ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 19, 2010

Mr. John A. Kazen
Kazen, Meurer & Pérez, L.L.P.
P.O. Box 6237
Laredo, Texas 78042

OR2010-07164

Dear Mr. Kazen:

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# 379947.

The Laredo Independent School District (the "district"), which you represent, received a request for the following three categories of information from the 2009-2010 school year pertaining to a named district elementary school: (1) documents related to an audit conducted on the school's librarian; (2) documents regarding any disciplinary action taken against the named school's librarian; and (3) investigation documents shared between district administrators that relate to the named school's librarian or to other matters pertaining to the named school. You claim 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 you state the submitted information is responsive to the first category of the request. We assume to the extent information responsive to categories two and three of the request existed when the district received the request for information, you have released it to the requestor. If not, then you must do so at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we must address the district's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See* Gov't Code § 552.301(b). Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of the receipt of the request: (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *See id.* § 552.301(e)(1)(A)-(D). You state the district received the request for information on February 15, 2010. However, the district did not request a ruling from this office until March 11, 2010, and did not submit the responsive information until March 25, 2010. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). You do not inform this office the district was closed for business any dates between February 15, 2010, and March 8, 2010. Thus, we conclude the district failed to comply with the requirements mandated by subsections552.301(b) and (e).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *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, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). The presumption that information is public under section 552.302 can be overcome by demonstrating that the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). You claim the submitted information is excepted from disclosure under sections 552.101 and 552.116 of the Government Code. Section 552.116 is a discretionary exception to disclosure that a governmental body may waive. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Accordingly, the district waived its claim under section 552.116, and it may not withhold any of the information at issue under that section. However, section 552.101 of the Government Code can provide a compelling reason for non-disclosure under section 552.302; therefore, we will consider whether this exception requires the district to withhold any portion of the submitted information. We will also consider the comments submitted by an attorney

representing the librarian at issue. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses common-law privacy, which 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 satisfied. *Id.* at 681-82. The information at issue pertains to a district investigation of potentially inappropriate work conduct by a district librarian. As this office has often stated, information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and is, therefore, generally not protected from disclosure under common-law privacy. *See, e.g.*, Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees), 423 at 2 (1984) (scope of public employee privacy is narrow), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest). Thus, because the submitted information is of legitimate public interest, it may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 of the Government Code also 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 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). In Open Records Decision No. 643, we determined for 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. The Third Court of Appeals has held a written reprimand constitutes an evaluation for purposes of section 21.355. *See Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin, 2006).

An attorney representing the librarian at issue argues two of the submitted documents are evaluations of the librarian made confidential by section 21.355. Upon review, the documents at issue contain facts about the allegations against the librarian, statements as to how the investigation should continue, and statements anticipating possible disciplinary

action. The attorney representing the librarian does not explain, and the submitted information does not reflect, how these documents constitute evaluations for purposes of section 21.355. Consequently, this information may not be withheld under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Some of the remaining information may be subject to section 552.117(a)(1) of the Government Code.[1] This section 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 timely request that such information be kept confidential under section 552.024. Gov't Code § 552.117(a)(1). Additionally, section 552.117 encompasses personal cellular telephone numbers, provided the cellular telephone service is paid for by the employee with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117 exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024). 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 employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made.

Accordingly, if the district librarian whose information we marked timely elected to keep her home address, home telephone number, and family member information confidential pursuant to section 552.024, the district must withhold her information under section 552.117(a)(1). If the librarian did not timely elect under section 552.024, her information must be released. We also marked a cellular telephone number pertaining to a district employee, which must be withheld under section 552.117(a)(1) if it is the employee's personal cellular telephone number and the employee timely requested confidentiality for this number. If the district employee did not timely request confidentiality or the marked cellular telephone number is not a personal cellular telephone number, this number must be released along with the remaining information.

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

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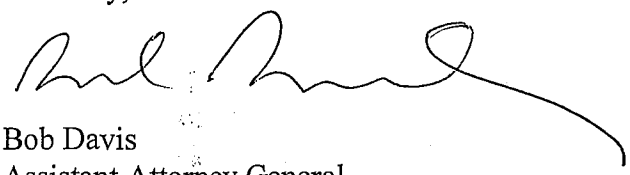
[1]The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470.

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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/eeg

Ref: ID# 379947

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

Ms. Julissa Herrera
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