



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

March 20, 1996

Mr. Ronald S. Block  
Block & Muscat  
12603 Southwest Freeway, Ste. 165  
Stafford, Texas 77477

OR96-0364

Dear Mr. Block:

You seek reconsideration of Open Records Letter No. 95-1624 (1995), in which this office determined that the Texas Open Records Act, Government Code chapter 552, required the Pasadena Independent School District (the "district") to make certain information available to the public. We have assigned your request for reconsideration ID# 39033.

The district received an open records request for the investigative report on a certain district employee. You stated that no such document existed, but that there were "sworn statements" by district employees which are responsive to the information request. You sought to withhold this requested information under section 552.103(a) of the Government Code.

In Open Records Letter No. 95-1624 (1995), we concluded that you had not met your burden under sections 552.301 through 552.303 of the Government Code. You failed to provide this office with a copy of the requested documents. Thus, under section 552.302, the requested information was presumed public, and we concluded that it must be released to the requestor absent a showing of some compelling reason to overcome this presumption, (for example, that the information is confidential under some other source of law or that third-party privacy interests are at stake). We reached our conclusion after waiting over four months for the documents. On June 20, 1995, you requested an open records decision concerning the documents. On August 29, 1995, we asked you for copies of the records at issue. You finally submitted the documents in February 1996 after our letter ruling of December 29, 1995. You have submitted the sworn statements of fifty witnesses.

In your letter for reconsideration, you claim that the documents were not sent to this office because you did not know to whom they should be sent. You state that our office could not identify who was "handling the file." You received a letter, however,

dated August 29, 1995 asking for the requested documents. The letter was signed by an Open Records Division Assistant Attorney General. You agree that you received this letter, but failed to submit the requested documents until February 1996.

The Open Records Act imposes a duty on governmental bodies seeking an open records decision pursuant to section 552.301 to submit that request to the attorney general within ten days after the governmental body's receipt of the request for information. The time limitation found in section 552.301 is an express legislative recognition of the importance of having public information produced in a timely fashion. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). When a request for an open records decision is not made within the time period prescribed by section 552.301, the requested information is presumed to be public. See Gov't Code § 552.302.

We realize that the short time frame prescribed by section 552.301 may occasionally impose a substantial burden on governmental bodies seeking to comply with the act. Accordingly, when we receive an otherwise timely request for an open records decision that lacks some information necessary for us to make a determination, it has been our policy to give the governmental body an opportunity to complete the request. In this instance, the district received an additional four months to comply with the Open Records Act. We, therefore, decline to reconsider our ruling in Open Records Letter No. 95-1624 (1995) where we determined that the requested information was presumed public absent a showing of some compelling reason to overcome this presumption.

Notwithstanding our above decision, because you have now submitted the requested documents, we can consider whether you have shown some compelling reason to overcome the presumption of public disclosure. You originally argued that section 552.103(a) of the Government Code excepted the documents from required public disclosure. This office has previously held that section 552.103 does not provide a compelling reason to overcome a presumption of openness. See Open Records Decision No. 473 (1987); Gov't Code § 552.103.

This presumption of openness can only be overcome by a compelling demonstration that the information should not be made public. See, e.g., Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). After reviewing the submitted documents, we conclude that some of the information is excepted from disclosure by common-law privacy under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1.

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. *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.*

Based on *Ellen*, the district must withhold the identities of the witnesses to the alleged harassment and the identity of the alleged victim in the submitted documents. However, we find that the public interest in the identity of the alleged harasser outweighs any privacy interest he may have in that information. Therefore, the district may not withhold his identity. As an example, we have marked those portions of one of the documents that the department must withhold under *Ellen* and *Industrial Foundation* as applied through section 552.101 of the Government Code.

Furthermore, the documents reveal that the investigation also involved possible sexual contact. The Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault as being the type of information considered intimate and embarrassing, and therefore, excepted from disclosure by common-law privacy. *Industrial Found*, 540 S.W.2d at 683; *See* Open Records Decision No. 339 (1982). Thus, information that identifies the victim of or the details to the sexual assault must be withheld from public disclosure.

Additionally, it appears that some or all of the records requested may be excepted from disclosure under the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, or section 552.114 of the Government Code. This office has recently issued Open Records Decision No. 634 (1995), which concluded: (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception.

We remind you that this ruling applies only to "education records" under FERPA. "Education records" are records that

- (i) contain information directly related to a student; and

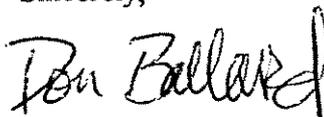
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A). *See also* Open Records Decision Nos. 462 (1987), 447 (1986). Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982), 206 (1978).<sup>1</sup> If you have further questions as to the applicability of FERPA to information that is the subject of an open records request, you may consult with the United States Department of Education's Family Policy Compliance Office. *See* Open Records Decision No. 634 (1995) at 4, n.6, 8.

Finally, we note that the documents may contain other confidential information. We enclose for your information a list of the types of information that are confidential by statute or by a right of privacy. We caution that this list is merely an example of different confidentiality provisions and is not exhaustive. *See* Gov't Code § 552.352 (the distribution of confidential information is a criminal offense).

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 regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Don Ballard  
Assistant Attorney General  
Open Records Division

JDB/ch

Ref.: ID# 39033

Enclosures: Submitted documents  
List of Confidential Information

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<sup>1</sup>*But see* 20 U.S.C. § 1232g(a)(1)(A), (d) (parent or adult student has affirmative right of access to that student's education records). *See also* Open Records Decision No. 431 (1985) (Open Records Act's exceptions to required public disclosure do not authorize withholding of "education records" from adult student).

cc: Ms. Lynda L. McAdams  
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(w/o enclosures)