



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 18, 2009

Mr. Robert W. Wilson  
Gale, Wilson, & Sanchez  
Attorney for South San Antonio Independent School District  
115 East Travis, 19<sup>th</sup> Floor  
San Antonio, Texas 78205

OR2009-18005

Dear Mr. Wilson:

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# 364661 (G, W, & S File No. 4722).

The South San Antonio School District (the "district"), which you represent, received a request for information pertaining to a specified incident. You claim that portions of the submitted information are excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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 the doctrine of common-law privacy. Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 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 v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. Accordingly, we address the district's section 552.102(a) claim in conjunction with its common-law privacy claim under section 552.101 of the Government Code.

Common-law privacy protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Indus. Found.*, 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. *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.*

Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released along with the statement of the accused under *Ellen*, but the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. *See 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 ordinarily must be released, with the exception of information that would identify the victims and witnesses. Because 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, the identity of the individual accused of sexual harassment is not protected from public disclosure. *See Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978)*.

The submitted information contains documents pertaining to an investigation into alleged sexual harassment, including an adequate summary of the investigation and statement of the person accused of the harassment. The summary and statement of the accused individual are not confidential; however, information within the summary and the statement of the accused individual that identifies the victim and witnesses is confidential under common-law privacy and must generally be withheld pursuant to section 552.101 of the Government Code. *See Ellen*, 840 S.W.2d at 525. We note the requestor, however, is the alleged victim. Section 552.023 of the Government Code gives a person or the person's authorized representative a special right of access to information that is excepted from public disclosure under laws intended to protect that person's privacy interests. *See Gov't Code § 552.023*. Thus, the requestor has a special right of access to her identifying information, and the district may not withhold that information from her under section 552.101 in conjunction with common-law privacy. *See id.*; *Open Records Decision No. 481 at 4 (1987)* (privacy theories not implicated when individual requests information concerning herself). Thus, the district must release the summary and statement of the accused, but withhold the information that identifies the witnesses, which we have marked, under section 552.101 in conjunction with common-law privacy and the court's holding in *Ellen*. The district must withhold the

remaining records of the sexual harassment investigation under section 552.101 in conjunction with common-law privacy and the court's holding in *Ellen*. Upon review, we find that you have failed to demonstrate how any of the remaining information in the summary or statement of the accused constitutes highly intimate or embarrassing information of no legitimate public concern. Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code on the basis of common-law privacy or under section 552.102.

Section 552.101 also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5; see *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985). Upon review, we conclude that, in this instance, the individuals' privacy interests are outweighed by the public interest in the conduct and qualifications of public employees, and thus, no portion of the summary and statement of the accused is confidential under constitutional privacy. Therefore, the district may not withhold any of this information under section 552.101 on that ground.

We note section 552.117 of the Government Code may be applicable to portions of the summary and statement of the accused.<sup>1</sup> Section 552.117(a)(1) excepts from disclosure the current and former 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 this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). We note that section 552.117 also encompasses personal cellular telephone numbers, provided that the cellular telephone service is not paid for by a governmental body. See Open Records Decision No. 670 at 6 (2001). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. See Open Records Decision No. 530 at 5 (1989). Pursuant to section 552.117(a)(1), the district must withhold the home address, home telephone number, family member information, and social security number of a current or former employee of the district who elected, prior to the district's receipt of the request for information, to keep such information confidential. Therefore, if the employee whose information we have marked timely elected to withhold his personal information, the district

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

must withhold this information pursuant to section 552.117(a)(1) of the Government Code; however, the district may only withhold the personal cellular telephone number we have marked if the cellular service was paid for with the employee's own funds. If the employee did not timely elect to withhold his personal information, then the district may not withhold his marked information under section 552.117(a)(1) of the Government Code.

In summary, with the exception of the summary and statement of the accused, the district must withhold the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy. In the summary and statement of the accused, the district must withhold the identifying information of witnesses we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, and the employee's personal information we have marked under section 552.117(a)(1) of the Government Code, if the employee at issue timely elected to keep his information confidential under section 552.024; however, the district may withhold the marked cellular telephone number under section 552.117(a)(1) only if the district did not pay for the cellular service. The remaining information must be released.<sup>2</sup>

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Jonathan Miles  
Assistant Attorney General  
Open Records Division

JMY/rl

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<sup>2</sup>We note that the information being released contains confidential information to which the requestor have a right of access. See Gov't Code § 552.023(a); ORD 481 at 4. Therefore, if the district receives another request for this particular information from a different requestor, then the district must again seek a decision from this office.

Ref: ID# 364661

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)