



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 26, 2013

Ms. Cynthia L. Benavides  
For Weslaco Independent School District  
Jones, Galligan, Key & Lozano, L.L.P.  
P.O. Box 1247  
Weslaco, Texas 78599-1247

OR2013-10867

Dear Ms. Benavides:

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# 491330.

The Weslaco Independent School District (the "district"), which you represent, received a request for specified statements made by a named employee, and two requests from different requestors for all information pertaining to a specified investigation. You indicate you have released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.117 of the Government Code.<sup>1</sup> You also indicate you have notified individuals whose personal information is at issue pursuant to section 552.304 of the Government Code. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the second requestor only seeks specified statements. Thus, the remaining information you have submitted as responsive to the first and third requests is not responsive to the second request. We further note that the district indicates some of the submitted information is not responsive to the first and third requests. In addition, we note some of the submitted information, which we have marked, is not responsive to any of the requests because it was created after the date the district received the last request for information.

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<sup>1</sup>Although you also raise section 552.135 of the Government Code, you have not submitted arguments explaining how this exception applies to the submitted information. Therefore, we presume the district no longer asserts this exception. *See* Gov't Code §§ 552.301, 552.302.

This ruling does not address the public availability of any information that is not responsive to the requests, and the district need not release any such information.

Next, we must address the district's obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. *See* Gov't Code § 552.301. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See id.* § 552.301(b). The district received the first request for information on April 03, 2013, the second request on April 04, 2013, and the third request on April 09, 2013. You state the district was closed on April 12, 2013. Accordingly, the districts's ten-business day deadlines were April 18, 2013, April 19, 2013, and April 24, 2013, respectively. While you raised section 552.101 within the ten-business-day time periods as required by subsection 552.301(b) for all of the requests, you did not raise section 552.117 until April 25, 2013 for the first and third request and until April 26, 2013 for the second request. Furthermore, you did not raise section 552.103 for the first and third request until April 25, 2013. Thus, the district failed to comply with the requirements mandated by subsection 552.301(b) as to its argument under sections 552.103 and 552.117 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 of the Government Code results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. Gov't Code § 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); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Although you raise section 552.103 of the Government Code for the submitted information, this section is discretionary in nature. It serves only to protect a governmental body's interests, and may be waived; as such, it does not constitute compelling reasons to withhold information. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Thus, in failing to comply with section 552.301, the district has waived its argument under section 552.103 and may not withhold the submitted information on that basis. However, because sections 552.102 and 552.117 can provide a compelling reason to withhold information from disclosure, we will address the applicability of these sections to the submitted information.<sup>2</sup> *See* Gov't Code § 552.301(b). We will also

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

consider your timely raised argument against disclosure under section 552.101 of the Government Code.

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. Section 552.101 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.

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 in an employment context. 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. *Ellen*, 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 that “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*, along with the statement of the accused, 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). 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 that because 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). We note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

You contend, and we agree, the submitted information pertains to a sexual harassment investigation and is subject to the ruling in *Ellen*. Upon review, we find the investigation includes an adequate summary, as well as statements by the persons accused of sexual harassment. The summary and statements of the accused, which we have marked, are not confidential under section 552.101 in conjunction with common-law privacy; however, information within the summary and statements of those accused that identifies the victims and witnesses must be withheld under section 552.101 of the Government Code in

conjunction with common-law privacy. *See Ellen*, 840 S.W.2d at 525. Thus, this identifying information, which we have marked, is confidential under common-law privacy and must be withheld pursuant to section 552.101 of the Government Code. *See id.* The remaining information in the summary and statements of those accused is not subject to common-law privacy and may not be withheld under section 552.101 on that basis. However, the district must withhold remaining information under section 552.101 in conjunction with common-law privacy and the court's holding in *Ellen*.<sup>3</sup>

We note the remaining information in the adequate summary and statements of the accused contain information that may be subject to sections 552.102 and 552.117 of the Government Code. 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). The Texas Supreme Court 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. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). We note the dates of birth at issue pertain to the first and third requestors. Section 552.023(a) of the Government Code states that a person has a special right of access to information that is excepted from public disclosure under laws intended to protect that person's privacy interest. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). Accordingly, the first and third requestors have rights of access to their own dates of birth. However, the district must withhold the dates of birth we have marked under section 552.102(a) of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code §§ 552.117(a)(1), .024. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the district may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. To the extent the employee concerned timely elected to keep such information confidential under section 552.024 of the Government Code, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. To the extent this employee did not make a timely election, the district may not withhold the marked information on this basis. Additionally, we note section 552.117 protects personal privacy. Therefore, the third requestor has a right of access

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<sup>3</sup>As our ruling is dispositive, we do not address your remaining argument against disclosure of this information.

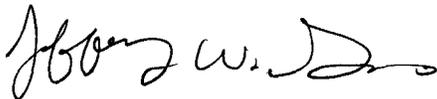
to his own information and it may not be withheld from him under section 552.117. *See* Gov't Code § 552.023(a); ORD 481 at 4.

In summary, the district must withhold the information we have marked in the summary and statements of the accused under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. To the extent the individual whose information is at issue in the statements of the accused timely elected confidentiality, the district must withhold the information we have marked under section 552.117(a)(1). The district must also withhold the dates of birth we have marked in the statements of the accused under section 552.102(a) of the Government Code. The remaining information in the adequate summary and statements of the accused must be released.<sup>4</sup> The district must withhold the remaining responsive information under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*.

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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Jeffrey W. Giles  
Assistant Attorney General  
Open Records Division

JWG/dls

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<sup>4</sup>We note the information being released to the third requestor contains the requestor's personal information, which the district might be required to withhold from the general public under section 552.117(a)(1) of the Government Code. *See* Gov't Code § 552.023. Should the district receive another request for this information from a different requestor, the district is authorized to withhold the third requestor's personal information under section 552.024(c) of the Government Code without requesting a decision under the Act if the third requestor timely requested confidentiality for the information. *See id.* § 552.024(c). *But see id.* § 552.024(c-2).

Ref: ID# 491330

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

5 Third Parties  
(w/o enclosures)