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ATTORNEY GENERAL OF TEXAS

August 16, 2017

Mr. John J. Jansen & Ms. Mackenzie Lewis
Counsel for Kirbyville Consolidated Independent School District
Powell & Leon, LLP
115 Wild Basin Road, Suite 106
Austin, Texas 78746

OR2017-18748

Dear Mr. Jansen & Ms. Lewis:

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# 671385.

The Kirbyville Consolidated Independent School District (the "district"), which you represent, received six requests from five requestors for information pertaining to (1) three named district employees, including the contracts and personnel files of these named employees; (2) written statements pertaining to a specified incident; (3) specified district policies and procedures; (4) specified board meetings; (5) e-mails between specified parties during a specified time period; (6) specified surveillance footage for a specified time period; (7) cell phone bills for two named employees for three specified months; (8) specified swipe card entries of certain employees; and (9) a specified district secretarial position. You state you have released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.117 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

¹Although you do not raise section 552.117 of the Government Code in your brief, we understand the district to assert this exception based on your markings. Additionally, although you also raise sections 552.107, 552.108, and 552.111 of the Government Code, you make no arguments regarding these provisions. Therefore, we assume you have withdrawn your claim that these sections apply to the submitted information. *See Gov't Code §§ 552.301, .302.*

Initially, we note the district has only submitted information responsive to categories one, two, and five. You state the district has released information pertaining to categories three and four. Although you state the district submitted a representative sample of information, the submitted information is not representative of the types of information requested in categories six through nine. This open records letter applies to only the type of information you have submitted for our review. Therefore, this ruling does not authorize the withholding of any other requested records to the extent those records contain substantially different types of information than that submitted to this office. *See* Gov't Code § 552.302 (where request for attorney general decision does not comply with requirements of section 552.301 of the Government Code, information at issue is presumed to be public). Thus, to the extent the information responsive to categories six through nine was maintained by the district on the date the district received the requests for information, we presume the district has released such information. If not, the district must do so at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

Next, we understand the district asserts some of the requested information was supplied with the expectation of confidentiality under a district board policy. Information is not confidential under the Act simply because the party that submits the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Next, we note 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.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

²A 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>.

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.

We note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). The submitted information includes contracts relating to the receipt or expenditure of funds by the district that are subject to section 552.022(a)(3). This information must be released unless it is made confidential under the Act or other law. *See id.* You seek to withhold the information subject to section 552.022(a)(3) under section 552.103 of the Government Code. However, this exception is discretionary in nature and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the information subject to section 552.022(a)(3), which we marked, may not be withheld under section 552.103 of the Government Code. However, because section 552.102 of the Government Code makes information confidential, we will consider the applicability of this exception to the information at issue. Additionally, we will consider your arguments against disclosure for the remaining 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 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.* 540 S.W.2d at 685. 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). 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). Upon review, we find the remaining information does not pertain to an investigation of alleged sexual harassment. Thus, the district may not withhold any of the information in the remaining information under section 552.101 in conjunction with common-law privacy and the *Ellen* decision.

Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The district has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The district must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

Although you provide documentation establishing a temporary restraining order concerning the requested information was filed against the district in the 136th District Court of Jefferson County, you acknowledge the order was not filed until after the district received the first four requests for information. *See* Gov’t Code § 552.103(c). Accordingly, we find the district was not involved in pending litigation at the time of the first four requests. Furthermore, you contend that litigation related to the requested information was reasonably anticipated because of the nature of the incident. However, you have not provided any concrete evidence that, prior to the receipt of the first four requests, a party actually took any objective steps toward filing suit against the district. *See* ORD 331. Thus, we find that you have not demonstrated that the district reasonably anticipated litigation on the date of its receipt of the first four requests. With respect to the remaining information not at issue in the first four requests, you state, and provide documentation demonstrating, the temporary restraining order was in force against the district at the time of the request for this information and the district reasonably anticipated litigation on the basis of this temporary restraining order. Based on your representations and our review of the information at issue, we find the district reasonably anticipated litigation when the district received the request for information not at issue in the first four requests. We also find the information at issue is related to the anticipated litigation for the purposes of section 552.103. Therefore, the district may withhold the information we marked under section 552.103(a) of the Government Code.³

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the

³As our ruling is dispositive, we need not address the district’s remaining arguments against disclosure of the information at issue.

applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); see also Open Records Decision No. 350 (1982).

Section 552.101 of the Government Code also encompasses section 21.355 of the Education Code, which 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). Additionally, a court 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.). In Open Records Decision No. 643, we determined an “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 as an administrator, as that term is commonly defined, at the time of the evaluation. *See* ORD 643.

You assert some of the remaining information consists of written evaluations that are confidential under section 21.355. You inform us, and have submitted documentation reflecting, the administrator at issue held the appropriate certification at the time of the evaluations. Based on your representations and our review, we agree the information we marked constitutes an evaluation as contemplated by section 21.355. Accordingly, 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.⁴ However, we find the district has not established any of the remaining information consists of “[a] document evaluating the performance of a teacher or administrator” as contemplated by section 21.355. Thus, the district has not established the remaining information is confidential under section 21.355, and may not withhold it under section 552.101 of the Government Code on that ground.

Section 552.102(b) of the Government Code excepts from disclosure “a transcript from an institution of higher education maintained in the personnel file of a professional public school employee[.]” Gov’t Code § 552.102(b). This exception further provides, however, “the degree obtained or the curriculum on a transcript in the personnel file of the employee” are not excepted from disclosure. *Id.*; see also Open Records Decision No. 526 (1989). Accordingly, with the exception of the information that reveals the employee’s name, the degree obtained, and the courses taken, which must be released, the district must withhold the submitted educational transcripts under section 552.102(b) of the Government Code.⁵

⁴As our ruling is dispositive, we need not address the district’s remaining arguments against disclosure of the information at issue.

⁵As our ruling is dispositive, we need not address the district’s remaining arguments against disclosure of the information at issue.

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). We understand the district to 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. *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 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 v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). 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. However, because “the right of privacy is purely personal[.]” that right “terminates upon the death of the person whose privacy is invaded[.]” *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. Civ. App.—Texarkana 1979, writ ref’d n.r.e.); *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 147 (N.D. Tex. 1979) (“action for invasion of privacy can be maintained only by a living individual whose privacy is invaded” (quoting RESTATEMENT (SECOND) OF TORTS § 6521)); Attorney General Opinions JM-229 (1984) (“the right of privacy lapses upon death”), H-917 (1976) (“We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death.”); Open Records Decision No. 272 (1981) (“the right of privacy is personal and lapses upon death”). Accordingly, the district must withhold the dates of birth of all living public employees under section 552.102(a) of the Government Code.⁶ However, we find no portion of the remaining information is subject to section 552.102(a) of the Government Code. Accordingly, the district may not withhold any of the remaining information 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). *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

⁶As our ruling is dispositive, we need not address the district’s remaining arguments against disclosure of the information at issue.

under section 552.024. We note a post office box number is not a “home address” for purposes of section 552.117(a). *See* Open Records Decision No. 622 at 4 (1994) (legislative history makes clear that purpose of Gov’t Code § 552.117 is to protect public employees from being harassed at home). 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.

We have marked information under section 552.117 pertaining to current and former district employees. We note one of the former district employees at issue is deceased. Because the protection afforded by section 552.117 includes “current or former” employees, the protection generally does not lapse at death, as it is also intended to protect the privacy of an employee’s family members and emergency contacts. Accordingly, 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; however the marked cellular telephone numbers may be withheld only if a governmental body does not pay for the cellular telephone service.⁷ Conversely, to the extent the employees did not timely request confidentiality under section 552.024, the district may not withhold the marked information pertaining to these individuals under section 552.117(a)(1).

As noted above, section 552.101 of the Government Code encompasses the doctrine of common-law privacy, which is subject to the two-part test discussed above. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation. Indus. Found.*, 540 S.W.2d at 683. However, this office has concluded the public has a legitimate interest in information that relates to public employees and their conduct in the workplace. *See, e.g.*, Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs but in fact touches on matters of legitimate public concern), 470 at 4 (1987) (job performance does not generally constitute public employee’s private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (manner in which public employee’s job was performed cannot be said to be of minimal public interest), 392 (1982) (reasons for employee’s resignation ordinarily not private). Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). However, as noted above, privacy is a personal right that lapses upon death. *See Moore*, 589 S.W.2d at 491; ORD 272 at 1. Thus, information pertaining

⁷As our ruling is dispositive, we need not address the district’s remaining argument against disclosure of the information at issue.

solely to a deceased individual may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Upon review, we find some of the remaining information, which we marked, satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the district must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the district failed to demonstrate the remaining information is highly intimate or embarrassing and of no legitimate public interest. Thus, the district may not withhold the remaining information under section 552.101 in conjunction with common-law privacy.

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).⁸ Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to the private e-mail address of a governmental employee who uses the private e-mail address to conduct official government business. *See Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.) (holding personal e-mail addresses of government officials used to conduct official government business are not e-mail addresses of “members of the public” for purposes of Gov’t Code § 552.137(a)). We are unable to determine whether the personal e-mail addresses within the remaining information at issue, which are located within e-mails communicating official business of the district, belong to district officials or employees. Thus, we rule conditionally. To the extent the e-mail addresses within the remaining information are the personal e-mail addresses of district officials or employees this information is not subject to section 552.137 and may not be withheld on that basis. However, to the extent the e-mail addresses within the remaining information are not the personal e-mail addresses of district officials or employees, this information is subject to section 552.137 and must be withheld under section 552.137, unless the owners of the e-mail addresses affirmatively consent to their release.

In summary, the district must release the information we marked pursuant to section 552.022(a)(3) of the Government Code. The district may withhold the information we marked under section 552.103(a) of the Government Code. 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. With the exception of the information that reveals the employee’s name, the degree obtained, and the courses taken, which must be released, the district must withhold the submitted educational transcripts under section 552.102(b) of the Government Code. The district must withhold the dates of birth


⁸The 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).

of all living public employees under section 552.102(a) of the Government 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; however the marked cellular telephone numbers may be withheld only if a governmental body does not pay for the cellular telephone service. The district must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the e-mail addresses within the remaining information are not the personal e-mail addresses of district officials or employees, this information is subject to section 552.137 and must be withheld under section 552.137, unless the owners of the e-mail addresses affirmatively consent to their release. The district must 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,



Kaelan A. Henze
Assistant Attorney General
Open Records Division

KAH/eb

Ref: ID# 671385

Enc. Submitted documents

c: 6 Requestors
(w/o enclosures)