



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

June 27, 2019

Ms. Rebecca Bradley  
Counsel for Plano Independent School District  
Abernathy, Roeder, Boyd, & Hullett, P.C.  
P.O. Box 1210  
McKinney, Texas 75070

OR2019-17742

Dear Ms. Bradley:

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# 772622 (File No. 723).

The Plano Independent School District (the "district"), which you represent, received a request for a specified investigation report pertaining to the requestor's client, a district employee.<sup>1</sup> The district informs us it has redacted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g(a).<sup>2</sup> The district claims

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<sup>1</sup>The district informs us the requestor clarified the request for information. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

<sup>2</sup>The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA 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. The DOE has determined FERPA determinations must be made by the educational authority in possession of the educational records. We have posted a copy of the letter from the DOE on the Attorney General's website at <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

the submitted information is excepted from disclosure under sections 552.101, 552.117, and 552.135 of the Government Code. Additionally, the district provides documentation showing it has notified individuals of the right to submit comments to this office why some of the submitted information should not be released.<sup>3</sup> See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions the district claims and reviewed the submitted information.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses section 21.355(a) of the Education Code, which provides "[a] document evaluating the performance of a teacher or administrator is confidential and is not subject to disclosure under [the Act]." Educ. Code § 21.355(a). 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." *Abbott v. North East 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 or administrator. See Open Records Decision No. 643 (1996). In Open Records Decision No. 643, we determined 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 in the process of teaching, as that term is commonly defined, at the time of the evaluation. See *id.* at 4.

The district asserts the submitted information consists of a confidential evaluation of a current district employee. However, upon review, we find the information at issue pertains to an investigation into allegations of improper conduct made against the employee at issue and does not consist of an evaluation for purposes of section 21.355. Thus, we find the district has failed to demonstrate any of the information at issue consists of documents evaluating the performance of a teacher for the purposes of section 21.355 of the Education Code. 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 of the Education Code.

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.

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<sup>3</sup>As of the date of this letter, this office has not received comments from any third party explaining why any of the submitted information should not be released.

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.

The submitted information relates to an investigation into an alleged sexual harassment. Upon review, we find the submitted information contains an adequate summary of the investigation of alleged sexual harassment. The submitted information also contains the statement of the accused. The summary and statement of the accused are not confidential under section 552.101 in conjunction with common-law privacy; however, information within the summary and statement that identifies victims and witnesses must generally 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 generally withhold the identifying information of the victims and witnesses within the summary and the statement of the accused. However, in this instance, the requestor is a legal representative of the victim whose privacy interest is at issue. See Gov't Code § 552.023(a) ("person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and that is protected from public disclosure by laws intended to protect that person's privacy interests"); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). Thus, the requestor has a right of access to information pertaining to his client that would otherwise be confidential under common-law privacy. Accordingly, the district may not withhold the identity of the victim from this requestor under section 552.101 on the basis of common-law privacy. Therefore, under *Ellen*, the district must release the adequate summary of the investigation and the statement

of the accused, which we have marked. However, 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 witness, which we have marked, within the summary and the statement of the accused.<sup>4</sup> Further, because there is an adequate summary, the district must also withhold the remaining information in the sexual harassment investigation under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*.

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. Section 552.117(a)(1) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988). 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. The district informs us, and provides documentation showing, one of the district employees at issue timely elected to keep all her personal information confidential under section 552.024 of the Government Code. Accordingly, the district must withhold this information, which we have marked, in the summary and the statement of the accused under section 552.117(a)(1) of the Government Code; however, if the marked telephone number is a cellular telephone number, it may be withheld only if a governmental body does not pay for the cellular telephone service.

Section 552.135 of the Government Code provides in relevant part the following:

- (a) "Informer" means a student or a former student or an employee or former employee of a school district who has furnished a report of another person's

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<sup>4</sup>As our ruling is dispositive for this information, we need not address the remaining argument against its disclosure.

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].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

Gov't Code § 552.135(a)-(c). 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 that 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, witnesses and other individuals who provide information in the course of an investigation are not informants for purposes of section 552.135 of the Government Code. The district states information in the summary and statement of the accused identifies an employee who reported an alleged violation of criminal and civil laws. Upon review, we find the district must withhold the information we marked under section 552.135 of the Government Code. However, the district has failed to demonstrate any of the remaining 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 the remaining information on that ground.

In summary, the district must release the adequate summary of the investigation and the statement of the accused we have marked. In releasing the summary and the statement of the accused, the district must withhold (1) the identifying information of the witness we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*, (2) the information we marked under section 552.117(a)(1) of the Government Code, however, if the marked telephone number is a cellular number, it may be withheld only if a governmental body does not pay for the cellular service, and (3) the information we marked under section 552.135 of the Government Code. The district must also withhold the remaining information under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*.

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](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,



Lecelle Clarke  
Attorney  
Open Records Division

LC/gw

Ref: ID# 772622

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

c: 2 Third Parties  
(w/o enclosures)