



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 26, 1995

Mr. Rudy V. Gonzales
Vice President, Administrative Services
Midland College
3600 North Garfield
Midland, Texas 79705-6399

OR95-229

Dear Mr. Gonzales:

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# 28923.

Midland College (the "college") received an open records request for copies of "any written grievances or complaints that were filed against [a named former college instructor] according to the college's grievance policy, by students or faculty of Midland College, from August 1, 1990 to May 31, 1991." You have submitted to this office as responsive to the request various documents, including interoffice memoranda, notes from interviews conducted during the course of the investigation of the complaints, and students' handwritten letters regarding the complaints. You contend that the requested documents come under the protection of sections 552.101 and 552.102 of the Government Code and therefore are not subject to required public disclosure.

Although the attorney general will not ordinarily raise an exception that might apply but that the governmental body has failed to claim, *see* Open Records Decision No. 325 (1982) at 1, we will raise sections 552.026 and 552.114 of the Government Code because the release of confidential information could impair the rights of third parties and because the improper release of confidential information constitutes a misdemeanor. *See* Gov't Code § 552.352. Section 552.114(a) requires that the college withhold "information in a student record at an educational institution funded wholly or partly by state revenue."

Section 552.026 of the Government Code provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

The Family Educational Rights and Privacy Act of 1974 ("FERPA") provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). When a student has attained the age of eighteen years or is attending an institution of post-secondary education, the student holds the rights accorded by Congress to inspect these records. *Id.* § 1232g(d). "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).

For purposes of FERPA, the records at issue constitute "education records" to the extent that they contain information about identifiable students. However, information must be withheld from the public pursuant to sections 552.026 and 552.114 only to the extent "reasonable and necessary to avoid personally identifying a particular student." *Open Records Decision No. 332 (1982)* (quoting *Open Records Decision No. 206 (1978)*); *see also Kneeland v. National Collegiate Athletic Ass'n*, 650 F. Supp. 1076, 1090 (W.D. Tex. 1986) (educational records are public where personally identifiable information is deleted), *rev'd on other grounds*, 850 F.2d 224 (5th Cir. 1988). We have marked the types of information in the records that the college must withhold because they identify or tend to identify particular students. *See* 34 C.F.R. § 99.3. Additionally, the college must withhold in their entirety all handwritten documents created by students. *See Open Records Decision No. 224 (1979)*.

We now address your concerns that the remaining information is protected from public disclosure pursuant to the common-law right of privacy. Section 552.102(a) of the Government Code protects

information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, except that all information in the personnel file of an employee of a governmental body is to be made available to that employee or the employee's designated representative as public information is made available under this chapter.

Section 552.102 is designed to protect public employees' personal privacy. The scope of section 552.102 protection, however, is very narrow. *See Open Records Decision No. 336 (1982)*; *see also Attorney General Opinion JM-36 (1983)*. The test for

section 552.102 protection is the same as that for information protected by common-law privacy under section 552.101: to be protected from required disclosure the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e). We note that none of the information at issue pertains to the former instructor's private affairs, but rather to his actions while serving as a public employee.

Some of the complaints against the former instructor contain allegations of sexual harassment. The Eighth District Court of Appeals has recently discussed the privacy interests of public employees who were the victims of sexual harassment or who, under threat of discipline, were required to provide statements regarding allegations of sexual harassment in the work place. In *Morales v. Ellen*, 840 S.W.2d 519, 525 (Tex. App.--El Paso 1992, writ denied), the court held that the identities of those who have been subjected to sexual harassment and any witnesses who, as a condition of employment, were required to provide statements regarding the harassment come under the protection of common-law privacy.

In the instance case, this office feels compelled to follow the *Ellen* decision with regard to victims' and witnesses' identities.¹ We have marked the information the college must withhold in order to protect those persons' identities. *Cf.* Open Records Decision No. 165 (1977) (de-identifying student records). However, the court in *Ellen* did not reach the issue of whether the public employee who was accused of the harassment had any inherent right of privacy to his identity or the content of his statement and we decline to extend such protection to the individual at issue here. We note that sexual harassment by public employees may constitute official oppression punishable as a Class A misdemeanor. *See* Penal Code § 39.02(c), (d); *Bryson v. State*, 807 S.W.2d 742 (Tex. Crim. App. 1991). Although you submitted to this office no documents that reflect the final conclusions of the college's investigators regarding the alleged harassment, we believe there is a legitimate public interest in the identity of public employees accused of sexual harassment in the workplace and the details of the complaints, regardless of the outcome of the investigation. *See, e.g.*, Open Records Decision Nos. 484 (1987), 400 (1983).²

¹It appears, but is not clear, to this office that all of the victims of, and at least some of the witnesses to, the alleged harassment were students whose identities are protected under section 552.026 and 552.114, as discussed above. To the extent that the victims and witnesses were not students during the time of the complained of behavior, the college must protect those individuals' identities pursuant to section 552.102. Please note, however, that we reach this conclusion only with regard to nonstudents who complained of sexual harassment.

²We further note that the court in *Ellen* held that the public possesses a legitimate interest in full disclosure of the facts surrounding employee discipline in this type of situation. *Ellen*, 840 S.W.2d at 525.

In summary, the college must withhold all information in the requested documents that reveals or tends to reveal the identities of students, alleged victims of sexual harassment, and witnesses thereto. However, none of the remaining information pertaining to other complaints filed against the instructor implicates the privacy interests of any third party, including the individuals who registered those complaints. *See* Open Records Decision No. 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee). The college therefore must release all of the remaining information.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/RWP/rho

Ref.: ID# 28923

Enclosures: Marked documents

cc: Mr. Warren Hinkley
3711 Scarlet Avenue
Odessa, Texas 79762-7052
(w/o enclosures)