



August 24, 2001

Mr. Ramon Dominguez
President
El Paso Community College
P.O. Box 20500
El Paso, Texas 79998-0500

OR2001-3762

Dear Mr. Dominguez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 151150.

El Paso Community College (the "college") received several requests for information relating to recent investigations conducted for the college by a private investigation firm, and investigations by the college police department involving certain individuals or subjects.¹

¹The first requestor seeks all licenses from the Texas Board of Private Investigators, contracts, bills, statements, correspondence or other documents that relate or refer to Internal Vigilance Professional Investigative Services ("Internal Vigilance") from January 1, 2001, to the present. The second requestor seeks copies of all bills received by the college from January 1999 to June 18, 2001 for private investigator work. The third and fourth requestors seek 1) all reports filed with the college police department which pertain to the word "feathers" or the phrase "CF DirtRoad," including the names of the persons filing the reports, the date of filing of the reports, the persons named in the reports, and the nature of the complaints, 2) a copy of the existing contract between a certain law firm and the college, and a detail of all billing of monies paid the firm for services related to or work done by Internal Vigilance, including hours billed, price per hour billed, names of persons for which hours are billed, and subject matter discussed, and 3) Information concerning Internal Vigilance including a copy of the contract between the college and Internal Vigilance, the date Internal Vigilance was hired by the college, all notifications of ongoing investigations by Internal Vigilance which have not been paid or billed as of July 5, 2001, including name and subject matter of the investigation, detailed billing of all monies paid to Internal Vigilance from the date the firm was hired until July 5, 2001, including amounts paid and owed, itemized records of all services provided the college by Internal Vigilance, including names of all individuals interviewed, subject matter, and length of time of the interview by Internal Vigilance, its representatives or employees, and names of outside agencies consulted by Internal Vigilance during its investigations for the college, and billing for the outside agencies. The fourth requestor, in addition to the foregoing, requested copies of all reports filed with the college police department containing the names of two individuals, including the names of the persons filing the reports, the date of filing of the reports, the persons named in the reports, and the nature of the complaints

You inform us that you are preparing to release or have released portions of the information at issue. We assume that you have done so. *See* Gov't Code §§ 552.301, .302. You have submitted responsive information, some of which constitutes representative samples, which consists of information concerning six investigations, as well as Internal Vigilance's billing statements. In this decision, we will refer to each investigation with the number you assigned to each in your brief to this office. You claim that portions of the requested information are excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.108, and 552.117 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information. We have also considered the comments this office has received from third parties whose statements comprise a portion of the information at issue. *See* Gov't Code § 552.305.

We first address certain procedural matters. You inform us that in response to the request for contractual information from the college's legal counsel involving Internal Vigilance, the college has no information responsive to the request. We note that chapter 552 of the Government Code does not require a governmental body to make available information which did not exist at the time the request was received. Open Records Decision No. 362 (1983); *see* Open Records Decision No. 452 (1986) (document not within chapter 552's purview if it does not exist when governmental body receives a request for it). Nor is a governmental body required to prepare new information to respond to a request for information. Open Records Decision Nos. 605 (1992), 572 (1990), 416 (1984). Thus, the college need not comply with the request for billing information from legal counsel involving Internal Vigilance. In addition, in response to the request for information on the date Internal Vigilance was hired, you have released to the respective requestor minutes from the college's board of trustees meeting during which the college's counsel was hired. From the information before us, it appears that, with respect to this request, the college has made a good faith effort to relate a request for information to information the college holds. *See* Open Records Decision No. 561 at 8 (1990).

Before addressing your claims, we note that some of the submitted information is expressly made public by section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

....

²We assume that the "representative samples" of records submitted to this office are truly representative of the requested records that they purport to represent. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

....

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). The complaint investigations which you refer to as Investigations 1, 2, and 3 are completed investigations performed by Internal Vigilance for the college. Thus, the information contained in those investigations is subject to section 552.022(a)(1). You do not assert section 552.108 for information concerning Investigations 1, 2, or 3. In the case of the report of Investigation 2, which you state was used in its entirety in an answer to an EEOC complaint, you assert section 552.103. This office has previously concluded that section 552.103 is a discretionary exception.³ Thus, this exception does not "expressly [make information] confidential under other law." Gov't Code § 552.022(a). Therefore, the Investigation 1, 2, and 3 information is subject to disclosure under section 552.022(a)(1) of the Government Code, and must be released to the first requestor, with the following exceptions.⁴

The information contained in Investigations 2, 3, and 6 contains employee home addresses and telephone numbers, social security numbers, and information that reveals whether the employee has family members.⁵ Section 552.117(1) excepts from disclosure the home

³Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation, and does not itself make information confidential), 177 (1977) (section 552.108 is discretionary exception to disclosure that protects governmental body's interests and may be waived), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

⁴We note that the submitted information indicates that the college has disclosed the Investigation 2 report to the opposing party in the course of the EEOC complaint process. Thus, even if the college met its burden under section 552.103, the section 552.103(a) interest no longer exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982).

⁵In the case of one military police report contained in Investigation 2, it appears that some of the report information has been redacted. Section 552.301 of the Government Code requires the governmental body to submit the requested information to this office in a manner that permits us to decide whether the information is excepted from disclosure. Redaction or obliteration of information claimed to be excepted from disclosure makes it impossible for this office to review that portion of the document. Because the report originated with an entity other than the college, it is unclear that the college effected this redaction. If done by the governmental body requesting a decision from this office, the redaction constitutes a failure to request a decision in the manner prescribed by section 552.301. In the future, such a failure to comply completely with section 552.301 could result in a decision that the requested information is public and must be released in its entirety. *See* Gov't Code §§ 552.006, .301(e), .302.

addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the college may only withhold information under section 552.117(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the college must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. The college may not withhold this information under section 552.117(1) for those employees who did not make a timely election to keep the information confidential. We have marked the section 552.117 information in the submitted documents for your convenience.

The Investigation 2 information also contains Texas license plate numbers and vehicle identification numbers. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold the Texas driver's license numbers and vehicle identification numbers that we have marked under section 552.130.

The Investigation 2 information also contains a student-identifying reference. Section 552.026 of the Government Code 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, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

The Family Educational Rights and Privacy Act of 1974 ("FERPA") provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A).

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). We have marked the information in Investigation 2 that must be withheld pursuant to FERPA.⁶

The Exhibit 2 information also contains medical records, access to which is governed by the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). For your convenience, we have marked the Investigation 2 documents to show which are medical records subject to the MPA.

The submitted billing statements and highlighted portions thereof, as accounts reflecting the expenditure of public funds, are subject to section 552.022(a)(3). You claim exception from public disclosure for portions of the Investigation 2 billing statements under section 552.103, and for portions of the Investigation 5 billing statements under section 552.108. As noted above, sections 552.103 and 552.108 are discretionary exceptions which do not constitute other law that makes information confidential. Therefore, the submitted billing information for Investigations 2 and 5 must be released to the respective requestors.

⁶In 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.

For investigations numbers 1 and 6, you assert sections 552.101 and 552.102. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the act. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Accordingly, we will consider your section 552.101 and section 552.102 claims together.

For information to be protected from public disclosure by the common law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme 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. *Id.* 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.*

Here, some portions of the Investigation 1 appear to relate to allegations of sexual harassment. Because the submitted documents constitute a summary of these allegations, you must release the documents. However, based on *Ellen*, the college must withhold the identities of the victims and the witnesses. We have marked the information that must be withheld.

As for your section 552.101 and 552.102 claims for witness statements and billing information⁷ in Investigation 6, you assert that the privacy rights of the witnesses are implicated, and you have informed the witnesses of the information request so that they might submit written comments to this office as to why the information should be withheld

⁷Although the college's brief is not specific as to which exception is claimed for the Investigation 6 billing information, you have highlighted names in the billing information, and have tabbed that information "witness names excluded 552.101 552.102."

from public disclosure. *See* Gov't Code § 552.305(a), (b). The witnesses object to public disclosure of the witness statement information, and state that the witnesses expected that the statements would be kept confidential. However, the scope of public employee privacy is narrow. Open Records Decision No. 423 at 2 (1984). Because the work behavior of a public employee and the conditions for his or her continued employment are matters of legitimate public interest, the common law right of privacy does not protect facts about a public employee's misconduct on the job or complaints made about the employee's performance. *See* Open Records Decision No. 438 (1986). Similarly, information about a public employee's qualifications, disciplinary action, and background is not protected by common law privacy. *See* Open Records Decision No. 444 (1986). Moreover, information that is subject to the Public Information may not be withheld simply because the party submitting it anticipates or requests confidentiality. *See Industrial Found.*, 540 S.W.2d 668, 676-78. Accordingly, the Investigation 6 witness statements and highlighted billing information may not be withheld under sections 552.101 and 552.102. However, Investigation 6 contains other information that is confidential under section 552.101 in conjunction with common law privacy. The college must withhold the information in Investigation 6 that we have marked as private.

For the information in Investigation 4, you assert section 552.103. Section 552.103(a) provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature 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.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). Further, litigation must be pending or reasonably anticipated on the date the requestor applies to the public information officer for access. Gov't Code § 552.103(c).

You inform us that the plaintiff is appealing summary judgment in *Mirano v. El Paso Community College*, No. EP-00-CA-0308-DB (W. D. Tex. April 24, 2001) to the United States Court of Appeals for the Fifth Circuit. You also include as an attachment to the request for information copies of court documents from that case. Thus, as to the first prong of the section 552.103 test, the college has demonstrated that litigation was pending at the time the college received the present information request. As to the second

prong, upon careful review of the submitted information, we agree that the information concerning Investigation 4 relates to the pending litigation. The college may therefore withhold the Investigation 4 information pursuant to section 552.103(a).⁸

Generally, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You claim that the Investigation 5 information, together with college police department incident reports involving "CF Dirt Road" and "feathers," are excepted under section 552.108. Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Generally, a governmental body claiming section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. See Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that the Investigation 5 information, comprising information compiled by both Internal Vigilance and the college police department, relates to an ongoing investigation of alleged criminal activity that the college "intends to prosecute to the fullest extent of the law." Based upon this representation, we conclude that the release of the Investigation 5 information at this time would interfere with the detection, investigation, and prosecution of crime. See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), writ *ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976).

We note, however, that information normally found on the front page of an offense report is generally considered public. See generally Gov't Code § 552.108(c); *Houston Chronicle*, 536 S.W.2d 559; Open Records Decision No. 127 (1976). Thus, you must release the types of information that are considered to be front page offense report information, even if this information is not actually located on the front page of the offense report. Although section 552.108(a)(1) authorizes you to withhold the remaining information from disclosure, you may choose to release all or part of the information at issue that is not otherwise confidential by law. See Gov't Code § 552.007.

⁸Because section 552.103 is dispositive with respect to the Investigation 4 report, we need not address the section 552.107 claim.

In summary, we have marked information in Investigations 1, 2, and 6 that must be withheld under section 552.101 of the Government Code in conjunction with the common law right of privacy. In Investigation 2, the college must also withhold the information we have marked under sections 552.130, FERPA, and the MPA. Also in Investigations 2 and 6, we have marked information that must be withheld under section 552.117(1), provided the employees whose information is contained therein made a timely election of confidentiality under section 552.024. The remainder of the Investigations 1 and 2 information must be released pursuant to section 552.022(a)(1). The submitted billing information must be released pursuant to section 552.022(a)(3). The college may withhold the Investigation 4 information under section 552.103(a), and may withhold the Investigation 5 information and college police incident reports involving the "CF Dirt Road" and "feathers" investigations under section 552.108(a)(1). The remaining information must be released to the respective requestors.

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).

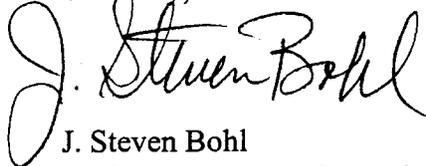
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



J. Steven Bohl
Assistant Attorney General
Open Records Division

JSB/sdk

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