



March 12, 2001

Mr. Robert E. Luna  
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4411 North Central Expressway  
Dallas, Texas 75205

OR2001-0961

Dear Mr. Luna:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 144878.

The Howe Independent School District (the "school district") received a request for information about the misconduct of a particular teacher. You state that the school district has released certain information to the requestor. You claim that the remaining information is excepted from disclosure under sections 552.026, 552.101, 552.107, 552.114, and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses the common law right of privacy. For information to be protected by common law privacy it must meet the criteria set out in *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685.

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.*

Where there is an adequate summary of the investigation, the summary must be released, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure. When no adequate summary exists, however, we believe that detailed statements regarding the allegations must be released, but the identities of witnesses and victims must still be redacted from the statements. In this case, we do not find an adequate summary of the investigation. Therefore, under *Ellen*, you must release the witness statements but withhold the identities of the victim and the witnesses. Within the submitted documents, you have marked information identifying or tending to identify particular students that you claim is protected under the Family Educational Rights and Privacy Act of 1974 (“FERPA”).<sup>1</sup> After reviewing your markings, we conclude that the privacy interests of the victims and witnesses have been adequately protected. Therefore, there is no need to withhold any additional information under section 552.101 in conjunction with *Ellen*. You must, however, withhold all handwritten documents created by students in their entirety under FERPA. *See* Open Records Decision No. 224 (1979) (student’s handwritten comments would make identity of student easily traceable and such comments are therefore excepted by statutory predecessor to section 552.114); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information to include information that would make student’s identity easily traceable). In addition, under *Ellen*, you must release the statement of the accused teacher, but with the identities of students redacted under FERPA.<sup>2</sup>

You next claim that some of the submitted information is excepted from disclosure under the attorney-client privilege in conjunction with section 552.107 of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney’s legal advice and the client’s confidences made to the attorney. *See* Open Records Decision No. 574 (1990). Based on our review of the submitted documents, we conclude that you may withhold, under section 552.107, all of the documents that you claim are protected under that exception.

We note finally that section 552.117 may be applicable to some of the submitted information. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of a current or former

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<sup>1</sup>Information must be withheld from required public disclosure under FERPA only to the extent “reasonable and necessary to avoid personally identifying a particular student.” *See* Open Records Decision Nos. 332 (1982), 206 (1978). In Open Records Decision No. 634 (1995), this office concluded that (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.

<sup>2</sup>Because we conclude that the identities of the victim and witnesses may be withheld under FERPA, we need not address your claim that those identities are protected under section 552.131.

official or employee of a governmental body who requests that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the school district may only withhold information under section 552.117 on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For any employee who timely elected to keep his or her personal information confidential, the school district must withhold the employee's home address and telephone number, social security number, and any information that reveals whether the employee has family members. The school district may not withhold this information under section 552.117 for an employee who did not make a timely election to keep the information confidential. We have marked the information that is excepted from disclosure under section 552.117 if the employee has made a timely election under section 552.024.

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 Hadassah Schloss at 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,



Stephen P. Agan  
Assistant Attorney General  
Open Records Division

SPA/er

Ref: ID# 144878

Encl. Submitted documents

cc: Mr. Danny Robbins  
*Houston Chronicle*  
P.O. Box 4260  
Houston, Texas 77210  
(w/o enclosures)