



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 25, 2011

Mr. Eric G. Rodriguez
Walsh, Anderson, Brown, Gallegos & Green, P.C.
P.O. Box 460606
San Antonio, Texas 78246

OR2011-04140

Dear Mr. Rodriguez:

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# 412502.

The Harlingen Consolidated Independent School District (the "district"), which you represent, received a request for the minutes taken by a named individual and any other documents pertaining to an investigation involving the requestor and allegations on or about December 16, 2010. We note you have redacted student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.111, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022 states in relevant part:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA 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. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

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[.]

Gov't Code § 552.022(a)(1). Upon review, we find the submitted information is part of a completed investigation made by the district. Pursuant to section 552.022(a)(1) of the Government Code, a completed investigation is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. Section 552.111 of the Government Code is a discretionary exception that protects a governmental body's interest and may be waived. *See id.* § 552.007; Open Records Decision Nos. 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process), 665 at 2 n.5 (discretionary exceptions generally). As such, section 552.111 is not other law that makes information confidential for the purposes of section 552.022. Thus, the district may not withhold any portion of the submitted information on this basis. However, you also claim that the submitted information is protected from disclosure under sections 552.101, 552.102, and 552.135 of the Government Code. Because sections 552.101, 552.102, and 552.135 are other law for purposes of section 552.022, we will consider your arguments under these exceptions.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which excepts from public disclosure private information about an individual if the information (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). 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 the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held "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 along with the statement of the accused 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* 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 identify the victims and witnesses. Because 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, the identity of the individual accused of sexual harassment is not protected from public disclosure. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

The submitted information pertains to a completed sexual harassment investigation. Upon review, we find the submitted information includes an adequate summary of the investigation and a statement of the accused, which we have marked. Thus, this summary and the statement of the accused are not confidential. However, we note information within the summary and statement of the accused that identifies the victims and witnesses is confidential under common-law privacy. *See Ellen*, 840 S.W.2d at 525. Accordingly, the district must withhold the information we have marked in the summary and in the statement of the accused under common-law privacy and the court's holding in *Ellen*. Further, the district must withhold the additional records of the sexual harassment investigation under common-law privacy and the court's holding in *Ellen*.²

Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). Upon review, we find none of the remaining information is excepted under section 552.102(a) of the Government Code. Accordingly, none of the remaining information may be withheld on that basis.

Next, we address your argument under section 552.135 of the Government Code, which provides the following:

(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 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].

Id. § 552.135. 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 the exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See id.*

²As our ruling is dispositive, we do not address your remaining argument against disclosure of this information.

§ 552.301(e)(1)(A). Additionally, individuals who provide information in the course of an investigation, but do not make the initial report, are not informants for purposes of section 552.135 of the Government Code. Upon review, we find no portion of the remaining information reveals the identity of an informer for the purposes of section 552.135. Thus, the district may not withhold any portion of the remaining information under section 552.135 of the Government Code.

In summary, the district must release the marked sexual harassment investigation summary and statement of the accused. However, in doing so the district must withhold the information that identifies the victim and the witnesses, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy and the court's holding in *Ellen*. The district must also withhold the remaining information under section 552.101 in conjunction with common-law privacy and the court's holding in *Ellen*.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/em

Ref: ID# 412502

Enc. Submitted documents

cc: Requestor
(w/o enclosures)