



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

August 12, 2003

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

OR2003-5602

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# 185863.

Southwest Texas Junior College (the "college"), which you represent, received a request for the requestor's own personnel file and information relating to the circumstances of the requestor's resignation. You state that some of the requested information is being released to the requestor. You claim, however, that the submitted information is excepted from disclosure under sections 552.026, 552.101, 552.102, 552.114, and 552.135 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

You contend that the information submitted as Document Group One contains information that is confidential under the federal Family Educational Rights and Privacy Act of 1974

¹ We note that you raise section 552.305 of the Government Code as an exception to disclosure. Section 552.305 states in relevant part that "[i]n a case in which information is requested under this chapter and a person's privacy or property interests may be involved . . . a governmental body may decline to release the information *for the purpose of requesting an attorney general decision.*" Gov't Code § 552.305 (emphasis added). Thus, as you acknowledge in your comments to this office, section 552.305 is not an exception to disclosure under the Public Information Act (the "Act"). Rather, section 552.305 is a procedural provision permitting a governmental body to withhold information that may be private while the governmental body is seeking an attorney general's decision under the Act. Because you believe the present request implicates the privacy interests of third parties, we consider your privacy arguments pursuant to section 552.101 of the Government Code.

("FERPA"), section 1232g of Title 20 of the United States 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. *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 of the Government Code and FERPA. Open Records Decision No. 539 (1990).

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. In this instance, as you have submitted the information for which you raise FERPA for review, we will address the applicability of FERPA to the information.

Information 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). Information that does not directly identify a student, but makes the identity of a student easily traceable, is confidential under FERPA and must be withheld. *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 information in Document Group One pertains directly to students of the college and constitutes education records for purposes of FERPA. We have marked the student identifying information in Document Group One that the college must withhold pursuant to FERPA.

We next address your claims under section 552.101 of the Government Code. Section 552.101 excepts "information considered to be confidential by law, either

constitutional, statutory, or by judicial decision,” and 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 submitted information pertains to investigations of complaints 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.* Therefore, when there is an adequate summary of an investigation of sexual harassment, the summary and any statements of the person under investigation must be released, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure. However, when no adequate summary exists, the documents pertaining to the investigation are not excepted from disclosure, but the identities of witnesses and complainants are protected by common-law privacy.

The information in Document Groups One and Two reveal the identities of college employees who have made complaints regarding sexual harassment and who are witnesses in sexual harassment investigations. The submitted documents do not contain adequate summaries of investigations of the complaints at issue. We determine that pursuant to *Ellen*, the identities of sexual harassment complainants and witnesses are protected by common-law privacy and must be withheld from disclosure under section 552.101 of the Government Code. *See Ellen*, 840 S.W.2d at 525. We have marked the information in Document Groups One and Two that the college must withhold pursuant to *Ellen* and common-law privacy.

You also contend that other information in the submitted witness statements is excepted from disclosure pursuant to section 552.101 in conjunction with common-law privacy. We note, however, that the statements at issue pertain to the job performance of a public employee and, as such, do not constitute private information. *See Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute private affairs of employee), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope*

of public employee privacy is narrow); *see also Ellen*, 840 S.W.2d at 525. Thus, we determine the college may not withhold any portion of the remaining information in Document Groups One and Two pursuant to section 552.101 in conjunction with common-law privacy.

We next address your claim under the common-law informer's privilege with respect to the remaining individuals identified in the submitted documents. The informer's privilege, incorporated into the Act by section 552.101 of the Government Code, has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). It protects from disclosure the identities of persons who report activities over which a governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute or law. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). However, the informer's privilege protects the content of the communication only to the extent that it identifies the informant. *See Roviario v. United States*, 353 U.S. 53, 59 (1957). In this case, you have not demonstrated that any of the remaining individuals identified in the submitted documents reported a violation of law to a law enforcement agency. Thus, the college may not withhold the names of the remaining individuals at issue pursuant to section 552.101 in conjunction with the informer's privilege.

Next, we must address your claim under section 552.135 of the Government Code with respect to the remaining individuals identified in the submitted documents.² Section 552.135 applies to information identifying students or employees of a school district. 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.

² In your comments to this office, you make reference to former section 552.131 of the Government Code in citing to this exception. 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.

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

You claim that section 552.135 applies to the college as a result of section 130.084 of the Education Code. Section 130.084 provides as follows:

The board of trustees of junior college districts shall be governed in the establishment, management, and control of the junior college by the general law governing the establishment, management, and control of independent school districts insofar as the general law is applicable.

By its terms, section 130.084 affects only the authority of junior college trustees to direct a junior college. *See San Antonio Union Junior College Dist. v. Daniel*, 206 S.W.2d 995 (Tex. 1947). Thus, this office has applied section 130.084 and its predecessor to confer various school district powers on junior college trustees. *See, e.g.*, Attorney General Opinions DM-178 (1992) (power to borrow money secured by delinquent maintenance tax revenues under section 20.45 of the Education Code), M-878 (1971) (power to issue time warrants to repair, renovate, and equip school buildings under section 20.43 of the Education Code), M-700 (1970) (power to exercise eminent domain under section 23.31 of the Education Code). However, this office has found that section 21.355 of the Education Code, which provides for the confidentiality of evaluations of school district teachers and administrators, does not bear on the direction of a junior college by junior college trustees, or confer power on those trustees. Likewise, we find that section 552.135, which provides for the confidentiality of the identities of school district informers, does not bear on the direction of a junior college by junior college trustees, and does not in any way confer power on those trustees. Consequently, the college may not withhold any portion of the submitted information pursuant to section 552.135 of the Government Code.

In summary, we have marked student identifying information that must be withheld under FERPA. We have also marked information identifying complainants and witnesses in sexual harassment investigations that must be withheld pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. The remainder of the submitted 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 Dep't of Pub. 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# 185863

Enc: Submitted documents

c: Mr. Ricky Hernandez
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(w/o enclosures)