



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

July 23, 2003

Ms. Holly Boyd Wardell
Schwartz & Eichelbaum
4201 West Parmer Lane, Suite A-100
Austin, Texas 78727

OR2003-5092

Dear Ms. Wardell:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 184746.

The Birdville Independent School District (the "district"), which you represent, received a written request for the following categories of information:

1. A list of any and all allegations of misconduct by Hank Fulkerson, football coach and softball coach at Birdville High School.
2. All materials, documents, faxes, e-mails related to any investigation into allegations of misconduct by Hank Fulkerson.
3. Any student statements taken as part of an investigation.
4. Any faculty/coaches statements taken as part of an investigation.

You inform us that the district does not possess any documents responsive to item 3 listed above.¹ You contend, however, that the information you submitted to this office as responsive to the request is excepted from required disclosure pursuant to sections 552.101, 552.102, 552.103, and 552.135 of the Government Code.

¹The Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

We note, however, that the release of the submitted records is governed by section 552.022 of the Government Code. Section 552.022 provides in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or *investigation* made of, for, or by a governmental body, except as provided by Section 552.108; [and]

...

(18) a settlement agreement to which a governmental body is a party.

Gov't Code § 552.022(a)(1), (18) (emphasis added). The submitted records consist of a "completed investigation" made public under section 552.022(a)(1) and a "Settlement and Release Agreement" made public under section 552.022(a)(18). Consequently, the district must release the submitted records unless they are expressly made confidential under other law or unless the completed investigation is excepted from disclosure pursuant to section 552.108 of the Government Code.² As noted above, you contend that the submitted records are excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.); Open Records Decision No. 542 at 4 (1990) (governmental body may waive section 552.103). Thus, none of the submitted information may be withheld on the basis of section 552.103. However, because the district is required by law to withhold information coming within the protection of sections 552.101 and 552.102 of the Government Code, we will consider the applicability of these exceptions to the records at issue.

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information encompassed by the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release

² We note that you have not raised section 552.108 for any portion of the submitted information.

would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. 540 S.W.2d at 683-85.

In this instance, however, we believe the more appropriate exception to address here is section 552.102 of the Government Code, which is specifically designed to protect public employees' personal privacy. The scope of section 552.102(a) protection, however, is very narrow. *See* Open Records Decision No. 336 (1982); *see also* Attorney General Opinion JM-36 (1983). The test for section 552.102(a) protection is the same as that for information protected by common-law privacy under section 552.101. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref'd n.r.e.). However, a public employee's privacy under section 552.102(a) is less broad than common-law privacy under section 552.101 because of the greater public interest in disclosure of information regarding public employees. Open Records Decision Nos. 269 (1981), 169 (1977).

The submitted records include witness statements and investigator notes concerning a sexual harassment complaint. 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 investigatory files at issue in *Ellen* contained individual witness and victim statements, an affidavit given by the individual accused of the misconduct in response to the allegations, and the conclusions of the board of inquiry that conducted the investigation. The court held that the names of witnesses and their detailed affidavits regarding allegations of sexual harassment are exactly the types of information specifically excluded from disclosure under the privacy doctrine as described in *Industrial Foundation. Ellen*, 840 S.W.2d at 525. However, the court ordered the release of the affidavit of the person under investigation. *Id.* The *Ellen* court also ordered the disclosure of the summary of the investigation with the identities of the victims and witnesses deleted from the documents, noting that the public interest in the matter was sufficiently served by disclosure of such documents and that in that particular instance "the public [did] not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements." *Id.*

In this instance, however, after reviewing the documents you submitted to this office, we conclude that none of the documents at issue constitutes an adequate summary of the investigation. We therefore conclude in this instance that the district must withhold the identities of both the victim of the alleged sexual harassment and the witnesses pursuant to section 552.102 in conjunction with the common-law right to privacy.³ We have marked the information the district must withhold in accordance with *Ellen*. However, all of the remaining submitted information must be released to the requestor, with the following exceptions.

³Because we resolve this aspect of your request under section 552.102, we need not address the applicability of section 552.135 of the Government Code.

We first note that the submitted records contain information the district may be required to withhold pursuant to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) requires that the district withhold an employee's home address, home telephone number, social security number, and information that reveals whether the employee has family members, but only if the employee timely elected to keep this information confidential in accordance with section 552.024 of the Government Code. *But see* Open Records Decision No. 455 (1987) (statutory predecessor not applicable to applicants for government employment). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for the information is received by a governmental body. *See* Open Records Decision No. 530 at 5 (1989). Therefore, in order to withhold section 552.117(a)(1) information from the public, a proper election must be made by the employee prior to the governmental body's receipt of the request for information. We have marked the information the district must withhold pursuant to section 552.117(a)(1) if the district employees with whom this information is associated timely elected confidentiality for this information in accordance with section 552.024.

Finally, we note that a student's identifying information is contained in the submitted records. In this regard, section 552.026 of the Government Code provides as follows:

This 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. 93-380, 20 U.S.C. Sec. 1232g.

The Family Educational Rights and Privacy Act of 1974 ("FERPA") provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). 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). We have marked the information the district must withhold in accordance with FERPA.

In summary, the district must withhold 1) the identities of the victim and witnesses contained in the submitted records that we have marked pursuant to section 552.102 in conjunction with the common-law right of privacy, 2) the section 552.117(a)(1) information we have marked, but only if the respective employee made a timely section 552.024 election to make that information confidential, and 3) the student's identity that we have marked pursuant to FERPA. The remaining submitted information must be released to the requestor.

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 Dep't of Pub. 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/RWP/sdk

Ref: ID# 184746

Enc: Submitted documents

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