



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 14, 2010

Ms. Sandra D. Carpenter  
Walsh, Anderson, Brown, Gallegos & Green, P.C.  
P.O. Box 168046  
Irving, Texas 75016

OR2010-10468

Dear Ms. Carpenter:

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# 386726.

The Fort Worth Independent School District (the "district"), which you represent, received a request for investigation reports involving two named individuals. We understand you have redacted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a).<sup>1</sup> See Gov't Code §§ 552.026 (incorporating FERPA into the Act), .114 (excepting from disclosure "student records"); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 of the Government Code and FERPA). You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup>The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

<sup>2</sup>We assume that the "representative sample" of records submitted to this office are truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, we note that the submitted information is subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant part:

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[.]

Gov't Code § 552.022(a)(1). The submitted information consists of a completed investigation of one of the named individuals. Therefore, pursuant to section 552.022, the district must release the completed investigation unless it is confidential under other law. The district raises sections 552.101, 552.103, and 552.135 for this information. Section 552.103 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *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. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 does not qualify as "other law" that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold the submitted investigation under section 552.103 of the Government Code. However, sections 552.101 and 552.135 are "other law" for the purpose of section 552.022. Therefore, we will determine whether these sections are applicable to the completed investigation.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which excepts from public disclosure private information about an individual if the information (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. *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 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 pertains to an investigation of alleged sexual harassment, including an adequate summary of the investigation and a statement of the person accused of the harassment. The summary is not confidential; however, information within the summary 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, however, that the requestor is the attorney representing the alleged victim in this instance. 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, here, the requestor has a special right of access to her client's information, and the district may not withhold that information from her under section 552.101 in conjunction with common-law privacy.<sup>3</sup> See *id.*; Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). Accordingly, 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*.<sup>4</sup> However, we will address your remaining arguments under sections 552.101 and 552.135 for portions of the summary.

Section 552.101 of the Government Code also encompasses information that other statutes make confidential. You assert that the remaining information is excepted from disclosure under section 552.101 in conjunction with section 21.355 of the Education Code, which

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<sup>3</sup>We note, however, that if the district receives another request for this particular information from a different requestor, the district should again seek a decision from this office before releasing this information.

<sup>4</sup>As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

provides that “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355. This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. See Open Records Decision No. 643 (1996). We have determined that the word “administrator” in section 21.355 means a person who is required to and does in fact hold an administrator’s certificate under chapter 21 of the Education Code and is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.* The remaining information consists of an investigation of alleged wrongdoing by a district administrator. We find this information does not constitute an evaluation of the administrator for purposes of section 21.355. Thus, the district may not withhold the remaining information under section 552.101 in conjunction with section 21.355 of the Education Code.

Section 552.135 of the Government Code provides the following:

(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 possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

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

Gov’t Code § 552.135. Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of “law,” a school district that seeks to withhold information under the exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. See *id.* § 552.301(e)(1)(A). Additionally, individuals who provide information in the course of an investigation, but do not make the initial report, are not informants for purposes of section 552.135 of the Government Code. Upon review, we find that the district has failed to demonstrate how the remaining information reveals the identity of an informer for the purposes of section 552.135. Thus, the district may not withhold any portion of the remaining information under section 552.135 of the Government Code.

In summary, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and the court’s holding in *Ellen*. The remaining information must be released.

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,



Nneka Kanu  
Assistant Attorney General  
Open Records Division

NK/jb

Ref: ID# 386726

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)