



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 5, 1998

Mr. Robert A. Schulman
Schulman, Walheim & Heidelberg, Inc.
112 East Pecan, Suite 3000
San Antonio, Texas 78205

OR98-0352

Dear Mr. Schulman:

On behalf of the Alamo Community College District (the "district"), you ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 112602.

The district received a request for various information relating to sexual harassment complaints filed against the district since 1993 as well as a copy of the resume of a particular district professor. As you do not address its public release, we assume the district has released the requested resume. You assert that portions of the requested information are excepted from required public disclosure based on sections 552.101, 552.103, 552.107(1), 552.108, 552.114, 552.117 of the Government Code. You also assert that portions of the information are subject to the Federal Educational Rights and Privacy Act of 1974 ("FERPA"). 20 U.S.C. § 1232g.

You inform us that portions of the requested information pertain to district students. The Open Records Act incorporates FERPA, which governs the public release of education records held by educational agencies or institutions that receive federal funds under programs administered by the federal government. 20 U.S.C. § 1232g(b); Gov't Code § 552.026. FERPA prohibits, in most circumstances, the release of student education records without a parent's written consent. If a student has reached age eighteen or is attending an institution of post-secondary education, the rights established by FERPA attach to the student rather than to the student's parents. 20 U.S.C. § 1232g(d). "Education records" include "records, files, documents, and other materials," that "contain information directly related to a student" and that "are maintained by an educational agency or institution or by a person acting for such agency or institution." *Id.* § 1232g(a)(4)(A). "Education records" include any information regarding an individual that relates to his activities while a student, even though compiled subsequently and based on information received from the student subsequent to his attendance. Open Records Decision No. 539 (1990).

FERPA only protects "personally identifiable information in education records. *Id.* § 1232g(b)(2). Thus, FERPA does not extend to all information in an education record but only to that information which identifies the student or the student's parents. Open Records Decision No. 332 (1982) at 3. Accordingly, the district must not release any information that discloses a district student's identity. Nor may the district release any information that discloses the identity of a former district student when the information relates to the student's activities while a district student. Thus, FERPA serves to protect the privacy rights of district students and former students. However, not all of the victims of sexual harassment files against district employees since 1993 are students.

Section 552.101 excepts from required public disclosure information considered to be confidential by law, including information made confidential by judicial decision. This exception applies to information made confidential by the common-law right to privacy. *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 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 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 if the information is of no legitimate concern to the public. *See id.*

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.*

In accordance with *Ellen*, the district must withhold from public disclosure the names of all witnesses and victims in exhibits B, C, D and E. For each allegation, the district must release an adequate summary of the disposition of the investigation of the allegations if such a summary exists, as, for example, a Memorandum of Determination. The district must withhold from public disclosure the witness and victim statements if an adequate summary exists. If the district does not release a summary for any particular investigation, the district must release the victim and witness statements, with redaction of any information that identifies a witness or victim. *Id.* Furthermore, we do not believe that the district has established that the release of exhibit D in its entirety allows the identification of victims and witnesses.

Section 552.101 also excepts from disclosure information made confidential by statute. You assert that charges files with the Equal Employment Opportunity Commission (the "Commission") are confidential pursuant to sections 2000e-5(b) and 2000e-8(e) of title 42 of the United States Code. These provisions apply to information in the possession of the Commission. They do not apply to information the district maintains.

You assert that section 552.103 applies to settlement agreements. Section 552.103(a) of the Government Code reads as follows:

(a) Information is excepted from [required public disclosure] if it is information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

However, the applicability of section 552.103(a) ends once the litigation is concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). As the information appears to relate to litigation that has concluded, we believe section 552.103 is inapplicable.

You raise section 552.111 in regard to portions of exhibit D. However, section 552.111 does not apply to information concerning administrative and personnel matters. Open Records Decision No. 615 (1993). Thus, the district may not withhold the information from disclosure based on section 552.111.

You raise Government Code section 552.108(a)(2) for several offense reports. That provision provides as follows:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; or

You state that the reports concern investigations that did not result in a conviction or deferred adjudication. Section 552.108 does not apply to basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c); *see* Open Records Decision No. 127 (1976). However, as we have already stated, the complainant's names are protected from disclosure under section 552.101. Thus, with the exception of the basic information, the district may withhold the offense reports.

You have marked one document as protected from public disclosure by the attorney-client privilege. Section 552.107(1) of the Government Code states that information is excepted from required public disclosure if

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

Although section 552.107(1) appears to except information within rule 1.05 of the Texas State Bar Disciplinary Rules of Professional Conduct, the rule cannot be applied as broadly as written to information that is requested under the Open Records Act. Open Records Decision No. 574 (1990) at 5. To prevent governmental bodies from circumventing the Open Records Act by transferring information to their attorneys, section 552.107(1) is limited to material within the attorney-client privilege for confidential communications; "unprivileged information" as defined by rule 1.05 is not excepted under section 552.107(1). Open Records Decision Nos. 574 (1990) at 5, 462 (1987) at 13-14. Thus, section 552.107(1) applies only to information that reveals attorney advice and opinion or client confidences. *See* Open Records Decision No. 574 (1990). We have reviewed the letter at issue. We conclude that the district may withhold the letter from public disclosure based on section 552.107(1).

Section 552.117 of the Government Code excepts from required public disclosure the home addresses, telephone numbers, social security numbers, or information revealing whether a public employee has family members of public employees who request that this information be kept confidential under section 552.024. Therefore, section 552.117 requires you to withhold the home telephone number or social security number of a current or former employee or official who requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold the information of a current or former employee who made the request for confidentiality under section 552.024 after this request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 (1989) at 5.

Finally, we note the presence of a court-filed document. This document must be released in its entirety. *See Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992).

We are resolving this matter with this 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 may 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,



Kay Hastings
Assistant Attorney General
Open Records Division

KHH/rho

Ref.: ID# 112602

Enclosures: Submitted documents

cc: Ms. Jeanne Russell
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(w/o enclosures)