



September 19, 2000

Mr. Jose R. Guerrero
Montalvo & Ramirez
Attorneys at Law
900 North Main
McAllen, Texas 78501

OR2000-3621

Dear Mr. Guerrero:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 139112.

The Weslaco Independent School District (the "district"), which your law firm represents, received a request for information regarding an individual whom you identify as a former teacher of the district. You claim that portions of the requested information are excepted from public disclosure under section 552.101 of the Government Code. We have considered the exception you claim and have reviewed the information you submitted.

Initially we must address your failure to comply with section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in seeking a decision as to whether requested information is excepted from disclosure. Section 552.301(b) provides that "[t]he governmental body must ask for the attorney general's decision and state the exceptions that apply . . . not later than the 10th business day after the date of receiving the written request." Gov't Code § 552.301(b). Section 552.302 provides as follows:

If a governmental body does not request an attorney general decision as provided by Section 552.301 and provide the requestor with the information required by Section 552.301(d), the information requested in writing is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information.

Gov't Code § 552.302. You state that the district received the request for information on June 19, 2000. Your request for this ruling was mailed to this office on July 12, more than ten

business days after the district's receipt of the information request. Thus, as you did not request this ruling in timely compliance with section 552.301(b), the information requested in writing is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of that information from the public. Gov't Code § 552.302; *see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 380-81 (Tex. App.--Austin 1990, no writ). A claim that the requested information is confidential under section 552.101 of the Government Code in conjunction with some other source of law can furnish a compelling reason sufficient to overcome the operation of section 552.302. *See* Gov't Code § 552.101; Open Records Decision Nos. 630 at 3 (1994) (addressing compelling reasons sufficient to overcome non-compliance with section 552.301), 325 (1982) (citing statutory predecessor to section 552.101).

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. You claim that requested evaluations of the former teacher are confidential under section 552.101 in conjunction with section 21.355 of the Education Code. Section 21.355 provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. *See* Open Records Decision No. 643 at 3 (1996). In that decision, we also determined that the word "teacher," for the purposes of section 21.355, is a person who is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See* ORD 643 at 4. We have carefully reviewed the records that you claim are confidential teacher evaluations under section 21.355 of the Education Code. Based on your representation that those records pertain to a former teacher of the district, we conclude that most of the records in question are excepted from disclosure under section 552.101. We have marked two items that we conclude are not confidential teacher evaluations. Those items are not excepted from disclosure and must be released.

The district also seeks to withhold the teacher's personal financial information under section 552.101 in conjunction with the common law right of privacy. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld under section 552.101 in conjunction with common law privacy when that information (1) 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. *See Industrial Found.*, 540 S.W.2d at 685. In this instance, you seek to withhold payroll records that reflect employee contributions to the teacher retirement system. Prior decisions of this office have determined that financial information relating only to an individual ordinarily satisfies the first element of the common law privacy test, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See generally* Open Records Decision Nos. 600 (1992), 545 (1990), 523 (1989), 373 (1983). Thus, a public

employee's allocation of part of his or her salary to a voluntary investment program offered by the employer is a personal investment decision, and common law privacy excepts information about the allocation from public disclosure. *See* Open Records Decision Nos. 600 (1992) (TexFlex benefits), 545 (1990) (deferred compensation plan). Conversely, common law privacy does not except from disclosure information about a transaction that is funded in part by the state or another governmental entity. *See* Open Records Decision Nos. 545 at 4 (1990) ("In general, we have found the kinds of financial information not excepted from public disclosure by common law privacy to be those regarding the receipt of governmental funds or debts owed to governmental entities."), 523 at 4 (1989) (noting distinction under common law privacy between confidential background financial information furnished to a public body about an individual and basic facts regarding a particular financial transaction between the individual and the public body). Therefore, only the details of any payroll-related transaction that was funded entirely by the former teacher are excepted from disclosure under section 552.101 in conjunction with common law privacy.

You also claim that the submitted records contain information relating to alleged sexual harassment that is confidential under section 552.101 in conjunction with the decision in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied). In *Morales v. Ellen*, the court of appeals applied the common law privacy principles discussed in *Industrial Foundation* to an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained third-party witness statements, an affidavit in which the individual accused of the misconduct responded to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *See Ellen*, 840 S.W.2d at 525. The court of appeals upheld the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the disclosure of such documents sufficiently served the public's interest in the matter. *Id.* The *Ellen* court also held, however, that "the public does 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*, this office typically has required the release of a document analogous to the conclusions of the board of inquiry in *Ellen*, but has held that a governmental body must withhold both the identities of victims and witnesses of alleged sexual harassment and any information that would tend to identify such a victim or witness. *See* Open Records Decision Nos. 393 (1983), 339 (1982). The identity of the accused is not excepted from disclosure, however, as the common law right of privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about the employee's job performance. *See* Open Records Decision Nos. 438 (1986), 230 (1979), 219 (1978). In this instance, the information that you submitted does not include any summary of the investigation analogous to the conclusions of the board of inquiry in *Ellen*. We therefore conclude that section 552.101, in conjunction with *Ellen*, requires the district to protect the identity of the victim of the alleged sexual harassment by redacting from the submitted information both the victim's name and any other information that would tend to identify the victim. We have marked that information. The rest of the submitted information concerning

the alleged incident of sexual harassment is not excepted from disclosure under section 552.101 in conjunction with *Ellen*.

Lastly, we note that the submitted records contain social security numbers that may be excepted from disclosure under section 552.117 of the Government Code or section 552.101. Section 552.117 excepts from disclosure the social security number of a present or former employee of a governmental body, if the employee has elected to not allow public access to this information in accordance with section 552.024 of the Government Code. See Gov't Code §§ 552.117(1), 552.024(a); see also Open Records Decision Nos. 622 (1994), 530 (1989), 455 (1987). Alternatively, a social security number may be confidential under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), *if the social security number was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990*. See Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that any social security number in the submitted records is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the district to obtain or maintain a social security number. Therefore, we have no basis for concluding that any social security number in question was obtained or is maintained pursuant to such a statute and is therefore confidential under the federal law. We caution you, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. See Gov't Code §§ 552.007, .352. Therefore, prior to releasing any social security number, the district should ensure that it was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

In summary, teacher evaluations are confidential and must be withheld under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. Records of any payroll-related transaction that was funded entirely by the former teacher are confidential and must be withheld under section 552.101 in conjunction with common law privacy. The identity of the victim of the alleged sexual harassment, and any other information that would tend to identify the victim, are confidential and must be withheld under section 552.101 in conjunction with *Morales v. Ellen*. Social security numbers may be protected under sections 552.024 and 552.117 or under section 552.101 in conjunction with federal law. Information that is not excepted from disclosure under sections 552.101 or 552.117 must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by

filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

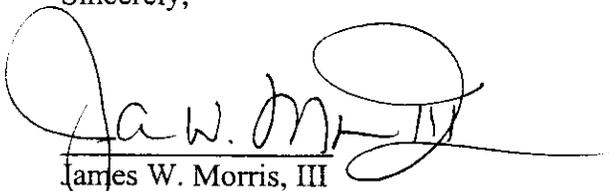
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is written in a cursive style with a large, looping initial "J".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/ljp

Ref: ID# 139112

Encl. Submitted documents

cc: Ms. Ann Dixon, Ed.D.
Interim Superintendent
P.O. Drawer 420128
Del Rio, Texas 78842
(w/o enclosures)