have determined that for the purposes of section 21.355, the word "teacher" means a person who is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See* ORD 643 at 4. We also have determined that the word "administrator" in section 21.355 means a person who is required to and does in fact hold an administrator's certificate under subchapter B of chapter 21 of the Education Code and is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.* Additionally, a court has concluded that a written reprimand constitutes an evaluation for the 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.).

The district contends that some of the remaining information consists of evaluations of an administrator who was required to and did hold a certificate under chapter 21 of the Education Code. Based on the district's representations and our review of the information at issue, we have marked information that the district must withhold under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. We conclude that the district has not demonstrated that any of the remaining information consists of an evaluation of a teacher or administrator for the purposes of section 21.355; therefore, the district may not withhold any of the remaining information under section 552.101 on the basis of section 21.355.

Section 552.101 also encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex.*

Indus. Accident Bd., 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the specific types of information that are held to be highly intimate or embarrassing in *Industrial Foundation*. See *id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined that other types of information also are private under section 552.101. See generally Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private). Common-law privacy also protects certain types of information relating to an investigation of alleged sexual harassment in the workplace. See *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (public had legitimate interest in affidavit of person under investigation and conclusions of board of inquiry, but not in identities of individual witnesses and details of their personal statements beyond information contained in documents ordered released).

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). Section 552.102(a) protects information relating to public officials and employees. The privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 and *Industrial Foundation*. 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 to Gov’t Code § 552.102). Accordingly, we consider the district’s privacy claims under sections 552.101 and 552.102 together.

The district contends that information relating to the former employee’s grievances, the investigation of the staff meeting, and the negotiation of the settlement agreement is protected by common-law privacy. We note that the information in question pertains to current or former officials and employees of the district and their conduct in the workplace. As we have explained on many occasions, information concerning public employees and public employment is generally a matter of legitimate public interest. See, e.g., Open Records Decision 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), 470 at 4 (1987) (job performance does not generally constitute public employee’s private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (1983) (manner in which public employee’s job was performed cannot be said to be of minimal public interest), 329 (1982) (reasons for employee’s resignation ordinarily not private).

Having considered your arguments and reviewed the information at issue, we have marked one item of information that is highly intimate or embarrassing and not a matter of legitimate public interest. The district must withhold that information under section 552.101 in conjunction with common-law privacy. We find that none of the remaining information at issue pertains to an investigation of alleged sexual harassment. Therefore, the district may not withhold any of the remaining information under section 552.101 on the basis of the

decision in *Morales v. Ellen*. We also find that the public has a legitimate interest in the matters to which the remaining information at issue pertains. We therefore conclude that the district may not withhold any of the remaining information on privacy grounds under section 552.101 or section 552.102(a).

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 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 (1988), 208 at 1-2 (1978)*. The 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*.

The district claims the informer's privilege for information relating to alleged violations of the educators' code of ethics, section 247.2 of title 19 of the Texas Administrative Code, and district policy. We note that witnesses who provide information in the course of an investigation but do not make the initial report of a violation are not informants for the purposes of the common-law informer's privilege. To the extent that the information at issue identifies any individual who reported a violation of the educators' code of ethics, we note that the code is enforced by the Texas State Board for Educator Certification (the "SBEC"). *See 19 T.A.C. § 247.1*. The district does not inform us that any violation of the educators' code of ethics was reported to the SBEC or that the district is authorized to enforce the code of ethics. Likewise, the district does not inform us of any alleged violation of a district policy that would be punishable by a civil or criminal penalty. *See ORD 582, 515*. We therefore conclude that the district may not withhold any of the remaining information under section 552.101 on the basis of the common-law informer's privilege.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code §§ 552.117, .024*. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989)*. Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former

official or employee who did not timely request under section 552.024 that the information be kept confidential. The district must withhold the information we have marked under section 552.117(a)(1) to the extent it consists of the home address, home telephone number, or family member information of a current or former official or employee of the district who timely requested confidentiality for the information under section 552.024.

Lastly, section 552.135 of the Government Code provides in part:

(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). The district also claims section 552.135 for information relating to an investigation of alleged violations of the educators' code of ethics, section 247.2 of title 19 of the Texas Administrative Code, and district policy. We note that section 552.135 protects the identity of an informer, but does not protect witness information or statements. In this instance, the district has not identified any current or former student or employee of the district who reported an alleged violation of the educators' code of ethics or district policy. We therefore conclude that the district may not withhold any of the remaining information under section 552.135 of the Government Code.

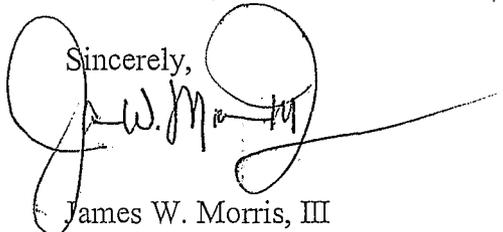
In summary: (1) the meeting notices and minutes must be released pursuant to sections 551.022, 551.041, and 551.043 of the Government Code; (2) the information we have marked under section 552.107(1) of the Government Code may generally be withheld, but the marked communications with non-privileged parties must be released to the extent they exist separate and apart from the e-mail strings; (3) the marked information that is confidential under section 21.355 of the Education Code must be withheld under

section 552.101 of the Government Code; (4) the marked information that is protected by common-law privacy also must be withheld under section 552.101; and (5) the information we have marked under section 552.117(a)(1) of the Government Code must be withheld to the extent it consists of the home address, home telephone number, or family member information of a current or former official or employee of the district who timely requested confidentiality for the information under section 552.024 of the Government Code. The rest of the submitted information must be released. This ruling does not address the applicability of FERPA to the submitted information. Should the district determine that all or portions of the submitted information consist of "education records" that must be withheld under FERPA, the district must dispose of that information in accordance with FERPA, rather than the Act.

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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/cc

Ref: ID# 375104

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