



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 25, 1994

Ms. Myra C. Schexnayder
Assistant School Attorney
Houston Independent School District
Hattie Mae White Administration Building
3830 Richmond Avenue
Houston, Texas 77027-5838

OR94-389

Dear Ms. Schexnayder:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 25174.

You have received two identical requests for a copy of the results of an investigation into alleged improprieties within the Houston Independent School District (the "district"). One request comes from the district employee whose allegations of misconduct initiated the investigation, Ms. Ball. You advise that the second request comes from a representative of the employee association on behalf of Ms. Ball. You state that the district is treating the two requests as one from Ms. Ball. Accordingly, we will refer in this opinion to only one requestor, Ms. Ball.

The requestor specifically seeks "a copy of the report of findings resulting from the November-December investigation of a harassment complaint which [she] filed against Ms. Adele L. Rogers, principal of Holland Middle School, and Mr. Calvin Bias, Holland Middle School custodian." You state that the district has released to the requestor two documents: first, a summary of the investigation report and second, a redacted version of the complete investigation report reflecting her own statements and allegations. The district maintains, however, that, pursuant to sections 552.101 and 552.111 of the Government Code, it must or may withhold those portions of the

investigation report containing summaries of the statements of numerous district employees and one item of correspondence from Ms. Rogers to the investigator, along with its attachment.¹

As a threshold matter, we note that some of the documents you have submitted, even one that you already have released to the requestor, are stamped "confidential." Under the Open Records Act, a governmental body may not make an enforceable promise to keep information confidential, unless the governmental body is specifically authorized by law to do so. Attorney General Opinion H-258 (1974) at 3; *see also* Attorney General Opinions JM-672 (1987) at 1-2; JM-37 (1983) at 2; Open Records Decision Nos. 594 at 3, 585 at 2 (1991); 514 (1988) at 1; 55A (1975) at 2. In addition, a governmental body may not promulgate a rule purporting to make certain information confidential unless the governmental body is statutorily authorized to do so. *See* Open Records Decision No. 594 at 3. Thus, unless the documents stamped "confidential" are indeed confidential under the law or unless the district is statutorily authorized to make such documents confidential, the stamps are of no consequence. You have not averred that the district is authorized to make such documents confidential.

We turn now to the exceptions you have raised. Section 552.101 of the Government Code excepts from required public disclosure information that is "confidential by law, either constitutional, statutory, or by judicial decision." You contend that the information you have marked is confidential under the common law.²

Under the Texas Supreme Court's decision in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977), information is private under the common law, and therefore protected from required public disclosure under section 552.101 of the Government Code, if the information meets both prongs of a two-pronged test. First, the requested information must contain highly intimate or embarrassing facts about a person's private affairs such

¹You have submitted to this office copies of the requested information and have marked those portions that you believe the district must or may withhold. *See* Gov't Code § 552.303 (providing that governmental body that requests attorney general's decision on open records matter shall supply to attorney general specific information requested); Open Records Decision No. 252 (1980) at 2 (quoting Open Records Decision No. 150 (1977), which states that "A general claim that an exception applies to an entire file or report, when the exception clearly is not applicable to all of the information in the file or report, simply does not comport with the procedural requirements of the [a]ct.") We assume that you will release to the requestors the information that you have not marked.

²Section 552.023(a) of the Government Code provides the subject of information with a special right of access to information that is deemed confidential by laws intended to protect that person's privacy interests. You already have released to the requestor a redacted version of the complete investigation report reflecting her own statements and allegations. We understand you to contend that the remaining information is confidential by laws intended to protect the privacy of other persons.

that its release would be highly objectionable to a reasonable person. Second, the information must be of no legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d at 685. You claim that the information contains highly intimate or embarrassing facts and, furthermore, that the information is not of legitimate public interest because the district has released to the requestor the summary of the investigation report.

Your argument is based partly upon the decision of the Court of Appeals of Texas in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied). Prior to the *Morales* decision, this office concluded that, with the exception of victims of aggravated sexual abuse, see Open Records Decision No. 339 (1982) at 2, and child victims of sexual abuse, see Open Records Decision No. 393 (1983) at 2, section 552.101 does not except from required public disclosure, on common-law privacy grounds, the names of crime victims. Open Records Decision No. 409 (1984) at 2; see also Open Records Decision No. 579 (1990) at 2-3 (concluding that sexual harassment information at issue generally not private under common law). The *Morales* decision has modified our view with regard to information concerning allegations of sexual harassment, however.

In *Morales* the court considered whether the statements and names of witnesses to and victims of sexual harassment, who were required to give information under threat of discipline, were public information under the act. *Morales*, 840 S.W.2d at 522. The *Morales* court found that the information was "highly intimate or embarrassing."³ *Id.* at 524-25. Moreover, the court found that the public did not possess a legitimate interest in the names of witnesses to or victims of the sexual harassment, in their statements, or in any other information that would tend to identify them because information pertinent to the sexual harassment charges already had been released to the public in summary form. *Id.* at 525. Thus, in some circumstances, the doctrine of common-law privacy excepts from required public disclosure the names of witnesses to and victims of sexual harassment, their statements, and any other information that would tend to identify them.

³The *Morales* court characterized the information sought as

exactly the sort held excluded from disclosure under the privacy exemption. It involves names of witnesses required to give information under threat of discipline, their statements regarding highly embarrassing, offensive and unprofessional conduct in the workplace, their dating and sexual relationships, the state of marriages and other highly personal material.

Morales v. Ellen, 840 S.W.2d 519, 524-25 (Tex. App.--El Paso 1992, writ denied). You have argued that *Morales* applies in part because district employees were required, as a condition of their jobs, to speak to the investigator upon request. In our opinion, the confidentiality of witness statements under *Morales* depends not only on the fact that the witnesses were compelled to testify or face disciplinary action, but also on the nature of the events and conduct about which the witnesses spoke.

In our opinion, the information you wish to withhold pursuant to section 552.101 differs from that in *Morales*. We find no information in the report that contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person. See *Industrial Found.*, 540 S.W.2d at 685. Additionally, we believe that the information is of legitimate concern to the public, *see id.*, because it pertains to conduct allegedly conducted in the public workplace, during work time, or affecting the relationships between public employees. Moreover, the release of the summary is insufficient in this case to abrogate the public's legitimate interest in this report; it contains information regarding only two of the allegations levelled in this case. In no way does the summary apprise the public as to what is alleged to have occurred within one or more of the district schools. Accordingly, we conclude that section 552.101 of the Government Code does not authorize the district to withhold the requested information from the requestor.

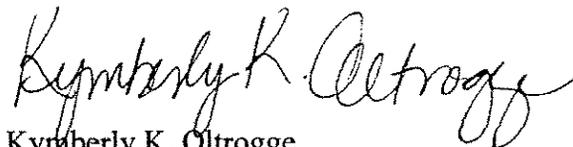
Section 552.111 of the Government Code authorizes a governmental body to withhold from required public disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993) at 5 this office construed the statutory predecessor to section 552.111 as follows:

We conclude that section [552.111] excepts from disclosure only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body at issue. Section [552.111] does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. . . . [W]e stress that . . . to come within the [section 552.111] exception, information must be related to the *policymaking* functions of the governmental body. An agency's policymaking functions do not encompass routine internal administrative and personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. [Footnote deleted.]

To the extent that information in the report is nonfactual, we do not believe it relates to the district's policymaking functions. Much of information pertains to relationships between certain district employees. Other information pertains to alleged violations of established district policy. We conclude, therefore, that section 552.111 of the Government Code does not authorize the district to withhold the requested information.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with an informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Kimberly K. Oltrogge
Assistant Attorney General
Open Government Section

KKO/LRD/rho

Ref.: ID# 25174

Enclosures: Submitted documents

cc: Ms. Mary D. Ball
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(w/o enclosures)