



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 20, 2012

Ms. Leandra Costilla Ortiz
Staff Attorney for Brownsville ISD
1900 Price Road
Brownsville, Texas 78521-2417

OR2012-11315

Dear Ms. Ortiz:

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# 459543 (PIR# 6637).

The Brownsville Independent School District (the "district") received a request for information pertaining to an incident involving possible testing violations. You state the district has released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.116, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2012-08852 (2012). We have no indication the law, facts, and circumstances on which Open Records Letter No. 2012-08852 was based have changed. Accordingly, with regard to the requested information that is identical to the information previously requested and ruled upon by this office in the prior ruling, we conclude the district must continue to rely on Open Records Letter No. 2012-08852 as a previous determination and withhold or release the previously ruled upon information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted information is not encompassed by the previous ruling, we will address your arguments against its release.

Next, we note 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"), 20 U.S.C. § 1232g, does not permit state and local educational authorities to disclose to this office, without parental consent or an adult student's 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 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 unredacted education records. Because our office is prohibited from reviewing these education records to determine the applicability of FERPA, we will not address the applicability of FERPA to any of the submitted records. *See* 20 U.S.C. § 1232g(a)(1)(A). Such determinations under FERPA must be made by the educational authority in possession of the education record.² We will, however, consider your arguments against disclosure of the submitted information.

We address your assertion of section 552.116 of the Government Code first, as it is potentially the most encompassing. Section 552.116 of the Government Code provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school

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

²In the future, if the district does obtain parental or an adult student's 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.

district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116(a), (b). You contend the submitted information constitutes audit working papers and audit investigation notes. We note, however, section 552.116 is intended to protect the auditor's interests. In this instance, you inform us the audit is being conducted by the Texas Education Agency pursuant to section 39.057(a)(8) of the Education Code. The information at issue is maintained by the district, who we understand is the auditee. As the auditee, the district cannot assert section 552.116 in order to protect its own interest in withholding the information. Thus, section 552.116 is not applicable, and the district may not withhold any of the submitted information under section 552.116 of the Government Code.

You next assert portions of the submitted information are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law informer's privilege. 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 section 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 common-law informer's privilege protects from disclosure 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. 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 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 (1988). The privilege excepts the informer's statement only to the extent necessary to protect the informer's identity. *See* Open Records Decision No. 549 at 5 (1990).

You seek to withhold portions of the submitted information under the common-law informer's privilege. However, you do not inform us what criminal or civil statute was reported to be violated, nor do you explain how the district is responsible for enforcing any such statute. Therefore, the district may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with the informer's privilege.

Section 552.135 of the Government Code provides the following:

(a) "Informer" means a student or a former student or an employee or former employee of a school district who has furnished a report of another person's 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].

Gov't Code § 552.135. 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 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 state the district has collected several eyewitness statements that should be protected from disclosure. Upon review, we find you have failed to demonstrate any of the submitted information identifies informers for purposes of section 552.135. Thus, the district may not withhold any of the submitted information under section 552.135 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses, telephone numbers, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code.³ *See* Gov't Code § 552.117(a)(1). 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 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. We have marked a telephone number and other personal information pertaining to district employees that may be subject to section 552.117(a)(1). Accordingly, if the telephone number we have marked is the district employee's home telephone number, and she timely elected confidentiality

³The 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 (1987).

under section 552.024, the district must withhold this information under section 552.117(a)(1) of the Government Code. Additionally, if the other district employee whose information we have marked timely elected confidentiality under section 552.024, the district must withhold her information under section 552.117(a)(1) of the Government Code. In this instance, the remaining information must be released. If the marked number is not the district employee's home telephone number or she did not make a timely election, the district may not withhold her marked telephone number under section 552.117(a)(1) of the Government Code. Further, if the other district employee whose information we have marked did not timely elect confidentiality under section 552.024, the district may not withhold her information under section 552.117(a)(1) of the Government Code. In this instance, all of the submitted information must be released.

In summary, to the extent the requested information is identical to the information previously requested and ruled upon by this office in the prior ruling, we conclude the district must continue to rely on Open Records Letter No. 2012-08852 as a previous determination and withhold or release the previously ruled upon information in accordance with that ruling. If the telephone number we have marked is the district employee's home telephone number, and she timely elected confidentiality under section 552.024 of the Government code, the district must withhold this information under section 552.117(a)(1) of the Government Code. Additionally, if the other district employee whose information we have marked timely elected confidentiality under section 552.024 of the Government Code, the district must withhold her information under section 552.117(a)(1) of the Government Code. The district must release 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 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,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/bhf

Ref: ID# 459543

Enc. Submitted documents

c: Requestor
(w/o enclosures)