



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

February 24, 2016

Mr. Stephen Trautmann, Jr.  
Counsel for the United Independent School District  
J. Cruz & Associates, LLC  
216 West Village Boulevard, Suite 202  
Laredo, Texas 78041

OR2016-04445

Dear Mr. Trautmann:

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# 599390.

The United Independent School District (the "district"), which you represent, received a request for information pertaining to the requestor's client, including his personnel file and all documents relating to investigations of misconduct or sent to the Texas Education Agency or State Board for Educator Certification. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the requestor seeks his client's personnel file. To the extent any other information pertaining to the personnel file of the requestor's client existed on the date the district received the instant request, we assume it has been released. If the district has not released any such information, it must do so at this time. Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

The United States Department of Education Family Policy Compliance Office has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, 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.<sup>1</sup> Consequently, state and local educational authorities that 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”). The district has submitted, among other things, unredacted education records for our review. Because our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records. Such determinations under FERPA must be made by the educational authority in possession of the education records.<sup>2</sup>

We note the district previously received a request for this same submitted information, in response to which this office issued Open Records Letter No. 2015-20022 (2015). In that ruling, we determined, in part, the district failed to comply with section 552.301(b) of the Government Code in raising section 552.107(1) of the Government Code and, thus, waived its argument under section 552.107(1) for the submitted information. *See* Gov’t Code § 552.301(b). Although you again raise section 552.107(1) for a portion of the submitted information, this exception is discretionary and may be waived. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, because the district waived its claim under section 552.107(1) in Open Records Letter No. 2015-20022, the district may not now raise section 552.107(1) for the same information. *See* Gov’t Code § 552.302. Accordingly, no portion of the information at issue may be withheld under section 552.107(1).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This section encompasses section 261.201(a) of the Family Code, which provides as follows:

[T]he following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

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<sup>1</sup>A copy of this letter may be found on the Office of the Attorney General’s website: [http://www.oag.state.tx.us/opinopen/og\\_resources.shtml](http://www.oag.state.tx.us/opinopen/og_resources.shtml).

<sup>2</sup>In 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.

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). The district asserts Exhibit B was used or developed in an investigation under chapter 261. *See id.* §§ 101.003(a) (defining “child” for purposes of section 261.201), 261.001(1), (4) (defining “abuse” and “neglect” for purposes of section 261.201). We note the district is not an agency authorized to conduct a chapter 261 investigation. *See id.* § 261.103 (listing agencies that may conduct child abuse investigations). Nevertheless, we note the submitted information contains a district Alleged Child Abuse or Neglect Reporting Form (the “reporting form”). We are unable to determine whether the district produced the reporting form to the Texas Department of Family and Protective Services (“DFPS”) or the district’s police department (the “department”). Accordingly, we must rule conditionally. If the district produced the reporting form to DFPS or the department, then it consists of information used or developed in an investigation of alleged or suspected child abuse under chapter 261, and the district must withhold it in its entirety under section 552.101 of the Government Code in conjunction with section 261.201(a)(2) of the Family Code. If the district did not produce the reporting form to DFPS or the department, then it is not confidential in its entirety under section 261.201(a)(2), and the district may not withhold it under section 552.101 on that ground. However, we note the form contains the identifying information of a person who reported alleged or suspected abuse or neglect to the Child Protective Services division of DFPS. This information, which we have marked, is within the scope of section 261.201(a)(1). Thus, if the reporting form is not confidential under section 261.201(a)(2), then the district must withhold the identifying information of the reporting party we have marked in the reporting form under section 552.101 in conjunction with section 261.201(a)(1). We also find some of the remaining information was obtained from DFPS. Therefore, the district must withhold this information, which we have marked, under section 552.101 in conjunction with section 261.201(a)(2). We find the district has failed to demonstrate the remaining information was used or developed in an investigation of alleged or suspected child abuse or neglect, or consists of a report of alleged or suspected abuse or neglect under chapter 261 of the Family Code. Therefore, the remaining information is not confidential under section 261.201, and the district may not withhold any of it under section 552.101 on that basis.

552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *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 files of an investigation of allegations of sexual harassment. The investigation files in the *Ellen* decision 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 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*, along with the statement of the accused. However, 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 victims and witnesses must still be redacted from the statements. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. We also note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

Exhibit C relates to an investigation into alleged incidents of sexual harassment. Upon review, we determine the submitted information does not contain an adequate summary of the investigation of the alleged sexual harassment. Because there is no adequate summary of the investigation, the district must generally release any information pertaining to the sexual harassment investigation. However, the information at issue contains the identities of victims of and witnesses to the alleged sexual harassment. Accordingly, the district must withhold such information, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. *See Ellen*, 840 S.W.2d at 525.

In summary, if the district produced the reporting form to DFPS or the department, then the district must withhold it in its entirety under section 552.101 of the Government Code in conjunction with section 261.201(a)(2) of the Family Code. If the reporting form is not confidential under section 261.201(a)(2), then the district must withhold the identifying information of the reporting party we have marked in the reporting form under section 552.101 in conjunction with section 261.201(a)(1) of the Family Code. The district

must withhold the other information we have marked under section 552.101 in conjunction with section 261.201(a)(2). The district must withhold the information we have marked under section 552.101 in conjunction with common-law privacy and the holding 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.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,



Cole Hutchison  
Assistant Attorney General  
Open Records Division

CH/bhf

Ref: ID# 599390

Enc. Submitted documents

c: Requestor  
(w/o enclosures)