



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 8, 2011

Ms. Jessica L. Saldivar  
Assistant General Counsel  
Houston Community College  
3100 Main Street  
Houston, Texas 77002

OR2011-08130

Dear Ms. Saldivar:

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# 420037.

Houston Community College (the "college") received a request for "all and any information/investigation about" a named college employee. You claim the submitted information is excepted from disclosure pursuant to sections 552.101, 552.102, 552.114, 552.117, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note 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.<sup>1</sup> 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, FERPA is not applicable to law enforcement records maintained by the college's police department (the "department") that were created by the department for a law enforcement purpose. *See* 20 U.S.C.

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<sup>1</sup>A 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>.

§ 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3, .8. You assert FERPA applies to portions of the responsive information. We note you have submitted unredacted education records for our review. We also note the submitted incident report consists of a law enforcement record prepared by the department for a law enforcement purpose. Thus, the submitted incident report is not subject to FERPA, and no portion of it may be withheld on that basis. Further, because our office is prohibited from reviewing the remaining records to determine whether appropriate redactions under FERPA should be made, we will not address the applicability of FERPA to any of the remaining 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 information.

Next, we note the remaining information contains court-filed documents. These documents are subject to section 552.022(a)(17) of the Government Code, which provides that "information that is also contained in a public court record" is "public information and not excepted from required disclosure under this chapter unless [it is] expressly confidential under other law[.]" Gov't Code § 552.022(a)(17). Although you raise section 552.101 in conjunction with common-law privacy for the documents at issue, information that has been filed with a court is not protected by common-law privacy. *See Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992) (common-law privacy not applicable to court-filed document). Therefore, the college may not withhold the submitted court-filed documents under section 552.101 in conjunction with common-law privacy. We note, however, the court-filed documents contain fingerprints. Therefore, we will address section 552.101 for that information. We will also address your arguments for the information not subject to section 552.022.

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 information protected by other statutes, such as chapter 560 of the Government Code, which provides that "[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act]." *See* Gov't Code §§ 560.001 (defining "biometric identifier" to include fingerprints), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (biometric identifiers in possession of governmental body exempt from disclosure under the Act). Upon review, we have marked fingerprints in the submitted court documents. You do not inform us, and the submitted information does not indicate, section 560.002 permits the disclosure of the submitted fingerprint information in this instance. Therefore, the college must withhold the fingerprints we have marked under section 552.101 in conjunction with section 560.003 of the Government Code. As you raise

no further exceptions to disclosure of the remaining information subject to section 552.022, it must be released.

We next address your arguments against disclosure of the information not subject to section 552.022. Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which 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 (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 "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*, 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). However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of witnesses and victims must still be redacted from the statements. We note supervisors are generally not witnesses for purposes of *Ellen*, and thus, supervisors' identities generally may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. In addition, 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).

A portion of the information at issue in Exhibit C consists of an incident report completed by the department. Because the incident report is related to an alleged criminal offense and not to alleged sexual harassment in the workplace, *Morales v. Ellen* is not applicable in this instance. Accordingly, the college may not withhold the incident report in conjunction with the ruling in *Morales v. Ellen*. The remaining information in Exhibits B, C, and D consists of three sexual harassment investigations. The information in Exhibits B and D does not contain adequate summaries of the investigations into the alleged sexual harassment. Thus, the information in Exhibits B and D must be released, with the identities of the victims, which we have marked, redacted under section 552.101 in conjunction with common-law

privacy. *See Ellen*, 840 S.W.2d at 525. The remaining information in Exhibits B and D does not identify any victims or witnesses of the alleged sexual harassment for the purposes of *Ellen*. *Id.* Thus, the college may not withhold any of the remaining information in Exhibits B and D under section 552.101 on the basis of common-law privacy and the holding in *Ellen*. Upon review, we determine the remaining information in Exhibit C contains an adequate summary of the alleged sexual harassment investigation. The summary and the statements of the accused are not confidential under section 552.101 in conjunction with common-law privacy; however, information within the summary and statements identifying the victim and witnesses, which we have marked, must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. *See id.* Because there is an adequate summary, the college must also withhold the remaining information we have marked in Exhibit C under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*.

Common-law privacy is subject to the two-part test discussed above. *See Indus. Found.*, 540 S.W.2d at 685. The type 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. 540 S.W.2d at 683. This office has found that an individual's criminal history when compiled by a governmental body may be protected under common-law privacy. *Cf. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). In addition, common-law privacy encompasses information that either identifies or tends to identify a victim of sexual assault or other sex-related offenses. ORD 393 at 2; *see* ORD 339. Determinations under common-law privacy must be made on a case-by-case basis. *See Indus. Found.*, 540 S.W.2d at 685 (whether matter is of legitimate interest to public can be considered only in context of each particular case); Open Records Decision No. 373 at 4 (1983). Upon review, we find the information we have marked in the incident report in Exhibit C is highly intimate or embarrassing and not of legitimate public interest. Thus, the college must withhold the information we have marked in the incident report in Exhibit C under section 552.101 of the Government Code in conjunction with common-law privacy.

You claim some of the remaining information is excepted from disclosure under section 552.102 of the Government Code. 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." Gov't Code § 552.102(a). Upon review, none of the remaining information is excepted under section 552.102(a) of the Government Code, and it may not be withheld on that basis.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that the information be kept confidential under section 552.024 of the Government Code. *Id.* § 552.117(a)(1). Section 552.117 also encompasses personal cellular telephone numbers, provided that a

governmental body does not pay for the cellular telephone service. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. We have marked information under section 552.117(a)(1) of the Government Code. The college must withhold this marked information under section 552.117(a)(1) to the extent the employee concerned timely elected under section 552.024 to keep his information confidential; however, the college may only withhold the cellular telephone number we have marked if the employee concerned paid for the cellular telephone service with his own funds.<sup>2</sup>

We note portions of the remaining information are subject to section 552.130 of the Government Code.<sup>3</sup> Section 552.130 provides information relating to a motor vehicle operator's license or driver's license issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1). Accordingly, we find the college must withhold the Texas driver's license numbers we have marked under section 552.130 of the Government Code.

Section 552.136 of the Government Code states "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136(b). Therefore, the college must withhold the cellular telephone account number, bank account and routing numbers we have marked under section 552.136 of the Government Code.

We note some of the submitted information is subject to section 552.137 of the Government Code, which excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the college must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

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<sup>2</sup>Regardless of the applicability of section 552.117 of the Government Code, 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. Gov't Code § 552.147(b).

<sup>3</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the college must withhold (1) the fingerprints we have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code; (2) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*; (3) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (4) the information we have marked under section 552.117(a)(1) of the Government Code, to the extent the employee concerned timely elected under section 552.024 of the Government Code to keep his information confidential; however, the college may only withhold the cellular telephone number we have marked if the employee concerned paid for the cellular telephone service with his own funds; (5) the information we have marked under section 552.130 of the Government Code; (6) the information we have marked under section 552.136 of the Government Code; and (7) the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.<sup>4</sup> 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,



Jennifer Burnett  
Assistant Attorney General  
Open Records Division

JB/dls

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<sup>4</sup>We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a fingerprint under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code, Texas driver's license numbers under section 552.130 of the Government Code, bank account and bank routing numbers under section 552.136 of the Government Code, and an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Ref: ID# 420037

Enc. Submitted documents

c: Requestor  
(w/o enclosures)