



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 27, 2011

Ms. Tiffanie S. Clausewitz
For San Felipe Del Rio Consolidated Independent School District
Rogers, Morris & Grover, L.L.P.
517 Soledad Street
San Antonio, Texas 78205

OR2011-10777

Dear Ms. Clausewitz:

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# 425052.

The San Felipe Del Rio Consolidated Independent School District (the "district"), which you represent, received a request for the requestor's client's employment and health records. You state the district has provided the requested health records and some of the requested employment records to the requestor. You claim the remaining requested employment records are excepted from disclosure under sections 552.101, 552.116, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Section 552.116 of the Government Code provides:

- (a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper

¹We assume the "representative sample" of records submitted to this office is 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 those records contain substantially different types of information than that submitted to this office.

is also maintained in another record, that other record is not excepted from [required public disclosure] by this section.

(b) In this section:

(1) “Audit” means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) “Audit working paper” includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Act of May 29, 2011, 82nd Leg., R.S., H.B. 2947, §§ 1, 2 (to be codified as amendments to Gov’t Code § 552.116(a), (b)(1)). You assert the requested employment records at issue consist of audit working papers “gathered to allow the [d]istrict to investigate the circumstances surrounding allegations of impropriety and potential civil and criminal violations on the part of [the requestor’s client].” Although you inform us the investigation was initiated by the district’s superintendent, you have not explained, or otherwise demonstrated, the investigation was authorized or required by a statute of this state or by a resolution or other action of the district’s board of trustees. *See* Gov’t Code § 552.116(b)(1). Consequently, we find you have not established the applicability of section 552.116 to the information at issue. Therefore, the district may not withhold any of the information at issue under section 552.116 of the Government Code.

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 common-law right of 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). 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 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, under *Ellen*, 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, 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).

You contend a portion of the requested employment records at issue pertains to an investigation into, among other things, alleged sexual harassment. The submitted information regarding the sexual harassment investigation consists of only victim and witness statements. You have not informed us an adequate summary of the sexual harassment investigation exists or has been provided to the requestor. Consequently, the submitted statements must generally be released with the victim's and witness's identities redacted. Therefore, the district must withhold the alleged victim's and witness's identifying information, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. The remaining information at issue may not be withheld on this basis.

We note the remaining employment records contain medical information. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We have marked the medical information that we find is not of legitimate concern to the public. Therefore, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.135 of the Government Code provides:

- (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

or persons' 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. You claim portions of the remaining employment records are excepted under section 552.135 because the records include "reports of misconduct constituting possible violations of statutory and/or regulatory law[.]" We note section 552.135 protects an informer's identity, but does not encompass protection for witness information or statements. We have marked the information that tends to identify persons who reported a possible violation of law to the district. Thus, the district must withhold the marked informers' identifying information under section 552.135 of the Government Code. The remaining information at issue, however, does not reveal the identity of an informer or consists of witness statements and interviews. The district may not withhold this information under section 552.135 of the Government Code.

We note portions of the remaining employment records may be subject to section 552.117(a)(1) of the Government Code, which excepts from disclosure the current and former home addresses and telephone numbers, emergency contact information, 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.² Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). 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 district 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 have marked district employees' personal information in the remaining employment records. You have not informed us whether or not the employees timely chose to not allow public access to their personal information. Therefore, if the employees timely requested confidentiality for their personal information, the district must withhold the information we have marked pursuant to section 552.117(a)(1) of the Government Code. If the employees did not timely request confidentiality, the district may not withhold the marked information under section 552.117(a)(1) 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. The

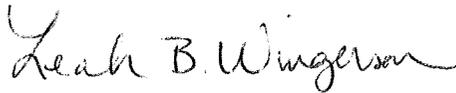
²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

district must withhold the informers' identifying information we have marked under section 552.135 of the Government Code. If the employees whose personal information we have marked timely requested confidentiality for their personal information, the district must withhold the marked information pursuant to section 552.117(a)(1) of the Government Code. The district must release the remaining information.³

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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 425052

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We note the information to be released contains information pertaining to the requestor's client that may be confidential with respect to the general public under common-law privacy and section 552.117(a)(1) of the Government Code. Because both of these provisions protect a person's privacy, the requestor, as her client's authorized representative, has a right to her client's private information pursuant to section 552.023 of the Government Code. Gov't Code § 552.023(a) (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests). If the district receives another request for this particular information from a different requestor, then the district should again seek a decision from this office.