



March 27, 2001

Ms. Merri Schnieder-Vogel  
Bracewell & Patterson, L.L.P.  
711 Louisiana Street, Suite 2900  
Houston, Texas 77002-2781

OR2001-1194

Dear Ms. Schneider-Vogel:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 145315.

The Lamar Consolidated Independent School District (the "district"), which you represent, received a request for the following information:

- (1) All written communication (including exhibits, attachments, etc.) between the district and the State Board for Educator Certification (SBEC) regarding teacher and coach Stephen Sulak.
- (2) All documents (including exhibits, attachments, etc.) stemming from any investigation of Mr. Sulak's conduct by the district.
- (3) The personnel file of Mr. Sulak.

You state that you have been notified that the former employee who is the subject of the request seeks to withhold some of the information responsive to the request, and that the district will release the information he does not wish to protect. You have submitted to this office the information sought to be withheld from the requestor, and inform us that the district takes no position as to whether the information must be released. Counsel for the former employee ("Mr. Sulak") has submitted arguments to this office for why the requested information should not be released, and counsel for the requestor has submitted arguments for why the information should be made public. *See* Gov't Code § 552.304. Mr. Sulak argues that the information at issue is excepted from disclosure under section 552.101 of the Government Code in conjunction with common law privacy, as well as under section 552.103 of the Government Code. We have considered the arguments of all parties and have reviewed the submitted information.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 also encompasses the doctrines of common law and constitutional privacy. Common law privacy protects information 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. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

The responsive information pertains to an investigation of whether a former district employee engaged in sexual harassment at work and documents pertaining to the former employee's resignation from employment. The court in the case of *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App. - El Paso 1992, writ denied) applied the above-referenced common law right of privacy test to the records resulting from a workplace sexual harassment investigation. 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.* 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.* In its conclusion, the court stated:

The records requested contain highly intimate, embarrassing revelations about persons required to cooperate with an investigation by their employer. These witnesses were never informed of the request that these records be made public; they have, thus, had no opportunity to assert privacy interests on their own behalf. To disclose their names and the details of their statements would send a most unfortunate message to all public employees in Texas: that they complain about sexual harassment in their workplace, or cooperate in the investigation of such a complaint, only at risk of embarrassing and offensive publicity. While this may occasionally be a necessary evil in the enforcement of prohibitions against sexual harassment, we do not believe it is warranted here and decline to order the disclosure of documents which would have such a chilling effect.

Upon review of the information submitted, we conclude that it contains an adequate summary of the investigation, release of which we believe serves the legitimate public interest in the harassment allegation. In addition, we believe that, in accordance with *Ellen*, the statement of the accused must also be released, as must the submitted information pertaining to the salary and personnel actions concerning Mr. Sulak, which are not protected by privacy. See Open Records Decision Nos. 626 (1994), 455 (1987) (employees'

educational training; names and addresses of former employers, dates of employment, kind of work, salary, and reasons for leaving; names, occupations, addresses and phone numbers of character references; job preferences or ability; and birth dates, height, weight, and marital status not protected by privacy). We have marked with a green tag the information to be released. Based on *Ellen*, however, the district must withhold the identities of the victim and witnesses from the information that must be released.

In addition, we note that within the statement of Mr. Sulak to be released, the district appears to have redacted information identifying or tending to identify particular students pursuant to the Family Educational Rights and Privacy Act of 1974 ("FERPA").<sup>1</sup> After reviewing your markings, it is not clear whether the redacted names are those of witnesses whose identities must be withheld under *Ellen*. To the extent the redacted information pertains to students who are not witnesses, such identifying information must be withheld under FERPA.

We further note that the information to be released contains information that may be excepted from disclosure under section 552.117 of the Government Code. Section 552.117 excepts from public disclosure information relating to the home address, home telephone number, and social security number of a current or former government employee or official, as well as information revealing whether that employee or official has family members. Section 552.117 requires you to withhold this information for an official, employee, or former employee who requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold this information if the employee had not made a request for confidentiality under section 552.024 at the time this request for the documents was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 (1989) at 5.

Federal law may also prohibit disclosure of the former employee's social security number. A social security number is excepted from required public disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). We note that the federal statute provides that the *law* requiring the maintenance of the employee's social security number must have been enacted on or after

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<sup>1</sup>Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception.

October 1, 1990. In other words, the fact that the social security number was obtained after October 1, 1990 by itself does not dispose of the issue. Based on the information you have provided, we are unable to determine whether the social security numbers are confidential under this federal statute. We note, however, that section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information.

Finally, we address Mr. Sulak's argument under section 552.103 of the Government Code. Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. Section 552.103, however, applies only where the litigation involves or is expected to involve the governmental body raising the exception. Open Records Decision No. 392 (1983). Neither the district nor any other governmental body has raised section 552.103 to this office. Therefore, we conclude that section 552.103 may not be relied upon by Mr. Sulak to withhold the requested information.

To summarize, the district must withhold a portion of the requested information under section 552.101 in conjunction with common law privacy. The summary of the investigation, the statement of the accused, and certain employment information of the accused, all of which we have marked with a green tag, must be released to the requestor, with the exception of the identities of the victim and witnesses and information protected by FERPA. In addition, information protected under section 552.117 must be withheld from the information to be released if the former employee had made a timely election under section 552.024 to keep the 552.117 information confidential. Finally, social security numbers may be confidential if obtained or maintained by the district pursuant to any provision of law enacted on or after October 1, 1990.

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 Hadassah Schloss at 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,



Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/seg

Ref: ID# 145315

Encl. Submitted documents

cc: Mr. Danny Robbins  
Houston Chronicle  
P.O. Box 4260  
Houston, Texas 77210  
(w/o enclosures)