



October 13, 2000

Mr. Therold I. Farmer
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OR2000-3978

Dear Mr. Farmer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 140212.

The Pflugerville Independent School District (the "district"), which you represent, received a request on July 11, 2000 for various information such as travel vouchers, budgets, and information pertaining to a sexual harassment investigation. On July 25, 2000, you requested clarification from the requestor and also provided an estimate of charges. *See* Gov't Code § 552.2615(a) (providing for itemized estimate of charges if request exceeds \$40). On July 28, 2000, you received a letter from the original requestor's spouse asking for access to the requested information instead of copies and clarifying some of the requested items. Based on the July 28, 2000 letter, we conclude that the requestor's spouse modified the original request in response to the itemized statement by requesting access to the requested information instead of copies and, therefore, the original request was not withdrawn. *See* Gov't Code § 552.2615(b)(2) (request considered withdrawn if requestor does not respond to itemized estimate of charges by either accepting the estimated charges or modifying the request). On July 28, 2000, you also received a request from the original requestor's spouse seeking additional information including an audio tape of a board meeting. Further, on August 8, 2000, you received a copy of the July 28, 2000 request along with additional requested items which included a request for everything requested in the original request. You claim that you will make records available to the requestor, except for the records for which you claim an exception. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for an attorney general's decision no later than the tenth business day after the date of receiving the written request. In this instance, you received the original request on July 11, 2000, and sought clarification of the original request on July 25, 2000. *See* Gov't Code § 552.222(b)

(permitting governmental body to ask the requestor to clarify an unclear request for information). Thus, the ten day time period to request a decision began on July 12, 2000 and continued through July 24, 2000 which consisted of nine business days. On July 25, 2000, the date you requested clarification, the time period was tolled until July 28, 2000, when you received the letter modifying the original request from the requestor's spouse. *See* Open Records Decision No. 663 at 5 (1999) (providing that ten day period is tolled during the clarification process). In order to meet the ten day deadline under section 552.301(b), you had until July 31, 2000 to request a decision. Because your request for a decision was postmarked August 11, 2000, you failed to request a decision for the information requested in the original request within the ten business day period under section 552.301(b).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). You argue that the submitted information is excepted under sections 552.101, 552.102, 552.103 and 552.131 of the Government Code. Sections 552.101 and 552.102 of the Government Code provide a compelling reason to overcome the presumption of openness. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). However, section 552.103 is a discretionary exception and, therefore, does not provide a compelling reason to overcome the presumption of openness. *See* Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation and does not itself make information confidential). Therefore, we will not address the applicability of section 552.103 to the submitted information.

You claim that the information is excepted under section 552.101 in conjunction with the right of common law privacy. Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information protected by the common law right of privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The doctrine of common law privacy protects information that contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and the information must be of no legitimate concern to the public. *Id.* The court addressed the applicability of the common law privacy doctrine to files of an investigation of allegations of sexual harassment in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied). 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 conclusion, 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.* Based on *Ellen*, a governmental body must withhold the identities of alleged victims and witnesses to alleged sexual harassment as well as any information which would tend to identify a witness or victim.

Although you claim that you have marked an adequate summary of the investigation, upon review of the documents, we found no markings or a document which constitutes an adequate summary. Because there is not an adequate summary, you must release the submitted information but you must redact the names and identifying information of witnesses to the sexual harassment allegations. Because the requestor is the alleged victim of sexual harassment, the requestor has a special right of access to information that relates to herself. Gov't Code § 552.023.¹ Thus, the district need not redact the victim's name from the released information.²

You also assert that an audio tape of a closed board meeting is excepted under section 552.101. This section encompasses information protected by statute. Section 551.104(c) of the Government Code provides that "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying *only under a court order issued under Subsection (b)(3).*" (emphasis added). Thus, such information cannot be released to a member of the public in response to an open records request. *See* Open Records Decision No. 495 (1988). Further, the Open Meetings Act does not permit the Office of the Attorney General to review the confidential agendas and tapes. *See* Open Records Decision No. 495 (1988). Therefore, the district must withhold the audio tape of the closed session pursuant to section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code.

In conclusion, the district must release the submitted information but must redact identifying information of the witnesses to the sexual harassment allegations under section 552.101 in conjunction with the holding in *Ellen*. Because the requestor is the victim of the sexual

¹Section 552.023 of the Government Code provides a special right of access to a person or a person's authorized representative to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests.

²Because we have found that the identities of witnesses to the sexual harassment allegations are excepted under section 552.101 and the holding in *Ellen*, we need not address your arguments under the informer's privilege or sections 552.102 or 552.131 of the Government Code.

harassment, you need not redact the victim's name in this instance. You must withhold the audio tape of the closed session under section 552.101 in conjunction with section 551.104(c) of the Government Code.

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).

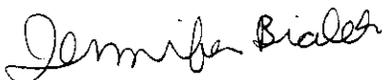
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

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,



Jennifer Bialek
Assistant Attorney General
Open Records Division

JHB\er

Ref: ID# 140212

Encl: Submitted documents