



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 28, 2010

Ms. Debra L. Goetz
Atlas & Hall, L.L.P.
P.O. Box 3725
McAllen, Texas 78501

OR2010-19399

Dear Ms. Goetz:

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# 404474.

The McAllen Independent School District (the "district"), which you represent, received two requests from the same requestor for information pertaining to a specified investigation and any and all legal fees and retainers accrued during a specified time period. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant requests because it was created after the date the requests were received. This ruling does not address the public availability of any information that is not responsive to the requests, and the district need not release that information in response to the instant requests. We also note you have only submitted information pertaining to the investigation specified in the requests. To the extent information responsive to the remainder of the requests existed on the date the district received the requests, we assume you have released it. If you have not released any such information, you must do so at this time. *See Gov't Code §§ 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).*

Next, we note that the United States Department of Education Family Policy Compliance Office has informed this office that the Family Educational Rights and Privacy Act ("FERPA") does not permit state and local educational authorities to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.¹ Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. See 34 C.F.R. § 99.3 (defining "personally identifiable information"). However, as you acknowledge, FERPA is not applicable to law enforcement records maintained by the district's police department (the "department") that were created by the department for a law enforcement purpose. See 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3, .8. You assert FERPA applies to portions of the responsive information, and we note you have submitted unredacted education records for our review. Because our office is prohibited from reviewing these records to determine whether appropriate redactions under FERPA should be made, we will not address the applicability of FERPA to any of the submitted responsive records. See 20 U.S.C. § 1232g(a)(1)(A). Such determinations under FERPA must be made by the educational authority in possession of the education records. Likewise, we do not address your arguments under section 552.114 of the Government Code. 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). However, we will consider your remaining arguments against disclosure of the submitted responsive information.

We note the submitted information consists of a completed investigation subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "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). Pursuant to section 552.022(a)(1), completed investigations, reports, and evaluations are expressly public unless they are either excepted under section 552.108 of the Government Code or are expressly confidential under other law. Although you raise section 552.103 of the Government Code for this information, section 552.103 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. See *id.* § 552.007; *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 No. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, district may not withhold the submitted information under

¹A copy of this letter may be found on the Office of the Attorney General's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

section 552.103 of the Government Code. However, because section 552.101 of the Government Code is other law for section 552.022(a)(1) purposes, we will consider the applicability of this exception to the submitted information. We will consider the applicability section 552.108 as well.

Section 552.101 of the Government Code 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 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found that the public has a legitimate interest in the qualifications and work conduct of employees of governmental bodies. *See* Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow).

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. 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 under *Ellen*, along with the statement of the accused, 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. We note that since 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 a sexual harassment investigation that is subject to the ruling in *Ellen*. Upon review, we note the submitted information includes an adequate summary of the investigation. The summary, along with the statement of the accused, which we have marked, are not confidential under section 552.101 in conjunction with common-law privacy. However, information within the summary that identifies the alleged victim is confidential under common-law privacy and must be withheld pursuant to section 552.101 of the Government Code. *See Ellen*, 840 S.W.2d at 525. Thus, the district must release the adequate summary and the statement of the accused, but withhold the information that we have marked within the summary, under section 552.101 in conjunction with common-law privacy and the court's holding in *Ellen*. The district must withhold the remaining responsive information under section 552.101 of the Government Code in conjunction with common-law privacy and the court's holding in *Ellen*. As our ruling is dispositive, we do not address your remaining argument against disclosure.

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,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/vb

Ref: ID# 404474

Enc. Submitted documents

c: Requestor
(w/o enclosures)