



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 20, 2011

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

OR2011-05537

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# 415137.

The Laredo Independent School District (the "district"), which you represent, received a request for information pertaining to a named former employee. You claim the requested information is excepted from disclosure under section 552.101 of the Government Code. You also state that the district believes the information may involve the interests of a third party. You state you have notified the interested third party of this request and of her right to submit arguments to this office stating why her information should not be released. *See* Gov't Code § 552.304 (providing that interested third party may submit comments stating why information should or should not be released).¹ We have considered the exception you claim and reviewed the submitted information.

You assert the submitted information is 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

¹As of the date of this letter, we have not received any arguments from the interested employee regarding the information at issue.

encompasses the doctrine of 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate or 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. You cite to *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), in support of your argument under common-law privacy for the submitted information. In *Ellen*, the court addressed the applicability of the common-law privacy doctrine to files of an investigation of sexual harassment. Here, however, the information at issue does not relate to an investigation of sexual harassment. Because the information does 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 *Ellen*.

Section 552.101 of the Government Code also encompasses the common-law 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); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority. Open Records Decision No. 515 at 3 (1988). 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 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. 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. However, the informer's privilege does not apply where the informant's identity is known to the individual who is the subject of the complaint. See Open Records Decision No. 208 at 1-2 (1978).

In this instance, you claim the information at issue is excepted from disclosure by the common-law informer's privilege. However, you fail to inform this office of any specific criminal or civil statute that the district believes to have been violated. As you have not demonstrated that the information at issue pertains to an alleged violation of any specific criminal or civil law, none of the information may be withheld on the basis of the informer's privilege.

We note some of the submitted documents may be excepted from public disclosure under section 552.101 in conjunction with 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). We 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 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. *See id.*

You do not indicate whether the individual whose evaluations are at issue held an administrator’s certificate under chapter 21 of the Education Code and was performing the functions of an administrator at the time of the respective evaluations. Therefore, we must rule conditionally. To the extent the individual in question did hold an administrator’s certificate and was functioning as an administrator at the time of the evaluations, then the district must withhold the documents we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. To the extent the individual in question did not hold an administrator’s certificate or was not functioning as an administrator at the time of the evaluations, then the information at issue is not confidential under section 21.355 of the Education Code and may not be withheld under section 552.101 of the Government Code.

We note common-law privacy also protects certain types of personal financial information. Financial information that relates only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 at 9-12 (1992) (identifying public and private portions of certain state personnel records), 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body). Whether financial information is subject to a legitimate public interest and, therefore, not protected by common-law privacy, must be determined on a case-by-case basis. *See* Open Records Decision No. 373 (1983). We note the public generally has a legitimate interest in information that relates to public employment and public employees, and information that pertains to an employee’s actions as a public servant generally cannot be considered beyond the realm of legitimate public interest. *See* Open Records Decisions Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find that the information we have marked is highly intimate or embarrassing and of no legitimate public interest. Accordingly,

the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

We note the remaining information includes information that is excepted from disclosure under section 552.102(a) of the Government Code.² Section 552.102(a) 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). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Having carefully reviewed the information at issue, we have marked the information that must be withheld under section 552.102(a) of the Government Code.

We note the submitted information contains the personal information of the named former employee and another district employee. 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 this information be kept confidential under section 552.024 of the Government Code.³ See Gov't Code §§ 552.117(a)(1), .024. We note section 552.117 is applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. See Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 of the Government Code not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). 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 made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. We note the submitted information contains an election form for one of the employees whose information is at issue. This election form reflects that, at the time the district received the request, the named former employee elected to restrict access to her personal information under section 552.024. Accordingly, the district must withhold this employee's personal information, which we have marked, under section 552.117(a)(1) of the Government Code. The marked cellular telephone number may only be withheld, however, if the employee concerned paid for the cellular telephone service with her personal funds. If the other employee whose information is at issue timely elected to withhold her social security

²The Office of the Attorney General will raise a mandatory exception like section 552.102 on behalf of a governmental body, but ordinarily will not raise other exceptions.

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

number, then this information must be withheld under section 552.117(a)(1). The district may not withhold this social security number under section 552.117(a)(1) if the employee did not make a timely election to keep her information confidential.⁴

We also note the information at issue contains personal e-mail addresses. 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). *See* Gov’t Code § 552.137(a)-(c). The e-mail addresses listed in the information at issue are not specifically excluded by section 552.137(c). As such, these e-mail addresses, which we have marked, must be withheld under section 552.137, unless the owners of the addresses have affirmatively consented to their release.⁵ *See id.* § 552.137(b).

In summary, to the extent the individual in question held an administrator’s certificate and was functioning as an administrator at the time of the evaluations, 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. The district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The district must also withhold the information we have marked under section 552.102(a) of the Government Code. The district must withhold the named former employee’s personal information, including the cellular telephone number if she paid for the cellular telephone service with her personal funds, we have marked under section 552.117(a)(1) of the Government Code as well as the other employee’s information we marked if this employee elected to keep this information confidential prior to the district’s receipt of the request for information. The district must withhold the personal e-mail addresses we have marked under section 552.137, unless the owners of the addresses have affirmatively consented to their release. 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

⁴Regardless of the applicability of section 552.117, section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act. *See* Gov’t Code § 552.147(b).

⁵Open Records Decision No. 684 (2009) serves as a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137, without the necessity of requesting an attorney general decision.

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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/eeg

Ref: ID# 4154137

Enc. Submitted documents

cc: Requestor
(w/o enclosures)