



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 10, 2013

Ms. Leandra Costilla Ortiz
Staff Attorney
Brownsville Independent School District
1900 Price Road
Brownsville, Texas 78521

OR2013-05701

Dear Ms. Ortiz:

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# 483697 (BISD Request No. 07159).

The Brownsville Independent School District (the "district") received a request for a specified contract signed by the requestor and all complaints made in writing or discussions of the placement of the requestor on administrative leave. You state the district has released some responsive information to the requestor. You state the submitted information should not be released pursuant to section 552.221 of the Government Code because it is in "active use." In the alternative, you claim portions of the submitted information are excepted from disclosure under sections 552.101 and 552.135 of the Government Code. We have considered your arguments and reviewed the submitted information.

You assert the submitted information is not subject to disclosure because it is in "active use." Section 552.221 of the Government Code provides in relevant part the following:

- (a) An officer for public information of a governmental body shall promptly produce public information for inspection, duplication, or both on application by any person to the officer. In this subsection, "promptly" means as soon as possible under the circumstances, that is, within a reasonable time, without delay.

...

(c) If the requested information is unavailable at the time of the request to examine because it is in active use or in storage, the officer for public information shall certify this fact in writing to the requestor and set a date and hour within a reasonable time when the information will be available for inspection or duplication.

Gov't Code § 552.221(a), (c). This office has interpreted section 552.221 to require prompt disclosure of information unless it is in "immediate active use." *See* Open Records Decision No. 225 at 3 (1979) (under former section 552.221, shorthand notes are in active use while typist is in the process of typing them out, but are not in active use "if there is no prospect that they will be immediately typed or further processed"), 57 at 4 (1974) (student directory information not in active use under former section 552.221 if copies of same information are provided to various college departments). Section 552.221 is a narrow exception to the rule of prompt production of information under the Act; it permits an agency to avoid only unreasonable disruption of its immediate business. Open Records Decision No. 121 at 3 (1976). Section 552.221, however, cannot be used to deny a requestor access to records. *See* Attorney General Opinion No. JM-757 at 4 (1987).

You assert the submitted information, consisting of handwritten notes, is in active use as it details a complaint made by an employee and is being used for the purposes of reference in order to complete an investigation. However, we disagree with the district's position that the handwritten notes are in active use because the investigation has not been completed. *See, e.g.,* Open Records Decision Nos. 148 at 1 (1976) (recommendations and employment evaluations not in active use under former section 552.221 during entire time when faculty member's promotion is under consideration), 121 at 3 (university's financial records in custody of district attorney during criminal investigation not in active use under former section 552.221). The district also has not adequately explained how release of the handwritten notes would disrupt the district's immediate business. Therefore, we find you have not established the submitted information is in active use for purposes of section 552.221, and the district may not withhold it on that basis.

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 responsive information consists of records related to an investigation of alleged sexual harassment. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), 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 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.* 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.

In this instance, the submitted information is related to a sexual harassment investigation and does not include an adequate summary. Therefore, the district must generally release the information pertaining to the investigation. However, this information contains the identities of the alleged sexual harassment victim and witnesses. Therefore, the district must withhold the identifying information of the alleged victim 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 the district has not demonstrated how any portion of the remaining information identifies a victim or witness of sexual harassment and, thus, has not demonstrated the remaining information is highly intimate or embarrassing and not of legitimate public interest. Thus, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy and *Ellen*.

Section 552.101 also encompasses the 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). The informer's 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. See Open Records Decision No. 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties

to “administrative officials having a duty of inspection or of law enforcement within their particular spheres.” Open Records Decision No. 279 at 1-2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. See Open Records Decision Nos. 582 at 2 (1990), 515 at 4 (1988). You state the remaining information you marked reveals the identity of an informer and witnesses of sexual harassment and a hostile work environment. We note a witness who provides information in the course of an investigation, but does not make the initial report of a violation, is not an informer for purposes of the common-law informer’s privilege. Further, upon review, we find the remaining information you have marked does not identify an individual who reported a violation of law to a law enforcement agency or an appropriate administrative official. Thus, the district may not withhold any portion of the remaining information you have marked under section 552.101 of the Government Code in conjunction with the common-law informer’s privilege.

You claim the remaining information you have marked is excepted from disclosure by section 552.135 of the Government Code, which provides, in part:

(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(a), (b). We note the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of civil, criminal, or regulatory law. Thus, section 552.135 protects the identity of an informer but does not protect witness information or statements. Upon review, we find you have not demonstrated how the remaining information you have marked identifies an informer who reported a possible violation of civil, criminal, or regulatory law. We therefore conclude the district may not withhold the remaining information you have marked under section 552.135 of the Government Code.

In summary, the district must withhold the information we have marked under section 552.101 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,



David L. Wheelus
Assistant Attorney General
Open Records Division

DLW/dls

Ref: ID# 483697

Enc. Submitted documents

c: Requestor
(w/o enclosures)