



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 26, 2008

Mr. John A. Kazen
Law Offices of Kazen, Meurer & Perez L.L.P.
P.O. Box 6237
Laredo, Texas 78042-6237

OR2008-02534

Dear Mr. Kazen:

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# 303004.

The Laredo Independent School District (the "district"), which you represent, received three requests from three different requestors for any and all materials related to the district's investigation into a named employee. You state that you have released some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.111, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹ We have also received and considered comments submitted by the Texas State Teacher's Association, submitting comments on behalf of some of the requestors. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note that a portion of the submitted information is not responsive to the first request. Because the memorandum dated December 5, 2007 in Exhibit 2-D was created after the first request was received, this information is not responsive to the first request. This ruling does not address the public availability of information that is not responsive to the first request, and you need not release such information in response to the first request. *See Econ.*

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Opportunities Dev. Corp. v. Bustamante, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed).

The United States Department of Education Family Policy Compliance Office (the “DOE”) has informed this office that the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232(a), 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 purpose of our review in the open records ruling process under the Act.² “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). A “student” is defined to include “any person with respect to whom an educational agency or institution maintains education records or personally identifiable information,” but does not include a person who has not been in attendance at such agency or institution. *Id.* § 1232g(a)(6); *see also* 34 C.F.R. § 99.3. You state that the submitted information contains images of minors who are not students of the district. Because this information does not relate to students of the district, we find that these images are not subject to FERPA and no portion of it may be withheld on that basis. We will next address the applicability of the remaining claimed exceptions to the submitted information.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” The common law right of privacy is incorporated into the Act by section 552.101. For information to be protected by common law privacy it must meet the criteria set out in *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685. Information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and therefore generally not protected from disclosure under common law privacy. *See* Open Records Decision Nos. 470 (1987) (public employee’s job performance does not generally constitute employee’s private affairs), 455 (1987) (public employee’s job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow). This office has found, however, that the following types of information are excepted from required public disclosure under common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); personal financial information not relating to the financial transaction between an individual

²A copy of this letter may be found on the Office of the Attorney General’s website, available at http://www.oag.state.tx.us/opinopen/og_resources.

and a governmental body, *See* Open Records Decision Nos. 600 (1992), 545 (1990); and identities of victims of sexual abuse, *See* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

In addition, the court in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) addressed the applicability of the common law privacy doctrine to files of an investigation into allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the accused individual responding to the allegations, and the conclusions of the board of inquiry that conducted the investigation. 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.*

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 and witnesses of 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 ordinarily must be released, with the exception of information that would tend to identify the victims and witnesses. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure.

In this instance, a portion of the submitted information consists of a sexual harassment investigation. Because there is no adequate summary of the investigation in this case, you must generally release the submitted information in Exhibit 2-C. However, based on the holding in *Ellen*, the district must withhold the identity of the victim we have marked in Exhibit 2-C under section 552.101 of the Government Code in conjunction with common law privacy. Although you also contend that the submitted photographs in Exhibit 2-A and 2-B are private, we find that the information is either not intimate or embarrassing or is of legitimate public interest.

Furthermore, we note that the photographs in Exhibit 2-B were obtained from publicly available websites. We find that, as these photographs are in the public domain, the individuals pictured have no reasonable expectation of privacy. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (action for invasion of privacy cannot be maintained where information is in public domain); *Star Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992) (law cannot recall information once in public domain), *Roberts v. Houston Indep. Sch. Dist.*, 788 S.W.2d 107, 111 (Tex. App. — Houston [1st Dist.] 1990). We also find that this information relates to the administrator's alleged misconduct on the job, which is of legitimate public interest. Accordingly, none of the remaining submitted information at issue may be withheld under section 552.101 in conjunction with common law privacy.

Section 552.111 of the Government Code excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d391, 394 (Tex. App. — San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App. — Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). However, a governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App. — Austin 2001, no pet.); ORD 615 at 4-5.

You contend that the submitted information in Exhibit 2-D should be withheld pursuant to section 552.111. Upon review of your arguments and the submitted information, we find that the information at issue pertains to administrative or personnel matters that do not rise to the level of policymaking. Accordingly, the district may not withhold this information under section 552.111 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code.³ Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body’s receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request, under section 552.024, that the information be kept confidential. If the employee timely elected to keep information confidential under section 552.024, the district must withhold the information we have marked under section 552.117(a)(1). Otherwise, the information we have marked must be released.

Finally, the district raises section 552.135 of the Government Code which provides in relevant part:

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

Gov't Code § 552.135(a), (b). Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under that exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See id.* § 552.301(e)(1)(A). Furthermore, section 552.135 only protects information that identifies an "informer" as defined by subsection (a). *See id.* § 552.135(a). We find that the remaining submitted information does not contain any informer's identifying information. Accordingly, the district may not withhold any part of the submitted information pursuant to section 552.135.

In summary: (1) the district must withhold the identity of the victim we have marked in Exhibit 2-C under section 552.101 of the Government Code in conjunction with common law privacy and (2) if the employee at issue timely elected to keep information confidential under section 552.024, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The remainder of the submitted information must be released to the 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 file suit in

Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

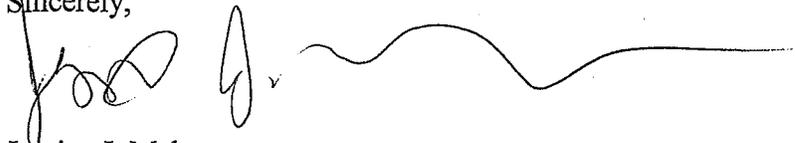
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 challenge 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,

A handwritten signature in black ink, appearing to read 'Jessica J. Maloney', followed by a long, wavy horizontal line.

Jessica J. Maloney
Assistant Attorney General
Open Records Division

JJM/jh

Ref: ID# 303004

Enc. Submitted documents

c: Ms. Tricia Cortez
Laredo Morning Times
111 Esperanza Drive
Laredo, Texas 78041
(w/o enclosures)

Ms. Yohana Saucedo
The Law Office of Yohanna Saucedo, P.C.
1618 Salinas Avenue
Laredo, Texas 78041
(w/o enclosures)

Mr. Hilario Cavazos & Mr. Rene De la Vina
Texas State Teachers Association
2059 Don Pasqual
Laredo, Texas 78045
(w/o enclosures)