KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 8, 2016

Ms. Lauren M. Wood
Counsel for the Plano Independent School District
Abernathy, Roeder, Boyd, & Hullet P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2016-02936

Dear Ms. Wood

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# 597693.

The Plano Independent School District (the "district"), which you represent, received a request for a specified investigation report and the total costs incurred by the district in completing the investigation. You state you have released some information. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. Additionally, you state release may implicate the privacy interests of certain individuals. Accordingly, you notified the individuals of the right to submit written comments to this office stating reasons why the information should or should not be released. *See* Gov't Code § 552.304 (interested part may submit written comments regarding availability of requested information). We have received comments from an individual representing two of the notified individuals. Further, we have received and considered

comments from the requestor. *See id.* We have considered the submitted arguments and reviewed the submitted information.

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"), section 1232g of title 20 of the United States Code, does not permit a state educational agency or institution to disclose to this office, without parental 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 education 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, you have submitted redacted and unredacted education records for our review. Because our office is prohibited from reviewing education records, we will not address the applicability of FERPA to any of the submitted records, other than to note the requestor has a right of access to his own child's education records and his right of access prevails over claims under section 552.101 of the Government Code. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3; *see also Equal Employment Opportunity Comm'n v. City of Orange, Tex.*, 905 F. Supp. 381, 382 (E.D. Tex. 1995) (holding FERPA prevails over inconsistent provision of state law). Such determinations under FERPA must be made by the educational authority in possession of such records. However, we will address the district's claimed exceptions to the extent the requestor does not have a right of access to his own child's education records within the submitted information under FERPA.

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 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). The Third Court of Appeals has concluded 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." *See Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). We have determined that for purposes of section 21.355, "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

[1]A 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.

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. We also have determined that "administrator," for purposes of section 21.355, 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. *Id.*

The district, and two of the notified individuals, contend the submitted information contains evaluations that are confidential under section 21.355 of the Education Code. The district states the individuals at issue held teaching certificates at the time of the evaluations. However, we note the information pertains to the individuals in their capacities as coaches. Thus, we find you have not demonstrated the information constitutes evaluations of the performances of teachers or administrators for section 21.355 purposes. *See* Educ. Code § 21.353 (teachers shall be appraised only on basis of classroom teaching performance and not in connection with extracurricular activities). Accordingly, the district may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 21.355.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information if it (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). 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. 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. In *Ellen*, the court addressed the applicability of the common-law privacy doctrine to files of an investigation of sexual harassment. Upon review, we find the submitted information does not pertain to an investigation of sexual harassment in the employment context of the district for purposes of *Ellen*. Therefore, the common-law privacy afforded in *Ellen* is not applicable to the information at issue. Further, we find none of the submitted information is highly intimate and embarrassing and of no legitimate public interest. Therefore, the district may not withhold any of the submitted information under section 552.101 on that basis.

Section 552.117(a)(1) of the Government Code 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-1).[2] *See* Gov't Code §§ 552.117(a)(1), .024(a-1). We note section 552.117 is also 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) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). 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 be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official 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, if the individual whose information is at issue timely requested confidentiality under section 552.024, the district must withhold the cellular telephone number we have marked under section 552.117(a)(1) if the cellular telephone service is not paid for by a governmental body. Conversely, if the individual at issue did not timely request confidentiality under section 552.024 or a governmental body pays for the cellular telephone service, then the district may not withhold the marked 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). The e-mail address at issue is not excluded by subsection (c). Therefore, the district must withhold the e-mail address we have marked under section 552.137, unless the owner affirmatively consents to its public disclosure.

In summary, if the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the district must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code if the cellular telephone service is not paid for by a governmental body. The district must withhold the e-mail address we have marked under section 552.137, unless the owner affirmatively consents to its 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.

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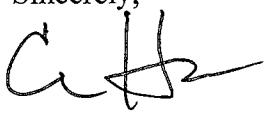
[2]The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,



Cole Hutchison
Assistant Attorney General
Open Records Division

CH/bhf

Ref: ID# 597693

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Parties
(w/o enclosures)