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ATTORNEY GENERAL OF TEXAS

January 11, 2017

Ms. Lauren Wood
Counsel for the Prosper Independent School District
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1700 Redbud Boulevard, Suite 300
McKinney, Texas 75070-1210

OR2017-00790

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# 641262 (Internal File No. LR-101316).

The Prosper Independent School District (the "district"), which you represent, received a request for all documents pertaining to the investigation of a named former district employee, as well as certain information pertaining to the last three district debate coaches. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have redacted identifying information from the submitted information. The United States Department of Education Family Policy Compliance Office has informed this office 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 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

¹A copy of this letter may be found on the Office of the Attorney General's website at <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

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”). However, FERPA is not applicable to records that were created by a law enforcement unit of an educational agency or institution for a law enforcement purpose and that are maintained by the law enforcement unit. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3, .8. We note the information you have redacted is contained within law enforcement records created by the district’s police department (the “department”) for a law enforcement purpose. These records are not subject to FERPA and no portion of these records may be withheld on that basis. However, because we can discern the nature of the redacted information, being deprived of the information does not inhibit our ability to make a ruling. Nonetheless, in the future, the district must not redact information from the information it submits to this office unless it is authorized to do so by statute or the information is the subject of a previous determination under section 552.301 of the Government Code. Failure to comply with section 552.301 may result in the information being presumed public under section 552.302 of the Government Code. *See* Gov’t Code § 552.302.

Next, we note you have only submitted information pertaining to the specified investigation and the last two debate coaches. To the extent any other responsive information existed and was maintained by the district on the date it received the request for information, we presume the district has released it. If not, the district must do so at this time. *See id.* §§ 552.301, .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to the requested information, it must release the information as soon as possible).

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 information made confidential by other statutes, including section 261.201 of the Family Code, which provides, in relevant part, as follows:

(a) [T]he following information is confidential, is not subject to public release under [the Act] and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). We note the submitted information may have been used in an investigation by the department of a charge of failure to report child abuse. *See id.* § 261.109(a) (person commits offense if person has cause to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse and knowingly fails to report); *see also id.* §§ 101.003(a) (defining "child" for purpose of this section as a person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes); 261.001(1) (defining "abuse" for purposes of chapter 261 of the Family Code). However we are unable to determine the age of the victim in the information at issue. Thus, we must rule conditionally. If the submitted information pertains to an incident involving a victim of alleged or suspected abuse who was under the age of eighteen at the time of the incident at issue, then this information is subject to section 261.201 of the Family Code. In that case, the district must withhold the submitted information in its entirety under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.² If, however, the victim in the information at issue was eighteen years of age or older at the time of the incident, then we find this information is not confidential under section 261.201(a) of the Family Code. In that instance, we conclude the district may not withhold the information at issue under section 552.101 of the Government Code on that basis, and we will address your arguments against disclosure of the submitted information.

Section 552.101 of the Government Code also encompasses section 21.355 of the Education Code, which provides, in part, "[a] document evaluating the performance of a teacher or administrator is confidential." *See* 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, the word "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 and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4. Additionally, the Third Court of Appeals has concluded that a written reprimand constitutes an evaluation for purposes of section 21.355, as 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 submitted information consists of documents that evaluate the performance of a teacher by the district. However, upon review, we find you have not established the submitted department incident report consists of "[a] document evaluating the performance of a teacher or administrator" as contemplated by section 21.355. *See* Educ. Code § 21.355(a). Accordingly, we conclude you have not established the information at issue is

²In this case, as our ruling is dispositive, we need not consider your arguments against disclosure of the submitted information.

confidential under section 21.355 and the district may not withhold it under section 552.101 of the Government Code on that ground.

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 demonstrated. *See id.* at 681-82. 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.). 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.³ *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.

You seek to withhold the submitted information under common-law privacy and the ruling in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied). In *Ellen*, the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. We note the ruling in *Ellen* was applicable to investigations involving sexual harassment in the workplace. Upon review, we find the information at issue does not constitute a sexual harassment investigation in the employment context of the district for purposes of *Ellen*. Accordingly, we conclude the ruling in *Ellen* is not applicable in this situation, and the district may not withhold the information at issue under section 552.101 of the Government Code on that basis. However, upon review, we find the district must withhold all dates of birth within the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy. Upon review, we find none of the remaining information is highly intimate or embarrassing and of no legitimate public interest. Therefore, the district may not withhold the remaining information under section 552.101 in conjunction with common-law privacy.

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

³Section 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).

excepted from public release.⁴ *See* Gov't Code § 552.130. Accordingly, the district must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

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 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].

Id. § 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 the investigation, but do not report a violation of law are not informants for purposes of section 552.135 of the Government Code.

You claim the remaining information reveals the identities of informers who reported to the district a possible violation of section 261.101(b) of the Family Code, relating to the requirement to report child abuse or neglect, as well as the Educator Code of Ethics, section 247.2 of title 19 of the Texas Administrative Code. *See* Fam. Code § 261.101(b) (a professional commits an offense if they have cause to believe a child has been abused as defined by section 261.001 of the Family Code and fails to report the abuse); *see also* 19 TAC § 247.2. Upon review, we find the district must withhold the information we have marked under section 552.135 of the Government Code. However, you have not demonstrated the remaining information identifies an informer for the purposes of section 552.135. Therefore, we find the district may not withhold the remaining information under section 552.135 of the Government Code.

In summary, if the submitted information pertains to an incident involving a victim of alleged or suspected abuse who was under the age of eighteen at the time of the incident at issue, then the district must withhold the submitted information in its entirety under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. If, however, the victim in the information at issue was eighteen years of age or older

⁴The 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).

at the time of the incident, then the district must (1) withhold all dates of birth within the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy, (2) withhold the motor vehicle record information we have marked under section 552.130 of the Government Code, (3) withhold the information we have marked under section 552.135 of the Government Code, and (4) 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.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/eb

Ref: ID# 641262

Enc. Submitted documents

c: Requestor
(w/o enclosures)