



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 16, 2013

Ms. Leandra Costilla Ortiz
Staff Attorney
Brownsville Independent School District
1900 Price Road
Brownsville, Texas 78521-2417

OR2013-06161

Dear Ms. Ortiz:

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# 484088 (BISD Req. No. 07161).

The Brownsville Independent School District (the "district") received a request for specified interview questions and answers asked by a named employee during the investigation of another named employee. You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you assert the submitted information is not subject to disclosure because it is in "active use." Section 552.221 of the Government Code provides in relevant part the following:

(a) An officer for public information of a governmental body shall promptly produce public information for inspection, duplication, or both on application by any person to the officer. In this subsection, "promptly" means as soon as possible under the circumstances, that is, within a reasonable time, without delay.

...

(c) If the requested information is unavailable at the time of the request to examine because it is in active use or in storage, the officer for public information shall certify this fact in writing to the requestor and set a date and hour within a reasonable time when the information will be available for inspection or duplication.

Gov't Code § 552.221(a), (c). This office has interpreted section 552.221 to require prompt disclosure of information unless it is in "immediate active use." See Open Records Decision No. 225 at 3 (1979) (under former section 552.221, shorthand notes are in active use while typist is in the process of typing them out, but are not in active use "if there is no prospect that they will be immediately typed or further processed"), 57 at 4 (1974) (student directory information not in active use under former section 552.221 if copies of same information are provided to various college departments). Section 552.221 is a narrow exception to the rule of prompt production of information under the Act – it permits an agency to avoid only unreasonable disruption of its immediate business. Open Records Decision No. 121 at 3 (1976). Section 552.221, however, cannot be used to deny a requestor access to records. JM-757 at 4 (1987).

You assert the submitted information is in active use as the investigation is not complete. However, we disagree with the district's position that the file is in active use because the investigation has not been completed. See, e.g., Open Records Decision Nos. 148 at 1 (1976) (recommendations and employment evaluations not in active use under former section 552.221 during entire time when faculty member's promotion is under consideration), 121 at 3 (university's financial records in custody of district attorney during criminal investigation not in active use under former section 552.221). The district also has not adequately explained how release of the submitted information would disrupt the district's immediate business. Therefore, we find you have not established the submitted information is in active use for purposes of section 552.221 of the Government Code, and the district may not withhold it on that basis.

Section 552.101 of the Government Code excepts from public 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 common-law right of privacy, which protects information that is 1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and 2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be met. *Id.* at 681-82.

Common-law privacy protects the types of information held to be intimate or embarrassing in *Industrial Foundation*. See *id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). 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. 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 under *Ellen*, along with the statement of the accused. However, 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). However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of victims and witnesses 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 also note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

The submitted information relates to an investigation into alleged sexual harassment. Upon review, we agree this information does not contain an adequate summary of the alleged sexual harassment investigation. Because there is no adequate summary of the investigation, any information pertaining to the sexual harassment investigation must generally be released. However, the information at issue contains the identifying information of the alleged sexual harassment victim and witnesses. Accordingly, the district must withhold the identifying information of the alleged victim and witnesses, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy and *Ellen*. See 840 S.W.2d at 525. However, we find the district has not demonstrated how any portion of the remaining information it seeks to withhold is highly intimate or embarrassing and not of legitimate public. Thus, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy and *Ellen*.

Section 552.101 of the Government Code also encompasses information protected by the common-law informer's privilege, which has long been recognized by Texas courts. See *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law enforcement authority, provided the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records

Decision No. 279 at 2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law* § 2374, at 767 (J. McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5.

You seek to withhold portions of remaining information under the common-law informer's privilege. You state the information at issue contains the names of employees who may have personal knowledge of the incidents at issue. We note a witness who provides information in the course of an investigation, but does not make the initial report of a violation, is not an informer for purposes of the common-law informer's privilege. Consequently, we find you have failed to demonstrate the applicability of the common-law informer's privilege to the remaining information at issue. Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

Section 552.135 of the Government Code. Section 552.135 provides in 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].

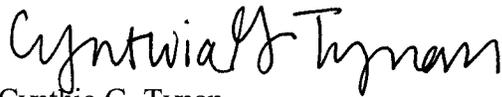
Gov't Code § 552.135(a)-(b). Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under the exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See id.* § 552.301(e)(1)(A). Additionally, individuals who provide information in the course of an investigation, but who do not make the initial report are not informants for purposes of section 552.135 of the Government Code. Upon review, we find you have failed to demonstrate the remaining information at issue identifies an informer who furnished an initial report of a violation of law to the district for purposes of section 552.135. Thus, the district may not withhold any of the remaining information under section 552.135 of the Government Code.

In summary, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and the ruling in *Ellen*. The district must release the remaining information.

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,



Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/akg

Ref: ID# 484088

Enc. Submitted documents

c: Requestor
(w/o enclosures)