



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 31, 1998

Mr. Donald E. Lindsay
Richards Lindsay & Martin, L.L.P.
13740 Research Blvd. Suite M-5
Austin, Texas 78750

OR98-1810

Dear Mr. Lindsay:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 116929.

The Charlotte Independent School District (the "school district"), which your office represents, received a request "for any document or record in which any individual has accused [the requestor] of an act which the District has designated sexual harassment." In response to the request, you submit to this office for review a copy of the records, which you assert are responsive. You assert that the responsive records are protected from disclosure under section 552.103 of the Government Code. We have considered your arguments and have reviewed the information submitted.

To show that section 552.103(a) is applicable, the school district must demonstrate that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *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. Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the school district must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 (1989) at 5. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

In this situation, you explain that the requested information was "obtained by the school district's attorney specifically in anticipation of litigation . . . with regard to the termination of the requester's contract of employment with the district." However, there is no evidence that requestor has taken concrete steps toward litigation. Given the information

provided, the prospect of litigation at this point is too speculative for section 552.103(a) to be applicable. Open Records Decision No. 518 (1989) at 5 (governmental body must show that litigation involving a specific matter is realistically contemplated). However, some of the information at issue is private and may not be disclosed.

Although you have not raised section 552.101 as an applicable exception, we note that the Office of the Attorney General will raise section 552.101 on behalf of a governmental body when necessary to protect third-party interests. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987). Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section also encompasses information protected by constitutional or common-law privacy and under certain circumstances excepts from disclosure private facts about individuals. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld from public disclosure under a common-law right of privacy when the information is (1) 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 pertaining to 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. *Id.* 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 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.*

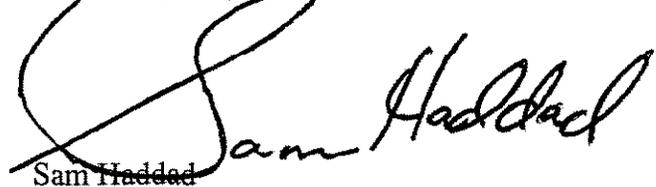
In this instance, however, it is not clear to this office whether or to what extent the school district has previously released details of the alleged sexual harassment to the public. Consequently, we have no basis for concluding that the school district has sufficiently informed the public of the details of the allegations against the accused. Although this office feels compelled to follow the *Ellen* decision with regard to the complainant's identity, we nevertheless recognize the public's legitimate interest in being made aware of the actions of its school district officials. We have marked the type of information, in the ex-employee's affidavit, which the school district must withhold to protect the identity of the complainants and witnesses. All remaining information contained in the ex-employee's complaint must be released.

We next note that some of the information at issue is protected from disclosure under sections 552.026 and 552.114, and also under the Family Educational Rights and Privacy Act ("FERPA"), title 20 of the United States Code, section 1232g. We note initially that the school district may withhold from disclosure information that is protected by FERPA and section 552.114 without the necessity of requesting a decision from this office.¹ Open Records Decision No. 634 (1995).

FERPA provides that federal funding shall not be made available to "any educational agency or institution which has a policy or practice of permitting the release of educational records" of students without the written consent of the parents of a minor student. 20 U.S.C. § 1232g(b)(1). Education records are those records that "contain information directly related to a student and are maintained by an educational agency or institution." *Id.* § 1232g(a)(4)(A). Generally, only information which would serve to identify students is excepted from disclosure under FERPA. Open Records Decision No. 332 (1982) at 3. We note that the submitted records contain an affidavit of a school district student, which is protected under FERPA. Therefore, the student affidavit must be withheld in its entirety.

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,



Sam Haddad
Assistant Attorney General
Open Records Division

SH/mjc

¹Section 552.114 requires that "information in a student record at an educational institution funded wholly or partly by state revenue" must be withheld. Section 552.026 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.

The term "student record" in section 552.114 has been generally construed to be the equivalent of "education records." *See generally* Attorney General Opinion H-447 (1974); Open Records Decision Nos. 539 (1990), 477 (1987), 332 (1982).

Ref: ID# 116929

Enclosures: Submitted documents

cc: Mr. Victor Vinton
314 Athol Lane
Pearsall, Texas 78061
(w/o enclosures)