



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 25, 2004

Mr. Robert M. Dunn, Jr.
Feldman & Rogers, L.L.P.
5718 Westheimer, Suite 1200
Houston, Texas 77057

OR2004-5235

Dear Mr. Dunn:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 204102.

The Houston Independent School District (the "district"), which you represent, received a request for information relating to (1) an investigation of alleged inappropriate conduct by an assistant principal of Sam Houston High School; (2) a complaint of harassment filed by an employee of the district; and (3) a named individual's whistle-blower case. You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.107, 552.114, 552.117, and 552.135 of the Government Code.¹ We have considered the exceptions you claim and have reviewed the information you submitted.²

We first note that much of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that

¹You also claim an exception to disclosure under section 552.022 of the Government Code. This section does not except information from public disclosure. Rather, section 552.022 provides that 18 types of information are subject to required public disclosure, unless the information is expressly made confidential under other law or, in the case of section 552.022(a)(1), is excepted from disclosure under section 552.108. See Gov't Code § 552.022(a)(1)-(18).

²We note that some of the submitted information does not appear to be responsive to this request for information. This decision does not address the public availability of the non-responsive information, which we have marked, and that information need not be released.

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:

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

Gov't Code § 552.022(a)(1). You indicate that portions of the submitted information relate to completed investigations made of, for, or by the district. The district must release all such information under section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 or expressly confidential under other law. Section 552.107(1) is a discretionary exception to public disclosure that protects the governmental body's interests and may be waived. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.107(1) is not other law that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold information that is subject to section 552.022(a)(1) under section 552.107(1).

The Texas Supreme Court has held, however, that the Texas Rules of Evidence are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege also is found at Texas Rule of Evidence 503. As the district claims that the information that is subject to section 552.022 is protected by the attorney-client privilege, we will consider whether that information is confidential under rule 503. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state that the information that is encompassed by section 552.022(a)(1) includes communications between representatives of the district and its attorneys that were made in connection with the rendition of professional legal services. You also state that these communications were intended to be and have remained confidential. Based on your representations, we have marked information that the district may withhold under Texas Rule of Evidence 503. You have not demonstrated, however, that rule 503 is applicable to the remaining information encompassed by section 552.022(a)(1) for which you claim the attorney-client privilege. Therefore, the district may not withhold any of that information under rule 503.

Section 552.101 excepts from required public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses the common-law right to privacy. Information must be withheld from the public under section 552.101 in conjunction with common-law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court applied the common-law right to privacy to an investigation of alleged sexual harassment. The investigation files at issue in *Ellen* contained third-party witness statements, an affidavit in which the individual accused of the misconduct responded to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *See* 840 S.W.2d at 525. The court upheld the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the disclosure of such documents sufficiently served the public’s interest in the matter. *Id.* The court also held that “the public does 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.*

Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released under *Ellen*, but the identities of the victims of and witnesses to the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. *See also* Open Records Decision Nos. 393 (1983), 339 (1982). If no adequate summary of the investigation exists, then all of the information relating to the investigation must ordinarily be released, except for information that would identify the victims and witnesses. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. Common-law privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about a public employee's job performance. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

We find that *Morales v. Ellen* is applicable to the information that is responsive to part 1 of this request for information. We also find that this information includes documents that constitute an adequate summary of the investigation and a statement of the individual accused of sexual harassment. Therefore, the district must release the summary document and the statement of the accused individual, except for those portions of the documents that reveal the identities of the victim of the alleged sexual harassment and the witnesses in the investigation. The victim and witness information, as well as the rest of the information that relates to the sexual harassment investigation, must be withheld from public disclosure under section 552.101 in conjunction with common-law privacy under *Morales v. Ellen*. We have marked that information accordingly.³

The common-law right to privacy also protects the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). Law enforcement information compiled by a governmental entity that relates to a particular individual as a criminal suspect, arrested person, or defendant also is private under section 552.101. *See U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); Open Records Decision

³We note that the district has withheld some of the information contained in the summary document under the previous determination in Open Records Decision No. 634 (1995) (educational agency or institution may withhold information protected by Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, and excepted from disclosure under Gov't Code §§ 552.026 and 552.101 without necessity of requesting attorney general decision under those exceptions; and (2) state-funded educational agency or institution may withhold information protected by Gov't Code § 552.114 as student record, insofar as FERPA protects student record, without necessity of requesting attorney general decision under that exception).

No. 616 at 2-3 (1993). The identity of a victim of alleged sexual harassment is private under *Morales v. Ellen*. See 840 S.W.2d 519, 525 (Tex. App.—El Paso 1992, writ denied). This office has concluded that other types of information also are private under section 552.101. See Open Records Decision Nos. 659 at 4-5 (1999) (summarizing information attorney general has held to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress). We have marked private information that the district must withhold under section 552.101.

Common-law privacy also protects certain types of personal financial information. This office has determined that financial information that relates only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. See Open Records Decision Nos. 600 at 9-12 (1992) (identifying public and private portions of certain state personnel records), 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). Thus, a public employee's allocation of part of the employee's salary to a voluntary investment program offered by the employer is a personal investment decision, and information about that decision is protected by common-law privacy. See, e.g., Open Records Decision Nos. 600 at 9-12 (1992) (participation in TexFlex), 545 at 3-5 (1990) (deferred compensation plan). Likewise, the details of an employee's enrollment in a group insurance program, the designation of the beneficiary of an employee's retirement benefits, and an employee's authorization of direct deposit of the employee's salary are protected by common-law privacy. See Open Records Decision No. 600 at 9-12. But where a transaction is funded in part by a governmental body, it involves the employee in a transaction with the governmental body, and the basic facts about that transaction are not private under section 552.101. See *id.* at 9 (basic facts of group insurance provided by governmental body not protected by common-law privacy). We have marked personal financial information that the district must withhold under section 552.101 in conjunction with common-law privacy, provided that none of the marked information relates to an employee benefit that is financed in whole or in part by the district.

Section 552.117(a)(1) excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this information be kept confidential

under section 552.024. The determination of whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the district may only withhold information under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the district's receipt of this request for information. The district may not withhold information under section 552.117(a)(1) on behalf of a current or former employee who did not make a timely election under section 552.024 to keep the information confidential. We have marked information that the district must withhold under section 552.117(a)(1) if the information relates to a current or former employee of the district who timely elected under section 552.024 to keep his or her section 552.117 information confidential.

A social security number may also be protected by section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if the social security number was obtained or is maintained by a governmental body under any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that any social security number contained in the submitted documents is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, and we are aware of no law, enacted on or after October 1, 1990 that requires or authorizes the district to obtain or maintain a social security number. Thus, we have no basis for concluding that any social security number contained in the submitted documents was obtained or is maintained under such a law and is therefore confidential under the federal law. We caution you, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, before releasing a social security number, the district should ensure that it was not obtained and is not maintained under any provision of law enacted on or after October 1, 1990.

Section 552.130 excepts from public disclosure information that relates to "a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]" Gov't Code § 552.130(a)(1). We have marked Texas driver's license information that the district must withhold under section 552.130.

In summary: (1) the district may withhold the information encompassed by section 552.022(a)(1) that is confidential under Texas Rule of Evidence 503; (2) the district must withhold the information that is protected by common-law privacy under section 552.101 of the Government Code; (3) the district must withhold the home address and telephone number, social security number, and family member information of any current or former district employee who timely elected under section 552.024 to keep his or her section 552.117 information confidential; (4) the district may also be required to withhold a social security number under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code; and (5) the district must withhold the Texas driver's

license information under section 552.130. The rest of the submitted information must be released. As we are able to make these determinations, we need not address your claims under sections 552.107, 552.114, or 552.135.

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).

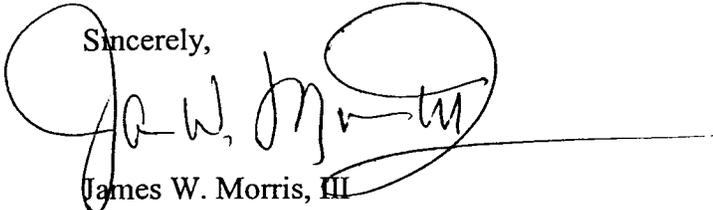
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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

A handwritten signature in black ink, appearing to read "J.W. Morris, III", is written over a horizontal line. The signature is stylized and somewhat cursive.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 204102

Enc: Submitted documents

c: Ms. Anna Werner
KHOU-TV
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(w/o enclosures)