



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 24, 2005

Mr. David P. Backus
Underwood, Attorneys and Counselors at Law
1111 West Loop 289
Lubbock, Texas 79416

OR2005-05639

Dear Mr. Backus:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 226851.

The Merkel Independent School District (the "district"), which you represent, received two requests for (1) information regarding five named district employees and a former school board trustee, and (2) the Child Protective Services ("CPS") report investigating allegations of sexual misconduct between district employees and students. You state that you have released some responsive information to the requestors. You further state that some of the requested information does not exist.¹ You claim that some of the submitted information is excepted from disclosure under sections 552.026, 552.101, and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.² We have also received and considered comments from an attorney for one of the requestors. See Gov't Code § 552.304 (allowing interested party to submit comments indicating why requested information should or should not be released).

¹ We note that the Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request for information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

² We note that the district has redacted social security numbers in the submitted information. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

Initially, we must address a dispute between the requestor and the district concerning other information that may be responsive to the present request, yet has neither been released to the requestor nor submitted for our review. In your June 6, 2005 letter to this office, you inform us that the district and the requestor at issue discussed the scope of her request, and it was the understanding of the district that her request did not encompass attorney-client privileged information or attorney work product. *See* Gov't Code § 552.222 (allowing governmental body to ask requestor to clarify or narrow request for information); Open Records Decision No. 663 at 2-5 (1999) (discussing requests to clarify or narrowing request for information). Whether or not the requestor at issue narrowed her request is a question of fact. This office is unable to make factual determinations or resolve factual disputes in the opinion process. *See* Attorney General Opinions GA-0087 at 1, GA-0003 at 1 n. 2, JC-0534 at 1; Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). We therefore must rely on a governmental body's representations with regard to such issues. Based on the district's representations, we conclude that the requestor at issue narrowed her request to exclude privileged attorney-client documents and attorney work product. Therefore, this ruling does not address the applicability of the Act to such information and it need not be released.

We now turn to your arguments regarding the submitted information. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information made confidential by other statutes. Section 21.355 of the Education Code, which provides that "[a] document evaluating the performance of a teacher or administrator is confidential." This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher. *See* Open Records Decision No. 643 (1996). In Open Records Decision No. 643, we determined that the word "teacher" for purposes of section 21.355 means a person who (1) is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and (2) is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4. You claim that Exhibits 6 and 7 are confidential teacher evaluations under section 21.355. We note, however, that this office is currently involved in litigation styled *North East Independent School District v. Abbott*, Cause No. GN304566 (345th Dist. Ct., Travis County, Tex.), *appeal filed*, No. 03-04-00744-CV (Tex. App.—Austin Nov. 15, 2004). Your arguments and the information that you have submitted in Exhibits 6 and 7 are similar to the issues and information involved in the pending litigation. Accordingly, this ruling does not address the information that you argue is subject to section 21.355, and we will allow the court to determine whether the type of information at issue must be released to the public.

Next, you claim that the information submitted as Exhibit 8 is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. Section 261.201 provides in relevant part:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You inform us that Exhibit 8 consists of the report of an investigation conducted under chapter 261 of the Family Code by the CPS program of the Texas Department of Family and Protective Services. *See* Fam. Code § 261.406(a). Furthermore, you state that this information was provided to the district by CPS. We therefore conclude that Exhibit 8 is confidential in its entirety under section 261.201 of the Family Code and must be withheld under section 552.101 as information made confidential by law.

You assert that portions of the information submitted as Exhibit 10 must be withheld under the Family Educational Rights and Privacy Act of 1974 (“FERPA”), which 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). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990).

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 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.

In Open Records Decision No. 634 (1995), this office concluded that 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. *See id.* at 6-8 (1995). In this instance, however, you have submitted the requested information at issue to this office for consideration. Therefore, we will consider whether this information is excepted from disclosure under section 552.114 of the Government Code and FERPA.

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).* Such information includes information that directly identifies a student as well as information that, if released, would allow the student’s identity to be easily traced. We have marked the student-identifying information that must be withheld pursuant to section 552.114 of the Government Code and FERPA.³

We also understand you to claim that the identities of employee-witnesses in Exhibit 10 are excepted from disclosure under common law privacy.⁴ Common law privacy protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* 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. *Id.* at 683.

In addition, 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.*

³As we are able to make this determination, we need not address your common law privacy claim regarding this information.

⁴Section 552.101 also encompasses the doctrine of common law privacy.

When there is an adequate summary of a sexual harassment investigation, the summary must be released along with the statement of the accused, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure. However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of witnesses and victims must still be redacted from the statements. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. We further note that common law privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about a public employee's job performance. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

Because the submitted information contains no adequate summary of the sexual misconduct investigation at issue, and you do not relate that such a summary has been released, most of the remaining submitted information may not be withheld under section 552.101 in conjunction with common law privacy. However, based on *Ellen*, the district must withhold the marked identifying information of employee-witnesses under section 552.101 in conjunction with common law privacy.

We note that portions of the remaining information may be excepted from disclosure under section 552.117 of the Government Code.⁵ Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the district may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the dates on which the requests for this information was made. For those employees who timely elected to keep the information we have marked confidential, the district must withhold this information under section 552.117(a)(1). The district may not withhold the marked information under section 552.117(a)(1) for those employees who did not make timely elections to keep that information confidential.

In summary, we do not address the applicability of section 21.355 of the Education Code to the documents submitted as Exhibits 6 and 7. Exhibit 8 must be withheld under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. The marked student-identifying information must be withheld under section 552.114 of the Government Code and FERPA. The marked identifying information of employee-witnesses must be withheld under section 552.101 of the Government Code in conjunction with

⁵This office will raise a mandatory exception like section 552.117 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

common law privacy. The marked information must be withheld under section 552.117(a)(1) of the Government Code if the employees at issue made timely elections under section 552.024 of the Government Code to keep this information confidential. The remaining information must be released to the respective requestors.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/sdk

Ref: ID# 226851

Enc. Submitted documents

c: Ms. Diane Jennings
The Dallas Morning News
508 Young Street
Dallas, Texas 75202
(w/o enclosures)

Ms. Sidney Levesque
Staff Writer
Abilene Reporter-News
101 Cypress Street
Abilene, Texas 79601
(w/o enclosures)

Ms. Dionne Carney Rainey
Jenkins & Gilchrist
1445 Ross Avenue, Suite 3200
Dallas, Texas 75202
(w/o enclosures)