



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 20, 2010

Ms. Mari M. McGowan
Abernathy Roeder Boyd & Joplin, P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2010-10773

Dear Ms. McGowan:

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# 387150.

The Collin County Community College District (the "college"), which you represent, received a request for transcripts and media pertaining to a hearing. You claim the submitted audio recording is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. You state, and provide documentation showing, you notified employees to whom the requested information relates pursuant to section 552.304 of the Government Code. *See Gov't Code § 552.304* (any person may submit written comments stating why information at issue in request for Attorney General ruling should or should not be released). As of the date of this letter, we have not received any arguments from the interested employees regarding the information at issue. We have considered the exceptions you claim and reviewed the submitted audio recording.

Initially, we note you have not submitted information responsive to the request for transcripts pertaining to the hearing. To the extent information regarding this portion of the request existed on the date the college received this request, we assume you have released it. If you have not released any such information, you must do so at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

You claim the submitted audio recording is confidential under section 552.101 of the Government Code in conjunction with the doctrine of common-law privacy and under

section 552.102 of the Government Code. 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. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" *Id.* § 552.102(a). Section 552.102 is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). The privacy analysis under section 552.102(a) is the same as the common-law privacy standard under section 552.101. *See* *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor). We will, therefore, consider the applicability of common-law privacy under section 552.101 together with your claim regarding section 552.102.

Common-law privacy protects information that (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). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. 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 in an employment context. You assert the submitted audio recording is excepted in its entirety under *Ellen*. We note, however, the audio recording pertains to an investigation into racial discrimination, not sexual harassment. Therefore, the privacy concerns expressed in *Ellen* do not apply to the audio recording.

Furthermore, this office has found information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest, and, therefore, is generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 405 at 2-3 (1983) (public has interest in manner in which public employee performs job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under common-law right of privacy); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). The audio recording is part of the college's investigation into the work practices of its employees and

whether these employees abided by college policy. Accordingly, the public has a legitimate interest in this information, and it may not be withheld under common-law privacy.

You also assert the audio recording is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law informer's privilege. Section 552.101 also encompasses the common-law informer's privilege, which Texas courts have long recognized. *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). The common-law informer's privilege protects from disclosure the identities of persons who report activities over which the 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 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." *See* 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. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5. The privilege excepts the informer's statement only to the extent necessary to protect the informer's identity. *See* Open Records Decision No. 549 at 5 (1990).

You state the audio recording pertains to an allegation of racial discrimination and a violation of college policy. You do not, however, inform us that the alleged conduct is a violation of a criminal or civil statute. Furthermore, witnesses who provide information in the course of an investigation but do not make the initial report of the violation are not informants for purposes of the informer's privilege. Thus, we conclude the college has failed to demonstrate the applicability of the common-law informer's privilege in this instance. Accordingly, the college may not withhold any part of the audio recording pursuant to section 552.101 of the Government Code in conjunction with the informer's privilege.

Section 552.117(a)(1) of the Government Code 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). 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). The college may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made.

We note the audio recording contains family information of a college employee that may be subject to section 552.117(a)(1). You have not informed us whether this employee timely chose not to allow public access to her family information. Therefore, if the employee timely elected to withhold her family information, the college must withhold this information pursuant to section 552.117(a)(1). You represent the college does not have the technical capability to redact portions of information in the audio recording. Accordingly, if the employee timely elected to withhold her family information, the college must withhold the submitted audio recording in its entirety pursuant to section 552.117 of the Government Code. *See* Open Records Decision No. 364 (1983). If the employee did not timely elect to withhold her family information, then the college may not withhold this information under section 552.117(a)(1), and, as no further exceptions are raised, must release the audio recording in its entirety.

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, 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,



Jessica Eales
Assistant Attorney General
Open Records Division

JCE/em

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Enc. Submitted documents

c: Requestor
(w/o enclosures)