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ATTORNEY GENERAL OF TEXAS

November 16, 2015

Ms. Ylise Janssen
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Austin Independent School District
1111 West Sixth Street, Suite A-240
Austin, Texas 78703

OR2015-24033

Dear Ms. Janssen:

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# 587581.

The Austin Independent School District (the "district") received a request for specified district police records pertaining to automobile accidents, as well as certain internal affairs investigations, incident reports, and invoices. The district claims the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the claimed exception and reviewed the submitted information.

Initially, we note the district has submitted requested responsive internal affairs investigation records, but not any information responsive to the other requested categories of information. Although the district states the submitted information is a representative sample of the requested information, we find the submitted information is not representative of the other types of information to which the requestor seeks access. Please be advised, this open records letter ruling applies only to the type of information the district has submitted for our review. This ruling does not authorize the district to withhold any information that is substantially different from the type of information it submitted to this office. *See Gov't Code § 552.302.* Accordingly, to the extent any information responsive to the remainder of the request for information existed in the possession of the district when it

received the request, we assume the district has released this information to the requestor. *See* 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). If the district has not released any such information, it must do so at this time. *See* Gov't Code §§ 552.301(a), .302.

The United States Department of Education Family Policy Compliance Office 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 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"). The district has submitted, among other things, unredacted education records for our review. Because our office is prohibited from reviewing these education records 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

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[.]"³ Gov't Code § 552.102(a). The Texas Supreme Court has 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.*, 354 S.W.3d 336 (Tex. 2010). The district must withhold the information we have marked under section 552.102(a) of the Government Code.⁴

¹A copy of this letter may be found on the Office of the Attorney General's website: http://www.oag.state.tx.us/opinopen/og_resources.shtml.

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.

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987).

⁴As our ruling is dispositive, we do not address the district's other argument to withhold this information.

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. Section 552.101 encompasses section 58.007 of the Family Code, which makes confidential juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997. *See* Fam. Code § 58.007(c). Section 58.007(c) provides the following:

Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

Id. Upon review, we find some of the submitted information involves alleged juvenile delinquent conduct or conduct indicating a need for supervision that occurred after September 1, 1997. *See id.* §§ 51.02(2) (for purposes of section 58.007(c), “child” means person who is ten years of age or older and under seventeen years of age when conduct occurred), .03(a), (b) (defining “delinquent conduct” and “conduct indicating a need for supervision”). The exceptions in section 58.007 do not appear to apply. Therefore, the district must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *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. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has found the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information, *see* Open Records Decision No. 455 (1987); and the identity of a juvenile

offender or a juvenile victim of abuse or neglect, *see* Open Records Decision No. 394 (1983); *cf.* Fam. Code §§ 58.007(c), 261.201. However, common-law privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about a public employee's job performance. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Id.* at 682. In considering whether a public citizen's date of birth is private, the Third Court of Appeals looked to the supreme court's rationale in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336 (Tex. 2010). *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). As discussed above, the supreme court concluded public employees' dates of birth are private under section 552.102 of the Government Code because the employees' privacy interest substantially outweighed the negligible public interest in disclosure. *Texas Comptroller*, 354 S.W.3d at 347-48. Based on *Texas Comptroller*, the court of appeals concluded the privacy rights of public employees apply equally to public citizens and, thus, public citizens' dates of birth are also protected by common-law privacy pursuant to section 552.101. *City of Dallas*, 2015 WL 3394061, at *3.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Id.* at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.* Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released under *Ellen*, but the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. *See* Open Records Decision Nos. 393 (1983), 339 (1982).

The submitted information contains an adequate summary of an investigation into alleged sexual harassment. Thus, the summary is not confidential under common-law privacy. However, the information within the summary that identifies the victim of the alleged harassment, which we have marked, is confidential under common-law privacy and the district must withhold it under section 552.101 of the Government Code on that ground. *See Ellen*, 840 S.W.2d at 525. The district must withhold the remaining information in the

investigation file, which we have also marked, under section 552.101 in conjunction with common-law privacy. *See id.*

We find some of the remaining information at issue, which we have marked or indicated, also satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. In addition, the submitted dates of birth of public citizens are confidential under common-law privacy. Accordingly, the district must withhold the remaining information we have marked or indicated and the submitted dates of birth of public citizens under section 552.101 of the Government Code in conjunction with common-law privacy. However, we conclude the remaining information is not confidential under common-law privacy, and the district may not withhold it under section 552.101 on that ground.

We note section 552.117 of the Government Code is applicable to some of the remaining information. Section 552.117(a)(2) excepts from public disclosure the home addresses, home telephone numbers, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with section 552.024 or section 552.1175 of the Government Code.⁵ Gov't Code § 552.117(a)(2). Section 552.117 also encompasses a personal cellular telephone number, provided a governmental body does not pay for the cellular telephone service. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). It is unclear whether the district police officers whose information is at issue are currently licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, the district must withhold the information we have marked or indicated under section 552.117(a)(2) of the Government Code if the employees at issue are currently licensed peace officers as defined by article 2.12; however, the district may only withhold the cellular telephone numbers at issue under section 552.117(a)(2) if the cellular telephone service was not provided to the employees at issue at public expense. If the employees are no longer licensed peace officers as defined by article 2.12, then the district may not withhold this information under section 552.117(a)(2).

Nevertheless, if these employees are no longer licensed peace officers, then the information at issue may be subject to section 552.117(a)(1) of the Government Code. Some of the remaining information also pertains to district employees who are not peace officers. Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code, except as provided by section 552.024(a-1). Gov't Code § 552.117(a)(1). Section 552.024(a-1) of the Government Code provides, “[a] school district may not require

⁵“Peace officer” is defined by article 2.12 of the Code of Criminal Procedure.

an employee or former employee of the district to choose whether to allow public access to the employee's or former employee's social security number." *Id.* § 552.024(a-l). Thus, the district may only withhold under section 552.117(a)(1) of the Government Code the home address and telephone number, emergency contact information, and family member information of a current or former employee or official of the district who requests this information be kept confidential under section 552.024. 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). Therefore, information may be withheld under section 552.117(a)(1) only 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. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 the information be kept confidential. According, regardless of whether the employees at issue are no longer currently licensed peace officers as defined by article 2.12, the district must withhold the information we have marked or indicated under section 552.117(a)(1) of the Government Code if the employees at issue timely requested confidentiality under section 552.024 of the Government Code; however, the district may only withhold the cellular telephone numbers at issue under section 552.117(a)(1) if the cellular telephone service was not provided to the employees at issue at public expense. Conversely, if the employees at issue are not currently licensed as peace officers as defined by article 2.12 and they did not timely request confidentiality under section 552.024, then the district may not withhold this information under section 552.117(a)(1).

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See* Gov't Code § 552.130. The district must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

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 id.* § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). The district does not inform us a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code.

We note some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

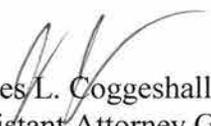
To conclude, the district must withhold the following: (1) the information we have marked under section 552.102(a) of the Government Code; (2) the information we have marked under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code; (3) the information we have marked or indicated and the submitted dates of birth of public citizens under section 552.101 of the Government Code in conjunction with common-law privacy; and (4) the information we have marked under sections 552.130 and 552.137 of the Government Code. The district must also withhold the information we have marked or indicated under section 552.117(a)(2) of the Government Code if the employees at issue are currently licensed peace officers as defined by article 2.12. If the employees at issue are not currently licensed peace officers as defined by article 2.12, then the district must withhold the information we have marked or indicated under section 552.117(a)(1) of the Government Code if the employees at issue timely requested confidentiality under section 552.024 of the Government Code. However, the district may only withhold the cellular telephone numbers at issue under section 552.117 of the Government Code if the cellular telephone service was not provided to the employees at issue at public expense. The district must release the remaining information, but may only release any copyrighted information in accordance with copyright law.⁶ 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.

⁶We note the remaining information contains a social security number. 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. Gov’t Code § 552.147(b).

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/bhf

Ref: ID# 587581

Enc. Submitted documents

c: Requestor
(w/o enclosures)