



December 22, 1999

Mr. Donald E. Lindsay
Richards, Lindsay & Martin
13740 Research Boulevard, Suite M-5
Austin, Texas 78750

OR99-3727

Dear Mr. Lindsay:

On behalf of the Devine Independent School District (the "school district"), you ask whether certain information is subject to required public disclosure under the Texas Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 130184.

The school district received a request for a particular sexual harassment investigative file. You assert that the requested information is excepted from disclosure based on sections 552.101, 552.102, 552.111, 552.114 and 552.131 of the Government Code.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992).

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 that "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.*

We have reviewed the documents at issue. We conclude that the school district must withhold from disclosure the information that identifies the victims and witnesses of the alleged sexual harassment. *Id.* We have marked the protected information.

You also raise section 552.101 in conjunction with section 21.355 of the Education Code. Section 21.355 makes confidential any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. An "administrator" is a person who is required to hold and does hold an administrator's certificate under subchapter B of chapter 21, and is performing the functions of an administrator at the time of the evaluation. We agree that one of the submitted documents contains information that is covered by section 21.355. We have marked the information the school district must withhold based on section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Section 552.111 of the Government Code excepts from required public disclosure:

An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

This exception applies to a governmental body's internal communications consisting of advice, recommendations, or opinions reflecting the policymaking process of the governmental body at issue. *See* Open Records Decision No. 615 (1993). An agency's policymaking function, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *See id.* at 5-6; *see also Garland v. Dallas Morning News*, 969 S.W.2d 548 (Tex. App.—Dallas 1998, pet. granted.) (citing *Lett v. Klein Indep. Sch. Dist.*, 917 S.W.2d 455, 457 (Tex. App.—Houston [14th Dist.] 1996), *writ denied per curiam*, 41. Tex. Sup Ct. J. 575 (1998) (documents relating to problems with specific employee do not relate to the making of new policy but merely implement existing policy). The information concerns personnel rather than policymaking matters. Section 552.111 is therefore inapplicable.

The school district asserts that the student-identifying information is excepted from required public disclosure based on section 552.114 of the Government Code. The Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, which is

incorporated into the Open Records Act by section 552.026 of the Government Code, governs the release of student-identifying information.

Section 552.026 of the Government Code states that

[t]his chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 930380, 20 U.S. C. Sec. 1232g.

FERPA provides that no federal funds will be made available

to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of their parents.

20 U.S.C. § 1232g(b)(1). “Education records” are those records, files, documents, and other materials which

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A). We believe that the requested records are in part “education records” for purposes of FERPA. *See* Open Records Decision No. 332 (1982). However, section 552.026 in conjunction with FERPA may not be used to withhold entire documents; the school district must delete information only to the extent “reasonable and necessary to avoid personally identifying a student” or one or both of the student’s parents. *See id.*; Open Records Decision No. 206 (1978). Thus, only information identifying or tending to identify students or their parents must be withheld from required public disclosure. We have marked the student-identifying information the school district must not release to the public.

Finally, we consider the applicability of section 552.131 of the Government Code as added by the Seventy-sixth Legislature’s enactment of House Bill 211,¹ which reads in pertinent part as follows:

- (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

¹Act Of May 29, 1997, 75th Leg., R.S., ch. 1187, § 4, 1997 Tex. Gen. Laws 4555, 4580.

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 the requirements of Section 552.021.

(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.

We agree that section 552.131 is inapplicable in this situation and have marked the documents accordingly.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be

provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kay H. Hastings
Assistant Attorney General
Open Records Division

KHH/jc

Ref.: ID# 130184

encl. Marked documents

cc: Ms. Kathleen Bacus
Legacy Newspapers, Inc.
413 London Street
Castroville, Texas 78009
(w/o enclosures)