KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 4, 2015

Mr. Orlando "Jay" Juarez, Jr.
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216 West Village Boulevard, Suite 202
Laredo, Texas 78041

OR2015-04257

Dear Mr. Juarez:

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# 556935.

The San Marcos Consolidated Independent School District (the "district"), which you represent, received two requests from the same requestor for all e-mails mentioning a named individual and other specified terms during a specified time frame, as well as all documents pertaining to the employment and/or resignation of the named individual.[1] We understand you will redact information subject to section 552.117(a)(1) of the Government Code pursuant to section 552.024 of the Government Code.[2] You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.102,

[1]You state, and provide documentation showing, the requestor amended her request. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S. W.3d 380, 387 (Tex. 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).

[2]Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2).

552.107, 552.135, and 552.137 of the Government Code.[3] We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted e-mails, a representative sample of which we have marked, are not responsive to the instant request because they were created outside the time frame specified in the request. This ruling does not address the public availability of any information that is not responsive to the request and the district is not required to release such information in response to this request.

Section 552.101 of the Government Code 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 demonstrated. *See id.* at 681-82. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Furthermore, 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 the *Ellen* decision 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. *Ellen*, 840 S.W.2d 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*, along with the statement of the accused. However, 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). However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of victims and witnesses must still be redacted from the statements. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. We also note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

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[3]Although you raise Texas Rule of Evidence 503, we note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. *See* Open Records Decision No. 676 at 1-2 (2002).

You assert Exhibit C relates to an investigation into an alleged sexual harassment. Upon review, we find Exhibit C contains an adequate summary of the alleged sexual harassment. The summary is not confidential under section 552.101 in conjunction with common-law privacy; however, information within the summary that identifies victims and witnesses must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. *See Ellen*, 840 S.W.2d at 525. Therefore, pursuant to section 552.101 in conjunction with common-law privacy and the holding in *Ellen*, the district must withhold the identifying information of the victims and witnesses, which we have marked, within the summary. Because there is an adequate summary, the district must also withhold the remaining information in the sexual harassment investigation, which we have marked, under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. Furthermore, we find the additional information we have marked in Exhibits F and G meets the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the district must withhold the additional information we have marked in Exhibits F and G under section 552.101 in conjunction with common-law privacy. However, we find you have not demonstrated how any portion of the remaining information in Exhibit C is highly intimate or embarrassing and not of legitimate public concern. Thus, the district may not withhold any of the remaining information in Exhibit C under section 552.101 in conjunction with common-law privacy.

You assert the remaining information in Exhibit C is confidential under the doctrine of constitutional privacy. Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy, which consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). After review of the information at issue, we find you have failed to demonstrate how any portion of the information at issue falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the district may not withhold any of the remaining information in Exhibit C under section 552.101 of the Government Code on the basis of constitutional privacy.

Section 552.135 of the Government Code provides the following:

> (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].

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). We note section 552.135 protects an informer's identity, but it does not generally encompass protection for witnesses or witness statements. In this instance, you claim the remaining information in Exhibit C reveals the identities of informers who reported possible violations of title 9 of the Texas Administrative Code. Upon review, we find you have failed to demonstrate how any of the information at issue reveals the identity of an informer for the purposes of section 552.135 of the Government Code. Therefore, the district may not withhold any of the remaining information in Exhibit C on that basis.

Section 552.101 of the Government Code also encompasses section 21.355 of the Education Code. Section 21.355(a) provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355(a). 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 purposes of section 21.355, "administrator" 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. *See id.* at 4. In addition, the Third Court of Appeals has held a written reprimand constitutes an evaluation for 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." *Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

You contend the information in Exhibit A consists of evaluations of an administrator that are confidential under section 21.355 of the Education Code. We understand the administrator at issue held the appropriate certificate at the time of the creation of the evaluations and was functioning as an administrator at the time of the evaluations. Based on your representations and our review, we conclude some of the information in Exhibit A, which we have marked, is confidential under section 21.355 of the Education Code. Accordingly, 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. However, we find you have failed to demonstrate how any of the remaining information in Exhibit A consists of documents evaluating the performance of an administrator for purposes of section 21.355 of the

Education Code. Thus, the district may not withhold any of the remaining information under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses section 21.048 of the Education Code, which addresses teacher certification examinations. Section 21.048(c-1) provides the following:

> (c-1) The results of an examination administered under this section are confidential and are not subject to disclosure under Chapter 552, Government Code, unless:
>
> > (1) the disclosure is regarding notification to a parent of the assignment of an uncertified teacher to a classroom as required by Section 21.057; or
> >
> > (2) the educator has failed the examination more than five times.

Educ. Code § 21.048(c-l). Upon review, we find the information you have marked in Exhibit B reflects the results of examinations administered under section 21.048 of the Education Code. You state subsections 21.048(c-l)(l) and (2) are not applicable in this instance. Accordingly, the district must withhold the information you have marked in Exhibit B under section 552.101 of the Government Code in conjunction with section 21.048(c-l) of the Education Code.

Section 552.101 of the Government Code also encompasses information made confidential by the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, which governs release of medical records. *See* Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides, in relevant part, the following:

> (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
>
> (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
>
> (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 at 3-4 (1988), 370 at 2 (1983), 343 at 1 (1982). Upon review, we find you have not demonstrated how any of the remaining information in Exhibit G is confidential under the MPA. Accordingly, the district may not withhold any of the remaining information in Exhibit G under section 552.101 of the Government Code on that basis.

You also raise section 552.101 of the Government Code in conjunction with the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") for the remaining information in Exhibit G. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office addressed the interplay of the Privacy Rule and the Act. Open Records Decision No. 681 (2004). In Open Records Decision No. 681, we noted section 164.512 of title 45 of the Code of Federal Regulations provides a covered entity may use or disclose protected health information to the extent such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *Id.*; *see* 45 C.F.R. § 164.512(a)(1). We further noted the Act "is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public." ORD 681 at 8; *see also* Gov't Code §§ 552.002, .003, .021. Therefore, we held the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v. Tex. Dep't of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 at 2 (1987) (statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the district may not withhold any portion of the remaining information in Exhibit G under section 552.101 of the Government Code on that basis.

Section 552.102(b) of the Government Code excepts from disclosure higher education transcripts of professional public school employees, but does not except the employee's name, the courses taken, and the degree obtained from disclosure. Gov't Code § 552.102(b); *see also* Open Records Decision No. 526 (1989). Accordingly, with the exception of the

employee's name, courses taken, and degrees obtained, the district must withhold the submitted college transcripts in Exhibit E pursuant to section 552.102(b) of the Government Code.

You raise 552.107(1) of the Government Code for the information in Exhibit D and the remaining information in Exhibit C. Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. *See* Gov't Code § 552.107(1). 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 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1). 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. Finally, the attorney-client privilege applies only to a confidential communication, 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, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the information at issue consists of communications involving attorneys for the district, district representatives, and other district employees and officials. You further state the communications were made for the purpose of facilitating the rendition of professional legal services to the district and these communications have remained confidential. You also explain some of the communications are between attorneys for the district and the named

individual's attorney. Although you assert the district and the named individual's attorney share a common legal interest, we note the communications with the named individual's attorney pertain to the named individual's resignation from the district. Thus, we find you have failed to establish that the district shared a common legal interest with the named individual's attorney that would allow the attorney-client privilege to apply to these communications. *See In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 51 (Tex. 2012) (discussing common interest rule under attorney-client privilege). Upon review, we find the district has demonstrated the applicability of the attorney-client privilege to the information we have marked. Thus, the district may generally withhold the information we have marked under section 552.107(1) of the Government Code. However, we note some of the e-mail strings we have marked under section 552.107 of the Government Code include e-mails received from or sent to non-privileged parties. Furthermore, if these e-mails are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if the district maintains these non-privileged e-mails, which we have marked, separate and apart from the otherwise privileged e-mail strings in which they appear, then the district may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code. The remaining communications were received from or sent to non-privileged parties. Therefore, the district may not withhold the remaining communications under section 552.107(1).

We note some of the remaining information is subject to section 552.117(a)(1) of the Government Code.[4] Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code, except as provided by section 552.024(a-l). *See* Gov't Code §§ 552.117(a)(1), .024. Section 552.024(a-l) of the Government Code provides, "A school district may not require 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-1). Thus, the district may only withhold under section 552.117 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). 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. Therefore, to the extent the individuals whose information is at issue timely requested confidentiality under

[4]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 (1987).

section 552.024 of the Government Code, the district must withhold the information you have marked, as well as the additional information we have marked, under section 552.117(a)(1) of the Government Code. Conversely, if the individuals whose information is at issue did not timely request confidentiality under section 552.024, then the district may not withhold this information under section 552.117(a)(1).

Section 552.137 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). We note section 552.137 is not applicable to an e-mail address a governmental entity maintains for one of its officials or employees. *See id.* § 552.137(c). The e-mail addresses we have marked are not of a type excluded by subsection (c). Therefore, the district must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure. However, we find the remaining e-mail addresses you have marked belong to government officials or employees. Accordingly, the district may not withhold any of the remaining information under section 552.137 of the Government Code.

In summary, with the exception of the adequate summary, which we have marked for release, the district must withhold the sexual harassment investigation, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. Within the adequate summary, the district must withhold the information we have marked identifying the victims and witnesses of the alleged sexual harassment under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. The district must withhold the additional information we have marked in Exhibits F and G under section 552.101 in conjunction with common-law privacy. The district must withhold the information we have marked in Exhibit A under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must withhold the information you have marked in Exhibit B under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code. With the exception of the employee's name, courses taken, and degrees obtained, the district must withhold the submitted college transcripts in Exhibit E pursuant to section 552.102(b) of the Government Code. The district may generally withhold the information we have marked under section 552.107(1) of the Government Code; however, if the district maintains the e-mails we have marked as non-privileged separate and apart from the otherwise privileged e-mail strings in which they appear, then the district may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code. To the extent the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the district must withhold the information you have marked, as well as the additional information we have marked, under section 552.117(a)(1) of the Government Code. The district must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless

their owners affirmatively consent to their public disclosure. 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 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,

Brian E. Berger
Assistant Attorney General
Open Records Division

BB/akg

Ref: ID# 556935

Enc. Submitted documents

c: Requestor
(w/o enclosures)