



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 26, 2011

Mr. Mike Leasor  
For the Aledo Independent School District  
Henslee Schwartz, LLP  
306 West Seventh Street, Suite 1045  
Fort Worth, Texas 76102

OR2011-15751

Dear Mr. Leasor:

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# 434294.

The Aledo Independent School District (the "district"), which you represent, received a request for seven categories of information pertaining to the requestor, a named district employee, a named district principal, and a specified settlement agreement. You state the district released information responsive to three categories of the request. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, and 552.135 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence.<sup>1</sup> We have considered the submitted arguments and reviewed the submitted information. We have also received and considered comments from the requestor and a representative of the named district employee. *See Gov't Code* § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the United States Department of Education Family Policy Compliance Office has informed this office the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, does not permit state and local educational authorities to

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<sup>1</sup>Although you raise section 552.101 in conjunction with Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass discovery privileges. *See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 1 (1990).*

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>2</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"). You have submitted, among other things, redacted and unredacted education records for our review. Because our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted 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. However, we will consider your arguments against disclosure of the submitted information.

Next, we address the requestor's contention the district did not comply with the procedural requirements of the Act. The requestor asserts the district failed to comply with section 552.301(d) of the Government Code. Pursuant to section 552.301(d), a governmental body must provide the requestor with (1) a written statement that the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general, and (2) a copy of the governmental body's written communication to the attorney general within ten business days of receiving the request for information. Gov't Code § 552.301(d). The district received the request for information on August 9, 2011. Therefore, the ten-business-day deadline to provide information to the requestor pursuant to section 552.301(d) was August 23, 2011. The requestor argues the district was not timely because it sent him the written statement that it wished to withhold the requested information, and asked for a decision from the attorney general, on August 23, 2011; however, the requestor did not receive this statement until August 24, 2011. Section 552.308 of the Government Code provides:

(a) [w]hen this subchapter requires a request, notice, or other document to be submitted or otherwise given to a person within a specified period, the requirement is met in a timely fashion if the document is sent to the person by first class United States mail or common or contract carrier properly addressed with postage or handling charges prepaid and:

(1) it bears a post office cancellation mark or a receipt mark of a common or contract carrier indicating a time within that period; or

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<sup>2</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>.

(2) the person required to submit or otherwise give the document furnishes satisfactory proof that it was deposited in the mail or with a common or contract carrier within that period.

*Id.* § 552.308. Thus, we conclude that the district fully complied with the requirements of section 552.301(d) in requesting this decision.

Next, the requestor argues the district has not provided all submitted information for which the district has not claimed an exception. Thus, to the extent any such information existed on the date the district received the request, we assume the district has released it. If the district has not released any such information, it must do so at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

Next, we understand you to state the submitted information is subject to section 552.022(a)(1) of the Government Code because it constitutes a completed investigation. Section 552.022(a)(1) provides for required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov’t Code § 552.022(a)(1). Although you raise section 552.107 of the Government Code for some of the submitted information, this section is a discretionary exception to disclosure that protects a governmental body’s interests and may be waived. *See id.* § 552.007; Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally). As such, section 552.107 is not “other law” that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold any of the submitted information under section 552.107. We note the Texas Supreme Court has held the Texas Rules of Evidence are “other law” within the meaning of section 552.022(a). *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information at issue. You also claim the submitted information is excepted by section 552.101 of the Government Code in conjunction with the common-law informer’s privilege, which is “other law” that makes information confidential for purposes of section 552.022. *Tex. Comm’n on Envtl. Quality v. Abbott*, No. GN-204227 (126th Dist. Ct., Travis County, Tex.). Therefore, we will address the applicability of your claim under the informer’s privilege for the submitted information. Additionally, sections 552.101, 552.102, 552.117, 552.135, 552.137, and 552.152 constitute other laws for

section 552.022 purposes.<sup>3</sup> Thus, we will also address the applicability of these sections for the submitted information.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* ORD 676 at 6-7.

Thus, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon

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<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).

a demonstration of all three factors, the information is privileged and confidential under Rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state Exhibit C#6 constitutes communications between an attorney for district, the interim superintendent, and the deputy superintendent that were made for the purpose of facilitating the rendition of professional legal services to the district. You indicate the confidentiality of the information at issue has been maintained. Therefore, based on your representations and our review, we conclude the district may withhold Exhibit C#6 under Texas Rule of Evidence 503.<sup>4</sup>

Section 552.101 of the Government Code exempts 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 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. 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 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

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

not protected from public disclosure. See Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978). We note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

The remaining information does not contain an adequate summary of the district's sexual harassment and stalking investigation. However, the remaining information contains the identities of the alleged sexual harassment victim and witnesses. Accordingly, we conclude the district must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy and the holding in *Ellen*. The remaining information does not constitute highly intimate or embarrassing information of no legitimate public interest. Thus, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy under *Ellen*.

You and the named employee's representative argue the remaining information is confidential pursuant to common-law privacy and "special circumstances." However, the Third Court of Appeals has ruled the "special circumstances" exception found in past Attorney General Open Records Decisions directly conflicts with Texas Supreme Court precedent regarding common-law privacy. *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P. and Hearst Newspapers, L.L.C.*, 287 S.W.3d 390 (Tex. App.—Austin 2009, pet. granted). The court of appeals ruled the two-part test set out in *Industrial Foundation* is the "sole criteria" for determining whether information can be withheld under common-law privacy. *Id.*; see also 540 S.W.2d at 686. Upon review, we find no portion of the remaining information is highly intimate or embarrassing. As you have failed to meet the first prong of the *Industrial Foundation* test for privacy, we find the information at issue is not confidential under common-law privacy and the district may not withhold it under section 552.101 of the Government Code.

We note, however, the Legislature enacted section 552.152 of the Government Code, which relates to a public employee or officer's safety.<sup>5</sup> This section provides:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Act of May 9, 2011, 82nd Leg., R.S., S.B. 1303, § 27.001(20) (to be codified as Gov't Code § 552.152). You state the district investigated complaints of harassment and stalking and determined there was a credible threat and legitimate concern for the victim's safety. Based

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<sup>5</sup>Although the 81st Legislature enacted this statute as section 552.151 of the Government Code, the 82nd Texas Legislature renumbered section 552.151 to section 552.152 of the Government Code. See Act of May 9, 2011, 82nd Leg., R.S., S.B. 1303, § 27.001(20).

on your representation, we find the district has demonstrated that release of the information at issue would subject the employee at issue to a substantial threat of physical harm. Therefore, the district must withhold the information we have marked under section 552.152. However, we find the district and the named employee's representative have not sufficiently shown release of the remaining information would subject the employee at issue to a threat of substantial physical harm. Accordingly, none of the remaining information may be withheld under section 552.152.

Section 552.101 of the Government Code also encompasses the common-law informer's privilege, which has long been recognized by Texas courts. *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). This 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 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). We note the remaining information is de-identified. Therefore, the remaining information does not identify an informer and no portion of it may be withheld on that basis under section 552.101 in conjunction with the common-law informer's privilege.

Section 552.102(a) of the Government Code 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). You assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101, which is discussed above. *See Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court recently expressly disagreed with *Hubert's* interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test under section 552.101. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163, at \*5 (Tex. Dec. 3, 2010). The supreme court then considered the applicability of section 552.102, and held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Id.* at \*10. Having carefully reviewed the remaining information, we find none of the remaining information may be withheld under section 552.102(a).

Section 552.135 of the Government Code provides the following:

- (a) "Informer" means a student or a 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. As noted above, the remaining information is de-identified. Accordingly, no portion of the remaining information may be withheld under section 552.135.

We note portions of the remaining information may be subject to section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. 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)(1)). 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 only be withheld under section 552.117(a)(1) on behalf of a current or former employee or official 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. Accordingly, to the extent the individual whose information we have marked timely elected confidentiality, the district must withhold the information we have marked under section 552.117(a)(1). If the individual at issue did not timely elect confidentiality, then the district may not withhold the information we have marked under section 552.117(a)(1).

We also note the remaining information contains e-mail addresses subject to section 552.137 of the Government Code. Section 552.137 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 Gov't Code § 552.137(a)-(c)*. The e-mail addresses we have marked are not specifically excluded by subsection (c). The district must withhold personal e-mail addresses we have marked under section 552.137, unless their owners affirmatively consent to the public disclosure of the marked e-mail addresses.

In summary, the district may withhold Exhibit C#6 under rule 503 of the Texas Rules of Evidence. 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 holding in *Ellen*. The district must also withhold the information we have marked under section 552.152 of

the Government Code. To the extent the individual whose information we have marked timely elected confidentiality, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release. The remaining information must be released.<sup>6</sup>

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,



Ana Carolina Vieira  
Assistant Attorney General  
Open Records Division

ACV/agn

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<sup>6</sup>We note the information being released contains information regarding the requestor, which the district might be required to withhold from the public under section 552.117 of the Government Code. Because this exception protects personal privacy, the requestor has a right of access to his own information. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Should the district receive another request for this information from a different requestor, the district is authorized to withhold this information pertaining to the requestor under section 552.024(c) of the Government Code without requesting a decision under the Act if the requestor timely requested confidentiality for the information. *See* Gov't Code § 552.024(c). We also note the information being released contains the requestor's own e-mail addresses, to which the requestor has a right of access pursuant to section 552.137(b) of the Government Code. *See* Gov't Code § 552.137(b). Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137, without the necessity of requesting an attorney general decision. Accordingly, if the district receives another request from an individual other than this requestor, the district is authorized to withhold this requestor's e-mail addresses under section 552.137 without the necessity of requesting an attorney general decision.

Ref: ID# 434294

Enc. Submitted documents

c: Requestor  
(w/o enclosures)