



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 29, 1993

Ms. Merri Schneider-Vogel
Bracewell & Patterson
100 Congress Avenue, Suite 1900
Austin, Texas 78701-4052

OR93-756

Dear Ms. Schneider-Vogel:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code.¹ Your request was assigned ID# 18527.

The San Jacinto Junior College District (the "district") has received a request for information relating to an investigation into "allegations of sexual harassment made by an employee" against the requestor. You state that Ms. Lutz's resume, memos that Ms. Lutz distributed to other faculty, and memos written or received by the requestor will be released but that the remaining information is excepted from public disclosure under sections 552.101, 552.107, and 552.111 of the Government Code.

You contend that the information submitted as exhibits 2, 4-a, 4-c through 4-r, and 5 are excepted from public disclosure by common-law privacy as incorporated under section 552.101. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." In order for information to be protected from public disclosure under the common-law right of privacy as incorporated by section 552.101, the information must meet the criteria set out in *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The court stated that:

¹We note that the Seventy-Third Legislature repealed article 6252-17a, V.T.C.S. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

information . . . is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing former section 3(a)(1) of article 6252-17a, V.T.C.S.). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation of the South* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

You claim that exhibit 2, containing handwritten notes made by the personnel director who investigated the allegations, exhibit 4, memoranda maintained in the investigatory file, and exhibit 5, handwritten notes for one of the memos in exhibit 4, are excepted from public disclosure by a common-law right of privacy and are confidential as a matter of law, citing *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied).

Although the allegations are described as relating to sexual harassment, the documents you have submitted relate to claims of sex discrimination, *i.e.*, preferential treatment of men over women in employment decisions.² See also 42 U.S.C. § 2000e-2(a)(1) (employment discrimination on the basis of sex); 29 C.F.R. § 1604.11(a) (providing that harassment on the basis of sex violates prohibition against discrimination in employment on the basis of sex). Compare Penal Code § 39.03(c) (sexual harassment) with V.T.C.S. art. 5221k, § 5.01 (discrimination against an individual with respect to terms and conditions of work based on sex). None of the documents submitted to us relate to unwelcome sexual advances or other conduct of a sexual nature.

The information considered by the *Ellen* court involved "names of witnesses required to give information under threat of discipline, their statements regarding highly embarrassing, offensive and unprofessional conduct in the workplace, their dating and sexual relationships, the state of marriages" and "sexual assault and mental abuse in the workplace." 840 S.W.2d at 524-25. The type of information considered by the *Ellen* court is clearly distinguishable from the information submitted by the district. Furthermore, except for one personal detail, there is nothing highly intimate or embarrassing contained in the documents. Most of the allegations deal with scheduling assignments and grading duties. Except for an item we have marked in exhibit 2, you may not withhold the requested documents under section 552.101 of the Government Code.

²See Exhibits 4-a, 4-f, 4-h, 4-i, 4-j, 4-l (heading of documents indicate sex discrimination).

You claim that exhibit 3 is excepted from disclosure by attorney-client privilege. Although this office has previously dealt with the attorney-client privilege under section 552.101, which you raise, the privilege is more specifically addressed under section 552.107. Open Records Decision No. 574 at 2. Section 552.107 provides in part that information is excepted from public disclosure if:

- (1) . . . information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas.

Although section 552.107 excepts information within rule 1.05 of the Texas State Bar disciplinary Rules of Professional Conduct, the rule cannot be applied as broadly as written to information that is requested under the Open Records Act. Open Records Decision No. 574 (1990). To prevent governmental bodies from circumventing the Open Records Act by transferring information to their attorneys, section 552.107 is limited to material within the attorney-client privilege for confidential communications; "unprivileged information" as defined by rule 1.05 is not excepted under section 552.107. Open Records Decision Nos. 574; 462 (1987) (explaining scope of attorney-client privilege). Furthermore, information which does not contain legal advice or opinion or reveal client confidences is not protected by section 552.107. Open Records Decision No. 574.

Exhibit 3-a is a memorandum from the district's personnel director to an attorney with Bracewell & Patterson (the district's attorneys). The memorandum contains client confidences and may be withheld under section 552.107. Exhibit 3-b is handwritten notes you claim were made by another attorney with Bracewell & Patterson. The notes contain the legal advice and opinion of the author and may also be withheld under section 552.107. We do not see, however, how the fax cover sheet reveals client confidences that would be protected under the attorney-client privilege. Section 552.107 does not allow a governmental body to make any information confidential merely by communicating it to its attorney. Open Records Decision No. 462 (1987). You may not, therefore, withhold exhibit 3-c under section 552.107 of the Government Code.

You claim that exhibits 4 and 5 are excepted from disclosure under section 552.111 as containing advice, opinion or recommendations. Section 552.111 excepts "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In a recent opinion that reexamined the section 552.111 exception, this office concluded that section 552.111 excepts from public disclosure:

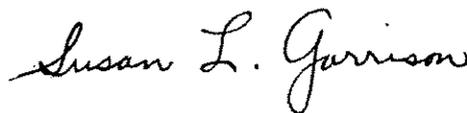
only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body at issue. [It] does not except from disclosure purely factual

information that is severable from the opinion portions of internal memoranda.

Open Records Decision No. 615 (1993) at 5 (copy enclosed). Furthermore, in order for information to come within the section 552.111 exception, the information must be related to the policymaking functions of the governmental body. *Id.* "An agency's policymaking functions do not encompass routine internal administrative and personnel matters" *Id.* As the information relates to a personnel matter, *i.e.*, allegations of discrimination against employees, we conclude that section 552.111 does not except it from required public disclosure. Accordingly, you may not withhold exhibit 4 and exhibit 5 under section 552.111 of the Government Code.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Susan L. Garrison
Assistant Attorney General
Open Government Section

SLG/LBC/rho

Ref.: ID# 18527

Enclosures: Marked documents

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(w/o enclosures)