



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 13, 2014

Ms. Merri Schneider-Vogel
Counsel for Blinn College
Thompson & Horton LLP
3200 Southwest Freeway, Suite 2000
Houston, Texas 77027-7528

OR2014-20678

Dear Ms. Schneider-Vogel:

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# 542950.

Blinn College (the "college"), which you represent, received a request for information pertaining to a specified complaint sent to the Equal Employment Opportunity Commission and a specified sexual harassment accusation during a specified time period.¹ You claim the requested information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

¹We note the college asked for and received clarification regarding this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²Although you raise section 552.101 of the Government Code in conjunction with Rule 503 of the Texas Rules of Evidence, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). The proper exception to raise when asserting the attorney client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. *See* Open Records Decision Nos. 676, 677 at 4-8 (2002).

³We assume 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.

The United States Department of Education Family Policy Compliance Office (the “DOE”) has informed this office that FERPA, 20 U.S.C. § 1232g, 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.⁴ 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 disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). Because our office is prohibited from reviewing education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA. Such determinations under FERPA must be made by the educational authority in possession of the education records. Thus, should the college determine all or portions of the requested information consist of “education records” that must be withheld under FERPA, the college must dispose of any such information in accordance with FERPA, rather than the Act.

Next, we note you have redacted portions of the submitted information. You state the college has redacted information subject to section 552.117 of the Government Code, as permitted by section 552.024(c) of the Government Code and certain information pursuant to section 552.136(c) of the Government Code.⁵ However, you do not assert, nor does our review of our records indicate, the college has been authorized to withhold the remaining redacted information, which consists of a birth date, without seeking a ruling from this office. *See* Gov’t Code § 552.301(a); Open Records Decision No. 673 (2000). Because we can discern the nature of the information that has been redacted, being deprived of this information does not inhibit our ability to make a ruling in this instance. Nevertheless, be advised that a failure to provide this office with requested information generally deprives us of the ability to determine whether information may be withheld and leaves this office with no alternative other than ordering that the redacted information be released. *See* Gov’t Code §§ 552.301(e)(1)(D) (governmental body must provide this office with copy of “specific information requested” or representative sample), .302.

⁴A copy of this letter may be found on the Office of the Attorney General’s website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

⁵Section 552.117 of the Government Code exempts from disclosure the home addresses and telephone numbers, social security numbers, emergency contact information, and family member information of current or former officials or employees of a governmental body. *See* Gov’t Code § 552.117. Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the employee or official or former employee or official chooses not to allow public access to the information. *See id.* § 552.024(c). Section 552.1175(f) of the Government Code authorizes a governmental body to withhold information subject to section 552.1175(b) of the Government Code without requesting a decision from this office. Section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

We also note portions of the submitted information, which we have marked, are not responsive to the instant request because they were created outside of the specified time period or were created after the college received the present request. The college need not release nonresponsive information in response to this request, and this ruling will not address that information.

We note some of the responsive information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part, the following:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or 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;

...

(15) information regarded as open to the public under an agency's policies[.]

Id. § 552.022(a)(1), (15). Some of the responsive information consists of completed evaluations that are subject to section 552.022(a)(1). The college must release this information pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code, or is made confidential under the Act or other law. *See id.* § 552.022(a)(1). Additionally, the responsive information includes information the college has published on its website. Because the college has published the information at issue on its website, we find this information is subject to subsection 552.022(a)(15), and the college may only withhold it if it is made confidential under the Act or other law. *See id.* § 552.022(a)(15). Although you assert this information is excepted from disclosure under section 552.103 of the Government Code, this section is discretionary and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the college may not withhold the completed evaluations subject to section 552.022(a)(1) or the information published on the college's website subject to section 552.022(a)(15) under section 552.103. As you raise no further exceptions for the information subject to section 552.022, it must be released pursuant to sections 552.022(a)(1) and 552.022(a)(15) of the Government Code. However, we will address your arguments for the remaining responsive information that is not subject to section 552.022.

Section 552.103 of the Government Code provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

..

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the department received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* This office has found that a pending complaint filed with the Equal Employment Opportunity Commission (the "EEOC") indicates litigation is reasonably anticipated. *See, e.g.*, Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state, and provide documentation showing, prior to the college's receipt of the instant request, a college employee filed a discrimination claim against the college with the EEOC. You also state the remaining responsive information is related to the claim of discrimination at issue because it forms the basis of the discrimination claim. Based on your representations and our review, we find the college reasonably anticipated litigation on the date this request was received, and the information at issue is related to the anticipated litigation.

However, we note the opposing party in the anticipated litigation has seen or had access to some of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information

relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the information we have marked is not protected by section 552.103 and may not be withheld on that basis. We also note the applicability of section 552.103 ends once the related litigation concludes or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Accordingly, with the exception of the information we have marked, the college may withhold the remaining responsive information under section 552.103 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”⁶ Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation. Id.* at 683.

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 in an employment context. 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.*

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, 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. We note that since

⁶The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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).

We note the information we have marked pertains to allegations of sexual harassment. The information we have marked does not contain an adequate summary of the sexual harassment investigation. Because there is no adequate summary of the investigation, the information we have marked generally must be released. However, the information we have marked contains the identity of the alleged sexual harassment victim. Accordingly, we conclude the college must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy and the holding in *Ellen*. The remaining information does not constitute highly intimate or embarrassing information of no legitimate public interest. Thus, none of the remaining information at issue may be withheld under section 552.101 in conjunction with common-law privacy under *Ellen*.

We note some of the remaining information is excepted from disclosure under section 552.102(a) of the Government Code. 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). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336, 348 (Tex. 2010). Upon review, we find the college must withhold the date of birth we have marked under section 552.102(a) of the Government Code.

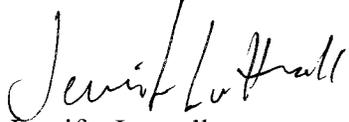
In summary, the information we have marked must be released pursuant to section 552.022 of the Government Code. With the exception of the information we have marked, the college may withhold the remaining responsive information under section 552.103 of the Government Code. In releasing the information we have marked, the college must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and withhold the date of birth under section 552.102(a) of the Government Code.

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.texasattorneygeneral.gov/open/>

[orl_ruling_info.shtml](#), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/akg

Ref: ID# 542950

Enc. Submitted documents

c: Requestor
(w/o enclosures)