

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 3, 2006

Mr. Augustin Rivera, Jr.  
Dunn, Weathered, Coffey, Rivera, Kasperitis & Rodriguez, P.C.  
611 South Upper Broadway  
Corpus Christi, Texas 78401

OR2006-11519

Dear Mr. Rivera:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 261000.

Del Mar College (the "college"), which you represent, received a request to inspect information pertaining to a report prepared for the college by outside counsel. You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.111, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that you have submitted some information that was created after the request was received. This information, which we have marked, is thus not responsive to the request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the college is not required to release that information in response to the request.

Next, we note that most of the submitted information is subject to section 552.022 of the Government Code, which provides in pertinent part as follows:

- (a) Without limiting the amount or kind of information that is public information under this chapter, 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). Most of the submitted documents were collected and considered in an investigation completed for the college by outside counsel. You claim that this investigative information is not subject to section 552.022(a)(1) because it is "part of the [c]ollege's ongoing deliberative process into the allegations raised by the grievances." We note, however, that the investigation was made for the college by outside counsel and resulted in final conclusions and recommendations. Thus, this information constitutes a completed investigation made for the college. Consequently, unless this information is made expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code, it must be released to the requestor.

Although the college raises sections 552.103, 552.107, and 552.111 of the Government Code for this information, these exceptions are discretionary under the Act, and do not constitute "other law" for purposes of section 552.022. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 676 at 5-6 (2002) (attorney-client privilege under section 552.107(1) may be waived), 663 (1999) (governmental body may waive section 552.111), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). Accordingly, the college may not withhold this information under section 552.103, 552.107, or 552.111. Because information that is subject to section 552.022(a)(1) may be withheld under mandatory exceptions, we will consider your claims under sections 552.101, 552.102, and 552.117 of the Government Code.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 551.104(c) of the Government Code provides that "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3)." *Id.* § 551.104(c). Thus, such information cannot be released to a member of the public in response to an open records request. See Open Records Decision No. 495 (1988). We note that the submitted information does not contain a certified agenda. Although you assert that the notes in Exhibit B.3 were taken during a closed session of the college's Board of Regents, we note that records discussed in a closed meeting and records created in a closed meeting, other than a certified agenda or tape recording, are not made confidential by chapter 551 of the Government Code. Open Records Decision No. 605 (1992). We therefore conclude that Exhibit B.3, which consists of notes taken in the closed meeting, is not excepted from disclosure under section 552.101 in conjunction with section 551.104 of the Government Code. See Open Records Decision Nos. 605 at 2-3, 485 at 9-10 (1987); see also Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 649 at 3 (1996) (language of confidentiality provision

controls scope of its protection), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public). Accordingly, the college may not withhold any of the submitted information under section 552.101 on that basis.

You also claim that portions of the submitted information are excepted from disclosure under sections 552.101 and 552.102 in conjunction with the common-law right of 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(a) 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 *Indus. Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). Accordingly, we will consider your privacy claims under section 552.101 and section 552.102(a) together.

In *Industrial Foundation*, the Texas Supreme 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. *Id.* at 685. You assert that “[i]nvestigations into allegations of sexual harassment, like the one at issue here,” are excluded from public disclosure in accordance with *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied). The *Ellen* court addressed the applicability of the common-law privacy doctrine to files from an investigation of allegations of sexual harassment. See *id.* The investigatory files at issue in *Ellen* contained, among other things, individual witness and victim statements pertaining to the alleged sexual harassment. The court held that the names of witnesses and their detailed affidavits regarding allegations of sexual harassment were excepted from disclosure under the privacy doctrine as described in *Industrial Foundation* because “the public [did] not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements.” See *id.* at 525.

In this instance, however, we conclude that the subject investigation, although related to a separate investigation of sexual harassment, does not itself pertain to an allegation of sexual harassment. Although you state that the grievances at issue were filed under the college’s sexual harassment policy, the grievant alleged unlawful discrimination and retaliation for her part in processing a sexual harassment claim filed by a student. Consequently, the rationale in *Ellen* is inapplicable to the subject investigation as a whole.

We note, however, the submitted records do contain references to a separate investigation of sexual harassment allegations. The identities of the alleged victim and witnesses, which we have marked, in the separate investigation are confidential under common-law privacy and must be withheld under section 552.101. We note, however, that information that is

otherwise confidential under common-law privacy may not be withheld in a court-filed document. *See Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992) (common-law privacy not applicable to court-filed document). Accordingly, the college must withhold the identifying information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Next, we address your claim under section 552.103 of the Government Code for the information in Exhibit B.1, which is not subject to section 552.022(a)(1). Section 552.103 provides in part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The college has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The college must meet both prongs of this test for information to be excepted under 552.103(a).

You state, and provide documentation showing, that the grievant filed a lawsuit against the college on July 10, 2006. You further state that the lawsuit and the grievance "arise out of the same or similar facts, allegations, and parties." Upon review of your representations and the submitted information, we find that litigation was pending when the college received the present request for information on July 11, 2006 and that the information in Exhibit B.1 relates to the pending litigation.

We note, however, that some of the documents at issue reflect on their face that they were provided to the opposing party in the anticipated litigation. Once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a)

interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, to the extent that the information in Exhibit B.1 has either been obtained from or provided to the opposing party or her representative, it is not excepted from disclosure under section 552.103(a) and may not be withheld on that basis. However, to the extent that the information in Exhibit B.1 has not been obtained from or provided to the opposing party or her representative, it may be withheld from disclosure under section 552.103(a). Furthermore, the applicability of section 552.103(a) ends once litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Next, we address your claim that portions of the remaining information are excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Section 552.117 also encompasses a personal cellular mobile telephone number, provided that the cellular mobile phone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (Gov't Code § 552.117 not applicable to cellular mobile phone numbers paid for by governmental body and intended for official use). However, information subject to section 552.117(a)(1) may not be withheld from disclosure if the current or former employee made the request for confidentiality under section 552.024 after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). In this case, you do not inform us nor provide documentation showing that the current or former employees at issue timely elected confidentiality under section 552.024. Thus, if the current or former employees timely elected to keep their personal information confidential, you must withhold this information, which we have marked, under section 552.117(a)(1). The college may not withhold this information under section 552.117(a)(1) if these employees did not make a timely election to keep the information confidential.

Next, we note that the remaining information contains Texas motor vehicle record information that is subject to section 552.130 of the Government Code.<sup>1</sup> Section 552.130 provides in part:

(a) Information is excepted from required public disclosure if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

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<sup>1</sup> The Office of the Attorney General will raise a mandatory exception like section 552.130 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(2) a motor vehicle title or registration issued by an agency of this state[.]

Gov't Code § 552.130(a)(1), (2). Therefore, the college must withhold the Texas-issued motor vehicle record information we have marked under section 552.130.

Next, we note that section 552.137 of the Government Code provides in part:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

Gov't Code § 552.137(a)-(c). Section 552.137 excepts from public disclosure certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or

employees. The e-mail addresses we have marked do not appear to be of a type specifically excluded by section 552.137(c). Thus, the college must withhold the marked e-mail addresses under section 552.137 unless the owners of the email addresses have affirmatively consented to their release. *See id.* § 552.137(b).

Finally, we note that the remaining information contains social security numbers. Section 552.147 of the Government Code provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. Therefore, the college must withhold the social security numbers in the remaining information under section 552.147.<sup>2</sup>

In summary, the college must withhold the identifying information we have marked under section 552.101 of the Government Code in conjunction with *Ellen* and common-law privacy. To the extent that the information in Exhibit B.1 has not been provided to the opposing party in the pending litigation or her representative, it may be withheld under section 552.103 of the Government Code. If the current or former employees at issue timely elected to keep their personal information confidential, the college must withhold the personal information we have marked under section 552.117(a)(1) of the Government Code. The college must also withhold the marked Texas-issued motor vehicle record information under section 552.130 of the Government Code, the marked e-mail addresses under section 552.137 of the Government Code, unless the owners of the email addresses have affirmatively consented to their release, and the social security numbers under section 552.147 of the Government Code. 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).

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<sup>2</sup> We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



Shelli Egger  
Assistant Attorney General  
Open Records Division

SE/sdk

Ref: ID# 261000

Enc. Submitted documents

c: Dr. Gerald A. Sansing  
5426 Chevy Chase Drive  
Corpus Christi, Texas 78412  
(w/o enclosures)

DEL MAR COLLEGE DISTRICT,  
Plaintiff,

V.

GREG ABBOTT, ATTORNEY GENERAL  
OF TEXAS,  
Defendant.

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IN THE DISTRICT COURT OF  
  
TRAVIS COUNTY, TEXAS  
  
345<sup>th</sup> JUDICIAL DISTRICT

Filed in The District Court  
of Travis County, Texas

JUL 25 2007  
At B. C. S. R. M.  
Amalia Rodriguez-Mendoza, Clerk

**AGREED FINAL JUDGMENT**

On this date, the Court heard the parties' motion for agreed final judgment. By their motion, Plaintiff Del Mar College District (Del Mar) and Defendant Greg Abbott, Attorney General of Texas, announce to the Court that all matters of fact and things in controversy between them have been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code Ann. ch. 552. The parties represent to the Court that, in compliance with Tex. Gov't Code Ann. § 552.325(c), the requestor, Gerald Sansing, was sent reasonable notice of this setting and of the parties' agreement that Del Mar may withhold attorney notes and must withhold private information relating to the grievant; that the requestor was also informed of his right to intervene in the suit to contest the withholding of this information; and that the requestor has not informed the parties of his intention to intervene. Neither has the requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. The attorney notes (Exhibit B.3) are excepted from disclosure by Tex. Gov't Code Ann. § 552.107(1), and Del Mar may withhold the notes from the requestor;

2. The grievant's personnel file and performance reviews (Exhibit A.3) are subject to disclosure, except for information marked by the Attorney General, which is excepted from disclosure by Tex. Gov't Code § 552.117. Del Mar shall disclose the personnel file, with the marked information redacted, to the requestor;

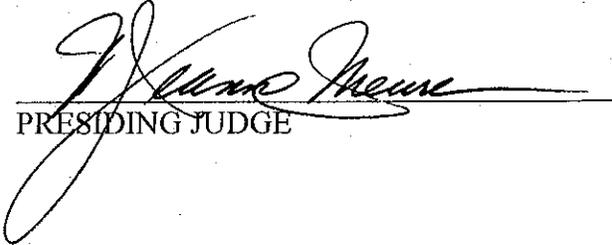
3. Del Mar no longer contests the disclosure of the remaining information at issue, the report and remaining materials from the investigative file, and Del Mar represents that this information has been disclosed to the requestor;

4. All costs of court are taxed against the parties incurring the same;

5. All relief not expressly granted is denied; and

6. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendant and is a final judgment.

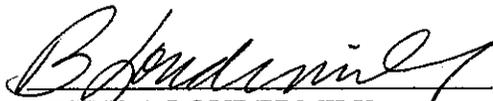
SIGNED this the 25 day of July, 2007.

  
PRESIDING JUDGE

APPROVED:



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