



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

January 22, 2003

Mr. Therold I. Farmer
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
P.O. Box 2156
Austin, Texas 78768

OR2003-0444

Dear Mr. Farmer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 175336.

The China Spring Independent School District (the "district"), which you represent, received a request for information relating to an investigation of the requestor, a district employee. You claim that the requested information is excepted from disclosure under sections 552.026, 552.101, 552.102, 552.107, 552.108, 552.114, and 552.135 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

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). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990).

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.

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. 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, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

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.

We find that the submitted information relates to sexual harassment complaints made by several students against the requestor and constitutes education records for the purpose of FERPA. 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). 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). The documents submitted as Document Group 1 are handwritten statements created by students. Thus, the district must withhold the documents in Document Group 1 in their entirety under FERPA. We have also marked the student identifying information in Document Group 2 that the district must withhold under FERPA.

We next address the remaining information in Document Group 2. You assert that the information at issue is excepted from disclosure under section 552.107. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to the attorney's client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. You state that the information at issue was collected "at the behest of the District's legal counsel." Upon review, however, we determine the district has not demonstrated that the submitted documents were communicated from the district to the district's attorney. See Open Records

Decision No. 676 at 7 (2002). Furthermore, the district has not explained how the submitted information was communicated for the purpose of facilitating the rendition of professional legal services to the district. *See id.* Accordingly, we determine that the district may not withhold the remaining documents under section 552.107(1) of the Government Code.

You also contend that the remaining documents are excepted from disclosure under section 552.108 of the Government Code. Section 552.108 of the Government Code provides pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation or prosecution of crime;

(2) it is information that deals with the detection, investigation or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

...

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

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).*

As you acknowledge, the district is not a law enforcement agency. *See Open Records Decision Nos. 493 at 2 (1988), 287 at 2 (1981)* (section 552.108 applies to records created by an agency, or a portion of an agency, whose primary function is to investigate crimes and enforce criminal laws). Moreover, you have not explained how release of the information

at issue would interfere with law enforcement. *See Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); *see also* Open Records Decision Nos. 474 (1987), 372 (1983) (where an incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information that relates to the incident). Accordingly, we determine the district may not withhold the information at issue under section 552.108 of the Government Code.

Next, you contend that the identities of district employees are protected by privacy. 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.

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 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 witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released.” *Id.* Upon review, we have marked information identifying a witness in the investigation that the district must withhold under section 552.101 in conjunction with common-law privacy. We also find, however, that you have not demonstrated that the other employees identified in the documents are witnesses in the investigation of the sexual harassment complaint at issue. Thus, we determine that the identities of other district

employees contained in the documents are not excepted from disclosure under section 552.101 and common-law privacy.

You also contend that section 552.135(b) of the Government Code excepts the identities of employees contained in the documents at issue because these employees are informers within the meaning of section 552.135. Section 552.135 provides as follows:

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

(d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or prosecutor upon proper request made in compliance with applicable law and procedure.

(e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be constitutional, statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.

Gov't Code § 552.135. Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under that exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See* Gov't Code § 552.301(e)(1)(A). You state that the district obtained statements regarding alleged

violations of several sections of the Texas Penal Code and Title IX of the General Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* However, you have not demonstrated that any of the remaining named employees reported a violation of the law. Accordingly, we determine that the district may not withhold the identities of any district employees from disclosure under section 552.135 of the Government Code.

In summary, the documents submitted as Document Group 1 must be withheld in their entirety under FERPA. We have marked student identifying information in Document Group 2 that the district must withhold under FERPA. We have also marked the name of a district employee witness that must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. The remainder of the information in Document Group 2 must be released to the requestor.

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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 175336

Enc: Submitted documents

c: Mr. Thomas Shives
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(w/o enclosures)