



September 17, 2002

Ms. Elizabeth G. Neally
Roerig, Oliveira & Fisher, L.L.P.
855 West Price Road, Suite 9
Brownsville, Texas 78520-8786

OR2002-5223

Dear Ms. Neally:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 168705.

The Brownsville Independent School District (the “district”), which you represent, received a request for “statements and notes on an ongoing investigation involving [the requestor].” You have released some responsive information to the requestor. You claim that information identifying student witnesses is excepted from disclosure under the Family Educational and Privacy Rights Act, (“FERPA”), 20 U.S.C. § 1232g, and sections 552.114 and 552.135 of the Government Code.¹ We have considered the exceptions you claim and have reviewed the submitted information.

You claim that the information at issue is excepted from disclosure pursuant to FERPA and section 552.114 of the Government Code. 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); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). “Education records” are those records that contain information directly related to a student

¹ Please note that Section 552.131 of the Government Code, as added by chapter 1335, Act of the 76th Legislature, relating to certain information held by school districts, has been renumbered as section 552.135 of the Government Code.

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 relating to a student must be withheld from required public disclosure under FERPA to the extent “reasonable and necessary to avoid personally identifying a particular student.” *See* Open Records Decision Nos. 332 (1982), 206 (1978). Moreover, all handwritten documents created by students must be withheld in their entirety. *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). In this instance, the documents at issue include several handwritten documents created by students that the district must withhold in their entirety. Moreover, the majority of the documents at issue directly relate to a particular student of the district and make detailed reference to specific interactions between this student and the requestor. The submitted documents also demonstrate that the district has questioned the requestor about her relationship with certain students in the course of this investigation. Thus, the documents demonstrate that the requestor knows the identity of the particular student at issue and several other students referenced in the documents. We therefore determine that only withholding the names these of students from the education records at issue would not suffice to avoid the release of personally identifiable information contained in student education records as mandated by FERPA. We have marked the information that must be withheld under FERPA.²

Next, a portion of the information not protected under FERPA is protected by common-law privacy. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The district argues that the investigation at issue pertains to an allegation of sexual harassment. 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

² As we address the student witness statements at issue in their entirety under FERPA, we do not reach your claim under section 552.135 of the Government Code.

witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released.” *Id.* The documents at issue include communications regarding the investigation between district administrators and the identities of district employee witnesses. Pursuant to *Ellen*, the district must withhold the identities of witnesses from disclosure. We have marked the information that must be withheld under *Ellen* and common-law privacy.

In summary, we have marked information that must be released to the requestor, with the identities of district employee witnesses redacted pursuant to *Ellen* and common-law privacy. We have marked student identifying information that must be withheld from certain documents pursuant to FERPA. The remaining education records must be withheld in their entirety under FERPA.

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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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 'D R S', with a stylized flourish at the end.

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 168705

Enc: Submitted documents

c: Ms. Kimberly Kizer
335 Augusta Road
Brownsville, Texas 78521
(w/o enclosures)