



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 8, 2012

Mr. David P. Backus  
Underwood Attorneys and Counselors at Law  
P.O. Box 16197  
Lubbock, Texas 79490

OR2012-12445

Dear Mr. Backus:

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# 461598.

The Plains Independent School District (the "district"), which you represent, received a request for five categories of information related to the requestor's client. You state you have released some of the requested information to the requestor. You claim that 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.

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 information that other statutes make confidential, such as section 611.002 of the Health and Safety Code. Section 611.002 provides "[c]ommunications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential." Health & Safety Code § 611.002(a). Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See id.* §§ 611.004, .0045; Open Records Decision No. 565 (1990). The mental health record we have marked must be withheld under

section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.<sup>1</sup>

Section 552.101 of the Government Code also encompasses the doctrine of common-law 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. 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. *Id.* at 683.

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 the files of a sexual harassment investigation. 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 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*, except where their statements appear in a non-supervisory context.

You state the submitted information relates to investigations of alleged sexual harassment. Upon review, we find a portion of the information consists of an adequate summary of one of the investigations. Therefore, as to this investigation, and pursuant to section 552.101 and the ruling in *Ellen*, the summary is not protected by common-law privacy, but any information in the summary and statement that identifies the alleged victim and non-supervisory witnesses, which we have marked, is confidential under common-law privacy and must be withheld. *See Ellen*, 840 S.W.2d at 525. The remaining portions of this

---

<sup>1</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure.

investigation must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy and the court's ruling in *Ellen*.

The requested information concerning the other investigation, however, does not contain an adequate summary of the investigation. Therefore, pursuant to section 552.101 and the ruling in *Ellen*, the identities of the victims and witnesses are confidential under section 552.101 of the Government Code in conjunction with common-law privacy, but the remaining information is not confidential on that basis. *See id.* Thus, 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 ruling in *Ellen*.

In summary, the mental health record we have marked must be withheld under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code. 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 ruling in *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](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,



Vanessa Burgess  
Assistant Attorney General  
Open Records Division

VB/akg

Ref: ID# 461598

Enc. Submitted documents

c: Requestor  
(w/o enclosures)