



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 6, 1996

Ms. Betsy Hall Bender
Attorney at Law
P.O. Box 26715
Austin, Texas 78755-0715

OR96-1396

Dear Ms. Bender:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. We assigned your request ID# 40669.

The West Orange-Cove Consolidated Independent School District (the "district"), which you represent, has received an open records request from an attorney representing the parents of a district student for information relating to disciplinary action taken against the student relating to several incidents of alleged sexual harassment by several students. The request seeks, among other things:

- (1) witness statements;
- (2) investigative report(s) and notes used in preparing such reports;
- (3) written communications with the family whom the attorney represents;
- (4) district communications regarding the student; and
- (5) any written notice to district parents of their rights under the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g.

The requestor has also supplied an authorization from the student's mother for release of the requested information. You assert that some of the requested information is excepted from required public disclosure by sections 552.101, 552.103, 552.107, 552.111, and 552.114 of the Government Code.

You assert that Exhibit B, a letter from you to the superintendent of the district, is excepted from required public disclosure under section 552.107 of the Government Code. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 (1990) at 5. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* We find that Exhibit B reveals both confidential communications from the client to the attorney and the attorney's legal advice or opinions and may be withheld under section 552.107 in its entirety.

You assert that Exhibit C is excepted from required public disclosure under sections 552.111 and 552.101. Section 552.111 excepts "[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), this office concluded that section 552.111 excepts from required public disclosure only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* We find that portions of the information contained in Exhibit C contain advice, recommendations, opinions, and other material reflecting the policymaking processes of the district and, therefore, may be withheld under section 552.111. However, the majority of Exhibit C concerns isolated incidents and is not related to "policymaking."¹ We have marked those portions of Exhibit C which may be withheld under section 552.111. The remainder may not be withheld under this exception.

You also assert that the names of witnesses and their detailed statements contained in Exhibit C must be withheld under section 552.101 in conjunction with the holding in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso, 1992, writ denied). Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial

¹However, we have marked several references to students in Exhibit C which must be withheld under FERPA (see discussion of FERPA, below).

decision.” This exception also excepts information made confidential by the common-law right to privacy. *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if (1) the information contains highly intimate or embarrassing facts about a person’s private affairs such that its release would be highly objectionable to a reasonable person and (2) the information is of no legitimate concern to the public. *Id.* In *Ellen*, 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.* Other than the names of several students which must be withheld under FERPA, we do not find any information in Exhibit C which identifies any individual witnesses or gives details of their personal statements. Therefore, with the exception of those portions of Exhibit C which already have been marked to show what may be withheld under section 552.111 and which must be withheld under FERPA, nothing in Exhibit C is excepted from required public disclosure under section 552.101 of the Government Code.

You assert that section 552.103, the “litigation exception,” excepts Exhibit D from required public disclosure. When asserting section 552.103(a), a governmental body must establish that the requested information relates to pending or reasonably anticipated litigation. Thus, under section 552.103(a) a governmental body’s burden is two-pronged. The governmental body must establish (1) that litigation is either pending or reasonably anticipated and (2) that the requested information relates to that litigation. *See 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 (1990) at 4.

To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 (1986) at 4. You have not offered any concrete evidence to indicate that litigation is reasonably anticipated. Consequently, you may not rely on section 552.103 to withhold any of the requested information.

You also assert that the documents in Exhibit D are education records that are excepted from public disclosure by section 552.114 and FERPA.² Section 552.114 excepts from disclosure (with some exceptions) student records at an educational institution funded completely or in part by state revenue. Section 552.026 provides that educational records are excepted unless released in conformity with FERPA requirements. The term "student record" in section 552.114 has been generally construed to be the equivalent of "education record." *See generally* Attorney General Opinion H-447 (1974); Open Records Decision Nos. 539 (1990), 477 (1987), 332 (1982). It appears that a portion of the records requested may be excepted from disclosure under FERPA.

Section 1232g(a)(1) of FERPA provides in part:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. . . .

Section 1232g(b)(1) provides in part:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records . . . of students without the written consent of their parents to any individual, agency, or organization

Under section 1232g(a)(1)(A), the district may not withhold from this requestor his client's child's education records. Section 552.114(b)(2) also provides for these records to be released to the parent. However, while these are education records that

²Please note that this office 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. 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.

pertain to the requestor's client's child, the records at issue also identify other students and parents. Information that identifies the other students and parents must be withheld from disclosure, unless released in accordance with FERPA.³ 20 U.S.C. § 1232(b)(1); Open Records Decision No. 332 (1982) at 3. Therefore, the district must release to the requestor these education records, but without identifying information about other parents and students, unless these parents have given written consent to the release in accordance with FERPA. In addition, the handwritten statements by students other than the requestor's client's child must be withheld in their entirety since a student's handwriting may identify the student. *Cf.* Open Records Decision No. 224 (1979). Because you have submitted to this office records which have not been completely de-identified, we have marked the portions of the documents which we conclude must be withheld under FERPA to avoid personally identifying "the other minor students and witnesses involved."⁴ The remainder of these documents may not be withheld under FERPA or section 552.114 of the Government Code.

Finally, you assert that Exhibit D should also be withheld under section 552.101. We have marked those portions of Exhibit D which either identify or tend to identify the victim of or witnesses to sexual harassment under *Ellen*, as discussed above in reference to Exhibit C. However, as the handwritten statements of the victims and witnesses must already be withheld under FERPA, and as no other documents submitted to this office detail the events of this incident, the district employees' notes and summaries of interviews with the victims and witnesses must be released.

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.

Yours very truly,



Todd Reese
Assistant Attorney General
Open Records Division

³Information 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).

⁴We have not marked references to the student on whose behalf this open records request has been made because this student's name need not be withheld from the student's parents under FERPA. We note, however, that this student's name would have to be redacted from the records under FERPA if requested by a person other than this student's parents or their legal representative.

Ms. Betsy Hall Bender - Page 6

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Enclosures: Marked documents

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(w/o enclosures)