



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

February 5, 2003

Ms. Nancy Nelson  
Associate Vice President, Employee Relations  
El Paso Community College District  
P.O. Box 20500  
El Paso, Texas 79998-0500

OR2003-0778

Dear Ms. Nelson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 176067.

The El Paso Community College District (the "district") received a request for ten categories of information. You indicate that the district has released some of the requested information to the requestor. You claim, however, that the submitted information is excepted from disclosure under sections 552.026, 552.101, 552.103, and 552.114 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information. We have also considered all other comments submitted for our review. *See* Gov't Code § 552.304 (providing for submission of public comments).

Initially, we address the requestor's contention that the district failed to comply with section 552.301 of the Government Code. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You state that the district received the present request on November 11, 2002. Although you submitted certain documents for our review on December 2, 2002, you did not submit six other documents for our review until December 5, 2002. Thus, you did not timely submit those six documents.

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<sup>1</sup>As you did not submit to this office written comments stating the reasons why section 552.103 would allow the submitted information to be withheld, we find that you have waived that exception. *See* Gov't Code §§ 552.301, .302.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). You claim that the six untimely submitted documents are excepted under section 552.101 of the Government Code. As section 552.101 can provide a compelling reason to overcome the presumption of openness, we will address your arguments under that exception with respect to all of the submitted information.

You claim that the submitted information must be withheld under sections 552.026 and 552.114 of the Government Code. The Family Education Rights and Privacy Act 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. *See* Open Records Decision No. 634 at 5 (1995).

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 [FERPA]."

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution must 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 must 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. In this instance, however, you have submitted the documents at issue to this office for consideration. Therefore, we will consider whether these documents contain information that is excepted from disclosure under sections 552.026 and 552.114 of the Government Code.

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). Further, information that does not

*directly* identify a student but would nevertheless make a student's identity easily traceable must also be withheld. *See* Open Records Decision No. 224 (1979) (finding student's handwritten comments making identity of student easily traceable through handwriting, style of expression, or particular incidents related in comments protected under FERPA). One of the statements you have submitted for our review directly relates to a particular student. Thus, we have marked the student identifying information that the district must withhold under FERPA.

We note, however, FERPA generally does not govern access to records in the custody of governmental bodies that are not educational agencies or institutions. *See* Open Records Decision No. 390 at 3 (1983). You acknowledge that some of the submitted documents consist of complaints made to the district's police department (the "department"). Thus, such information may not generally be withheld under FERPA. An exception to this rule applies if the governmental body received the records from an educational agency under written consent of the student. 20 U.S.C. 1232g(b)(4)(B). Thus, if the department received the records at issue from the district pursuant to the written consent of the student, such information is confidential under FERPA and must be withheld from the requestor. *See* 20 U.S.C. § 1232g(a)(3), (b)(4)(B).

Next, you argue that some of the submitted information pertains to allegations of sexual harassment and must therefore be withheld under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected under the doctrine of common-law privacy. For information to be protected by common-law privacy it must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 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. *Id.* 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.* When 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.

Several of the submitted documents pertain to allegations of sexual harassment filed with the district: Here, there are no adequate summaries regarding the allegations of sexual harassment. Thus, the district must release the statements regarding the allegations of sexual harassment. However, based on *Ellen*, the district must withhold the identities of the victims and witnesses of the harassment from disclosure. Thus, we have marked the information in such statements that must be withheld under section 552.101 in conjunction with common-law privacy. We note that some of the submitted police reports are classified as reports of sexual harassment. These police reports involve allegations of criminal conduct by district students. We find that a sexual harassment evaluation under *Ellen* would be inappropriate as to these police reports.

We note that two of the submitted documents involve allegations of sexual assault. In Open Records Decision No. 339 (1982), we concluded that a sexual assault victim has a common-law privacy interest which prevents disclosure of information that would identify the victim. *See also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). Accordingly, we have marked the sexual assault victims' identifying information that the district must withhold pursuant to section 552.101 and common-law privacy. *See* Open Records Decision Nos. 393 (1983), 339 (1982).

To summarize: (1) we have marked the information that must be withheld under FERPA; (2) we have marked the information that must be withheld under section 552.101 in accordance with *Ellen*; and (3) we have marked the submitted information that must be withheld under section 552.101 and common-law privacy. The remaining information 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,



Karen A. Eckerle  
Assistant Attorney General  
Open Records Division

KAE/sdk

Ref: ID# 176067

Enc: Submitted documents

c: Mr. Truman W. Dean, Jr.  
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(w/o enclosures)