Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 8, 1995

Dr. Chad Woolery
General Superintendent
Dallas Independent School District
3700 Ross Avenue
Dallas, Texas 75204-5491

OR95-348

Dear Dr. Woolery:

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# 16454.

The Dallas Independent School District (the "district") received an open records request for

> Any and all records, materials or other documents collected in or developed by the [district's] investigation(s) of Urban Park [Elementary School] principal.

You state that in response to this request the district released to the requestor the principal's letter of resignation and certain related internal memoranda. You seek to withhold, however, copies of sworn statements that the district took from various district employees during its investigation of allegations of sexual harassment and other charges against the principal of Urban Park Elementary School. You contend that these sworn statements come under both the informer's privilege and common-law privacy as incorporated into section 552.101 of the Government Code.[1]

[1]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 exceptions that protect information made confidential by statutory law 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* Government Code § 552.352. We have marked the portions of the sworn statements made confidential, and that the district must therefore withhold, pursuant to the federal Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (information pertaining to identifiable students).

In *Roviaro v. United States*, 353 U.S. 53, 59 (1957), the United States Supreme Court explained the rationale that underlies the informer's privilege:

> What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of *violations of law to officers charged with enforcement of that law*. [Citations omitted.] The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation. (Emphasis added.)

For information to come under the protection of the informers privilege, the information must relate to a violation of a civil or criminal statute. *See* Open Records Decision Nos. 391 (1983), 191 (1978). In this regard we note that sexual harassment by a public employee may constitute official oppression punishable as a Class A misdemeanor. *See* Penal Code § 39.02(c), (d). However, although the privilege can apply to administrative officials with a duty of enforcing particular laws, *see* Attorney General Opinion MW-575 (1982), the privilege does not apply ordinarily to employees "reporting" to their employers about the job performance of other employees. Open Records Decision No. 515 (1988). Consequently, we conclude that the informer's privilege does not apply in this particular circumstance for two reasons: 1) it is clear from an examination of the sworn statements that the individuals reporting the alleged wrongdoings did so with the expectation of an administrative, as opposed to a criminal or civil, remedy, *see, e.g.*, Open Records Decision No. 579 (1990) at 8, and 2) the district never reported the allegations to the appropriate law enforcement officials responsible for enforcing laws prohibiting sexual harassment.

We next address your contentions regarding common-law privacy. Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85.

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(Footnote continued)

In addition, section 552.117 of the Government Code requires that the district withhold any home address or telephone number of an official, employee, or former employee who requested that this information be kept confidential in compliance with section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). The district may not, however, withhold the home address or telephone number of an official or employee who made the request for confidentiality under section 552.024 after the request for these documents was made. Open Records Decision No. 530 (1989) at 5.

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 investigatory files at issue in *Ellen* contained individual witness and victim statements, an affidavit given by the individual accused of the misconduct in response to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W. 2d 519.

The court held that the names of witnesses and their detailed affidavits regarding allegations of sexual harassment was exactly the kind of information specifically excluded from disclosure under the privacy doctrine as described in *Industrial Foundation*. *Id.* at 525. However, the court ordered the release of the affidavit of the person under investigation, in part because it ruled that he had waived any privacy interest he may have had in the information by publishing a detailed letter explaining his actions and state of mind at the time of his forced resignation. *Id.* The *Ellen* court also ordered the disclosure of the summary of the investigation with the identities of the victims and witnesses deleted from the documents, noting that the public interest in the matter was sufficiently served by disclosure of such documents and that in that particular instance the public [did] not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements. *Id.* at 525.

In this instance, however, it is not clear to this office whether or to what extent the district has released details of the alleged sexual harassment to the public. Although you state that the district has released to the requestor copies of the principal's letter of resignation and certain internal memoranda, the district has been unable to provide this office with copies of those documents. Consequently, we have no basis for concluding that the district has sufficiently informed the public of the details of each of the allegations against the principal.

In the instance case, this office feels compelled to follow the *Ellen* decision with regard to victims' and witnesses' identities; we have marked the types of information the district must withhold to protect the identities of these individuals. 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 these individuals here. As noted above, sexual harassment by public employees may constitute official oppression punishable as a Class A misdemeanor. *See also Bryson v. State*, 807 S.W.2d 742 (Tex. Crim. App. 1991). We believe there is a legitimate public interest in the identity of public employees accused of sexual harassment in the workplace. *See, e.g.*, Open Records Decision Nos. 484 (1987), 400 (1983). Consequently, the district must release all remaining information pertaining to the allegations, including all references to the principal's name, because of the clear public interest in this information. *Cf.* Open Records Decision No. 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees).

Finally, you express concern that the release of the sworn statements would violate the principal's liberty interests under the Fourteenth Amendment of the United States Constitution. We note, however, that

> [t]o establish a liberty interest, an employee must demonstrate that his governmental employer has brought *false charges* against him "that might seriously damage his standing and associations in his community," or that impose a "stigma or other disability" that forecloses "freedom to take advantage of other employment opportunities." *Board of Regents v. Roth*, 408 U.S. 564 (1972).

*Wells v. Hico Indep. Sch. Dist.*, 736 F.2d 243, 256 (5th Cir. 1984) (emphasis added; parallel citations deleted). However, you do not contend, nor is it apparent to this office, that any of the allegations brought against the principal constitute "false charges." Consequently, you have not met your burden in establishing that the release of this information would implicate the principal's Fourteenth Amendment interests.[2] Furthermore, even if it did, we are aware of no authority for the proposition that information may be withheld under section 552.101 on this basis.

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

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[2]We further note that information regarding public employees may not be withheld under section 552.101 merely because the information is false. *See* Open Records Decision No. 579 (1990) (Gov't Code § 552.101 does not protect information placing individual in false light); *see also Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994) (state of Texas does not recognize tort of false-light invasion of privacy). Consequently, the district may not withhold any portion of the sworn statements merely because they contain information that may be untrue. Of course, if the district does in fact believe that any of the allegations contained in the sworn statements are untrue, it is free to release, in addition to the sworn statements, additional information explaining why and to what extent the information is inaccurate.

Ref.: ID# 16454

Enclosures: Marked documents

cc: Mr. Joseph Garcia
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(w/o enclosures)