ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 20, 2006

Ms. Maureen R. M. Singleton
Bracewell & Giuliani LLP
711 Louisiana Street, Suite 2300
Houston, Texas 77002-2770

OR2006-13759

Dear Ms. Singleton:

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# 265008.

The West Houston Charter School (the "school"), which you represent, received a request for all records relating to the requestor's child. You state that the school has released most of the requested information. You seek to withhold other responsive information under sections 552.101, 552.107, and 552.114 of the Government Code and the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code. We have considered your arguments and have reviewed the information you submitted.

We first note that the United States Department of Education Family Policy Compliance Office (the "DOE") recently informed this office that the Family Education Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purposes of our review in the open records ruling process under the Act.[1] Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is

[1]A copy of this letter may be found on the Office of the Attorney General's website: http://www.oag.state.tx.us/opinopen/og_resources.shtml.

disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). You have submitted, among other things, redacted education records for our review.[2] Accordingly, we will address your other arguments with regard to the redacted records and the rest of the submitted information.[3]

With regard to your claim under section 552.107 of the Government Code, the DOE also has informed this office that a parent's right of access under FERPA to information about the parent's child does not prevail over an educational institution's right to assert the attorney-client privilege.[4] Therefore, to the extent that the requestor has a right of access under FERPA to any of the information for which you claim the attorney-client privilege, we will address your assertion of the privilege under section 552.107. We also will address your claim under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses the common-law right to privacy. Information must be withheld from the public under section 552.101 in conjunction with common-law privacy when the information is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976).

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court applied the common-law right to privacy to an investigation of alleged sexual harassment. The investigation files at issue in *Ellen* contained third-party witness statements, an affidavit in which the individual accused of the misconduct responded to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *See* 840 S.W.2d at 525. The court upheld the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the disclosure of such documents sufficiently served the public's interest in the matter. *Id.* The court also held that "the public does not possess a legitimate interest in the identities of the individual witnesses, nor the details of

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[2]We note that this office generally has treated "student record" information that is protected by section 552.114 of the Government Code as the equivalent of "education record" information that is protected by FERPA. *See* Gov't Code § 552.114(a); Open Records Decision No. 634 at 5 (1995). As you have submitted redacted records, we need not address section 552.114.

[3] In the future, if the school does obtain parental consent to submit unredacted education records and the school seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

[4]Ordinarily, FERPA prevails over an inconsistent provision of state law. *See Equal Employment Opportunity Comm'n v. City of Orange, Tex.*, 905 F.Supp. 381, 382 (E.D. Tex. 1995); Open Records Decision No. 431 at 3 (1985).

their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released under *Ellen*, but the identities of the victims of and witnesses to the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. *See also* Open Records Decision Nos. 393 (1983), 339 (1982). If no adequate summary of the investigation exists, then all of the information relating to the investigation must ordinarily be released, except for information that would identify the victims and witnesses. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. 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).

You inform us that the information submitted as Exhibit C relates to an investigation of alleged sexual harassment. You state that Exhibit C includes notes taken by the school principal during interviews of students in the course of the investigation. We understand you to claim, based on *Ellen*, that the notes are confidential in their entirety under section 552.101 and common-law privacy. We note, however, that the information in question does not contain an adequate summary of the investigation. Consequently, only the identities of the victim and witnesses in the investigation are protected by common-law privacy under *Ellen*. You inform us that you have redacted that information from the submitted documents, pursuant to FERPA. You also state that you have withheld, on this same basis, hand-written statements of students that relate to the investigation. Therefore, we do not reach the issue of whether the information that you have redacted under FERPA is protected by common-law privacy under *Ellen*. The remaining information that relates to the sexual harassment investigation is not private under *Ellen*, and the school may not withhold any of the remaining information on that basis under section 552.101 of the Government Code.

Section 552.107(1) protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators,

investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that the information submitted as Exhibit D consist of the school principal's notes. You inform us that these notes either were taken during communications with an attorney for the school or are based on legal advice communicated to the principal by the school's attorney. You state that these communications were not intended to be disclosed to any third party. Based on your representations, we conclude that the information in question documents confidential attorney-client communications that were made in connection with the rendition of professional legal services to the school. We therefore conclude that the school may withhold Exhibit D in its entirety under section 552.107(1) of the Government Code.

In summary, the school may withhold Exhibit D under section 552.107(1) of the Government Code. The rest of the submitted information must be released. This ruling does not address the applicability of FERPA to the submitted information. Should the school determine that all or portions of the submitted information consists of "education records" that must be withheld under FERPA, the school must dispose of that information in accordance with FERPA, rather than the Act.

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); *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 Office of the Attorney General 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,

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 265008

Enc: Submitted documents

c: Ms. Carol Britton
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(w/o enclosures)