



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 16, 2012

Ms. Cheryl T. Mehl
Counsel for the Borger Independent School District
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Austin, Texas 78727

OR2012-10972

Dear Ms. Mehl:

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# 458946.

The Borger Independent School District (the "district"), which you represent, received a request for seven categories of information pertaining to named former district employee. You state you have released some information to the requestor. We understand the district has withheld student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, you inform us some of the requested information was the subject of previous request for information, in response to which this office issued Open Records Letter No. 2011-18219 (2011). In Open Records Letter No. 2011-18219 we determined the district must withhold (1) the information we marked under section 552.101 in conjunction with

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA 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. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

section 21.355 of the Education Code; (2) the identifying information of the alleged sexual harassment victims and witnesses under section 552.101 in conjunction with common-law privacy and *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied); (3) the information we marked under section 552.117(a)(1) of the Government Code, if the employee at issue made a timely election under section 552.024; and (5) the marked e-mail address under section 552.137 of the Government Code, unless the owner has affirmatively consented to its release. The remaining information was ordered released. As we have no indication the law, facts, and circumstances on which Open Records Letter No. 2011-18219 was based have changed, the district must continue to rely on Open Records Letter No. 2011-18219 as a previous determination and withhold or release the requested information at issue in accordance with that prior ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure). You indicate, however, the submitted information is beyond the scope of, or was created subsequent to, the previous request and, thus, is not encompassed by the prior ruling. Accordingly, we will address your argument against disclosure for the submitted information that is not subject to Open Records Letter No. 2011-18219.

Next, we must address the district's procedural obligations under the Act. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. Gov't Code § 552.301(b). You state the request for information was received on April 23, 2012. Thus, the district's ten-business-day deadline to request a ruling was May 7, 2012. However, the envelope in which the district submitted its request for a ruling bears a postmark of May 8, 2012. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Thus, the district failed to comply with the procedural requirements mandated by section 552.301(b).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Because section 552.101 can provide a compelling reason for non-disclosure, we will consider the applicability of this exception to the submitted information.

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. This section encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *See Indus. Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* include 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.

We note the submitted information consists of records related to an investigation of alleged sexual harassment. In *Ellen*, the court addressed the applicability of common-law privacy to information relating to an investigation of alleged 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 Ellen*, 840 S.W.2d 519 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.* 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 along with the statement of the accused under *Ellen*, but the identities of the victim 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 supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context. Further, 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)*.

In this instance, the submitted information is related to a sexual harassment investigation and does not include a summary of the investigation. Therefore, the district must generally release the information pertaining to the investigation, except for the identities of the alleged victims and witnesses. The district must withhold the identifying information of the alleged victims and witnesses, which we have marked, under section 552.101 of the Government

Code in conjunction with common-law privacy and *Ellen*. See 840 S.W.2d at 525. However, we find you have not demonstrated how any portion of the remaining information at issue is highly intimate or embarrassing and not of legitimate public. Thus, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy and *Ellen*.

In summary, the district must continue to rely on Open Records Letter No. 2011-18219 as a previous determination and withhold or release the responsive information that was previously ruled on in accordance with this prior ruling. The district must withhold the marked information identifying the alleged victims and witnesses under section 552.101 of the Government Code in conjunction with common-law privacy and *Ellen*. 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, 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;



Michelle R. Garza
Assistant Attorney General
Open Records Division

MRG/som

Ref: ID# 458946

Enc. Submitted documents

c: Requestor
(w/o enclosures)