



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 27, 2012

Ms. Bonnie A. Hungerford
For Ysleta Independent School District
ScottHulse, P.C.
P.O. Box 99123
El Paso, Texas 79999-9123

OR2012-04462

Dear Ms. Hungerford:

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# 448684.

The Ysleta Independent School District (the "district"), which you represent, received a request for six categories of information pertaining to a specified incident involving a named district employee. You state the district does not have information responsive to categories one through four of the request.¹ You also state the district has released some of the information responsive to categories five and six of the request. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.114 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 (the "DOE") has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.² Consequently, state and local educational authorities that

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

²A copy of this letter may be found on the Office of the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

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 redacted and unredacted documents, which you claim are education records, to this office for our review. Because our office is prohibited from reviewing these records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted documents. Such determinations under FERPA must be made by the educational authority in possession of such records.³ Accordingly, we also do not address your argument under section 552.114 of the Government Code. *See* Gov’t Code §§ 552.026 (incorporating FERPA into Act), .114 (excepting from disclosure “student records”); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 and FERPA). We will, however, address the applicability of the other claimed exceptions to the submitted information.

Next, we understand that the district has redacted portions of the submitted information under section 552.117 of the Government Code.⁴ However, you have also redacted the named district employee’s date of birth. You do not assert, nor does our review of the records indicate, you have been authorized to withhold this information without seeking a ruling from this office. *See* Gov’t Code § 552.301(a); Open Records Decision No. 673 (2001). Therefore, information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we can discern the nature of the redacted information at issue; thus, being deprived of this information does not inhibit our ability to make a ruling. In the future, however, the district should refrain from redacting any information it is not authorized to withhold in seeking an open records ruling. Failure to do so may result in the presumption the redacted information is public. *See* Gov’t Code § 552.302.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *See id.* § 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. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668

³In the future, if the district does obtain parental consent to submit unredacted education records and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

⁴Section 552.117 of the Government Code excepts from disclosure the home address and telephone number, social security number, family member information, and emergency contact information of a current or former employee of a governmental body. *See* Gov’t Code § 552.117(a)(1). Section 552.024(c) of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the current or former employee chooses not to allow public access to the information in accordance with section 552.024(b). *See id.* § 552.024(b), (c).

(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. *See id.* 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. *See 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, 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. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

The submitted information is related to an investigation where it was alleged that the named district employee harassed students. Upon review, we find this investigation does not constitute a sexual harassment investigation in the employment context of the district for the purposes of *Ellen*. Therefore, the common-law privacy protection afforded in *Ellen* is not applicable to the submitted information and the district may not withhold any of the information at issue under section 552.101 on that basis.

Section 552.102 of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwanted 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 noted 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 Third Court of Appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court 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. *See Tex. Comptroller of Pub. Accounts*, 354 S.W.3d at 342 (Tex. 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. *See id.* at 346. Accordingly, the district must withhold the named district employee's birth date, which we have marked, under section 552.102(a) of the Government

Code. As you raise no other exceptions to disclosure of the remaining information, the district must release it.⁵

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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/dls

Ref: ID# 448684

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵We note that portions of the remaining information would not be releasable to the general public. However, the requestor is the authorized representative of the parent of the minor children at issue. The parent of a minor child is the child's authorized representative. Thus, the requestor has a special right of access under section 552.023 of the Government Code to information that would ordinarily be withheld to protect the common-law privacy rights of the minor children at issue, and such information cannot be withheld from the requestor on that basis. *See* Gov't Code § 552.023 (person's authorized representative has special right of access to information held by governmental body that relates to person and that is protected from public disclosure by laws intended to protect that person's privacy interests); *see also* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself or person for whom she is authorized representative). If the district receives another request for this particular information from a different requestor, then it should again seek a decision from this office.