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ATTORNEY GENERAL OF TEXAS

June 13, 2017

Ms. Leticia D. McGowan
Assistant General Counsel
Dallas Independent School District
Box 74
3700 Ross Avenue
Dallas, Texas 75204

OR2017-13045

Dear Ms. McGowan:

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# 662326 (ORR# 16115).

The Dallas Independent School District (the "district") received a request for specified memoranda and reports pertaining to fourteen named district employees. You state some information will be released in response to this request. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.107 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence.¹ We have considered your arguments and reviewed the submitted information.

Initially, 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

¹Although you raise section 552.111 of the Government Code and Texas Rule of Civil Procedure 192.5 for the submitted information, you provide no arguments to support these claims. Therefore, we assume you no longer assert these arguments. *See* Gov't Code §§ 552.301, .302.

the purpose of our review in the open records ruling process under the Act.² 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”). You have submitted 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. *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 records. However, we will consider your arguments against disclosure of the submitted information.

Next, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov’t Code § 552.022(a)(1). The submitted information consists of completed investigations subject to section 552.022(a)(1). The district must release this information unless it is excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. *See id.* Although you raise section 552.107 of the Government Code, this section is discretionary in nature and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under Gov’t Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the information subject to section 552.022(a)(1) may not be withheld under section 552.107 of the Government Code. However, we note the Texas Supreme Court has held the Texas Rules of Evidence are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information subject to section 552.022(a)(1). As sections 552.101,

²A copy of this letter may be found on the Office of the Attorney General’s website at <http://www.texasattorneygeneral.gov/open/20060725usdoe.pdf>.

552.102, and 552.117 of the Government Code make information confidential, we will also consider the applicability of these exceptions to the submitted information.³

Rule 503(b)(1) of the Texas Rules of Evidence provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A) between the client or the client's representative and the client's lawyer or the lawyer's representative;

(B) between the client's lawyer and the lawyer's representative;

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;

(D) between the client's representatives or between the client and the client's representative; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege

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 No. 481 (1987), 480 (1987), 470 (1987).

enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You assert some of the submitted information consists of excerpts that reveal and reflect information, including legal advice, communicated between the district's representatives and internal legal counsel concerning the investigative matter. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the district. You further state these communications were not intended to be disclosed to non-privileged parties. Based on your representations and our review, we find the district has demonstrated the applicability of the attorney-client privilege to the information we marked. Accordingly, the district may withhold the information we marked under rule 503 of the Texas Rules of Evidence.⁴ However, we find you have failed to demonstrate any of the remaining information at issue consists of privileged attorney-client communications. Accordingly, no portion of the remaining information may be withheld under rule 503.

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 the doctrine of common-law privacy, which protects information that (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 (Tex. 1976). 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. The court of appeals has concluded public citizens' dates of birth are protected by common-law privacy pursuant to section 552.101. *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.).

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. *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 that 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

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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). However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of witnesses and victims must still be redacted from the statements. We note that, because 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, the identity of the individual accused of sexual harassment is not protected from public disclosure. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978). We also note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

In this instance, some of the remaining information pertains to sexual harassment investigations and, thus, is subject to the ruling in *Ellen*. Upon review, we find the remaining information includes adequate summaries of these investigations, as well as statements by the persons accused of sexual harassment. The summaries and statements of the accused are not confidential under section 552.101 in conjunction with common-law privacy. *See Ellen*, 840 S.W.2d at 525. Therefore, the district must withhold the information we marked under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*.⁵ We note, however, information within the summaries and statements of the accused that identifies the victims and witnesses, which we marked, is confidential under common-law privacy and must be withheld under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. *Id.* However, we find none of the remaining information identifies a victim or witness to the investigation. Therefore, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. Accordingly, the district must release the remaining information in the adequate summaries and statements of the accused.

Further, upon review, we find the district must also withhold the date of birth we marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, no portion of the remaining information is highly intimate or embarrassing and not of legitimate concern to the public, and may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses information protected by other statutes, including section 21.355 of the Education Code. Section 21.355(a) provides “[a]

⁵As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355(a). 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. N.E. Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). 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. *See* Open Records Decision No. 643 at 3 (1996). We also determined a “teacher” for purposes of section 21.355 means a person who (1) 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 and (2) is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4.

You contend portions of the remaining information consist of confidential evaluations of district teachers and administrators by the district. You assert the employees at issue were certified as teachers or administrators by the State Board of Educator Certification and were acting as teachers or administrators at the time the evaluations were prepared. Upon review, we find some of the information at issue, which we marked, consists of evaluations of district teachers. Thus, the district must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.⁶ However, we find you have failed to demonstrate any of the remaining information at issue consists of documents evaluating the performance of a teacher or administrator for the purposes of section 21.355 of the Education Code. Therefore, the district may not withhold any of the remaining information at issue under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

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.” Gov’t Code § 552.102(a). You assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code, which is discussed above. *See Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert*’s interpretation of section 552.102(a), and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts*, 354 S.W.3d 336. The supreme court also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. Upon review, we find no

⁶As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

portion of the remaining information is subject to section 552.102 of the Government Code, and it may not be withheld on that basis.

We note some of the remaining information may be subject to section 552.117 of the Government Code. 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). *See Gov't Code* §§ 552.117(a)(1), .024. Section 552.024(a-1) 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 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. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the employees at issue timely requested confidentiality under section 552.024 of the Government Code, the district must withhold the information we marked under section 552.117(a)(1) of the Government Code. Conversely, to the extent the employees at issue did not timely request confidentiality under section 552.024, the district may not withhold the information under section 552.117(a)(1).

In summary, the district may withhold the information we marked under rule 503 of the Texas Rules of Evidence. With the exception of the adequate summaries and the statements of the accused, the district must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. Pursuant to section 552.101 of the Government Code 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 marked, within the adequate summaries and statements of the accused. The district must withhold the date of birth we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The district must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. To the extent the employees at issue timely requested confidentiality under section 552.024 of the Government Code, the district must withhold the information we marked under section 552.117(a)(1) of the Government Code. 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,



Emily Kunst
Attorney
Open Records Division

EK/eb

Ref: ID# 662326

Enc. Submitted documents

c: Requestor
(w/o enclosures)