



July 25, 2000

Mr. Jeffrey J. Horner
Bracewell & Patterson
711 Louisiana Street, Suite 2900
Houston, Texas 77002-2781

OR2000-2825

Dear Mr. Horner:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 137447.

The La Porte Independent School District (the "district"), which you represent, received a request for "any and all files kept on" a named individual. You state that "many of the documents related to" the request have been released to the requestor. You have provided for our review additional documents, many of which, you assert, may be excepted from disclosure under sections 552.102 and 552.114 of the Government Code.

We note at the outset that you have submitted no comments in support of the claimed exceptions, nor have you marked any of the submitted information as to the applicability of the exceptions you have asserted. *See* Gov't Code § 552.301(e)(1)(A), (e)(2) (governmental body must submit written comments stating the reason why the stated exceptions apply, and governmental body must label the specific information submitted to indicate which exceptions apply to which parts of the copy). We have nevertheless carefully reviewed the information at issue and considered the exceptions you have asserted.

Section 552.114 excepts from disclosure "information in a student record at an educational institution funded wholly or partly by state revenue." Gov't Code § 552.114(a). This office considers the term "student record" as used in section 552.114 to generally be the equivalent of "education records" under the federal Family Educational Rights and Privacy Act of 1974

("FERPA"), 20 U.S.C. § 1232g.¹ Based on the information you have provided, we conclude that none of the information must be withheld under section 552.114.

Section 552.102 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). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Government Code. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Therefore, we consider together whether section 552.102 or section 552.101 in conjunction with the common law right of privacy applies to any of the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses common law privacy. Information must be withheld from the public as implicating the common law right to privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992).²

¹This office has concluded that: (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by section 552.026 without the necessity of requesting a decision from this office, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. See Open Records Decision No. 634 (1995); see also Gov't Code § 552.026.

²Section 552.101 also encompasses constitutional privacy. The constitutional right to privacy protects two interests. Open Records Decision No. 600 at 4 (1992) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), cert. denied, 474 U.S. 1062 (1986)). The first is the interest in independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court. Open Records Decision No. 600 at 4 (1992). The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, child rearing, and education. See *id.* The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. See Open Records Decision No. 455 at 5-7 (1987) (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." See *id.* at 5 (1987) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), cert. denied, 474 U.S. 1062 (1986)). We have nevertheless considered whether any of the submitted information implicates a constitutional privacy interest.

This office has found that the following types of information are excepted from required public disclosure under the constitutional or common law right to privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), and information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987).

The responsive information indicates that the named individual was investigated as to whether he had engaged in sexual harassment at work. The court in the case of *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App. - El Paso 1992, writ denied) applied the above-referenced common law right of privacy test to the records resulting from a workplace 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. *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.* 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.* In its conclusion, the court stated:

The records requested contain highly intimate, embarrassing revelations about persons required to cooperate with an investigation by their employer. These witnesses were never informed of the request that these records be made public; they have, thus, had no opportunity to assert privacy interests on their own behalf. To disclose their names and the details of their statements would send a most unfortunate message to all public employees in Texas: that they complain about sexual harassment in their workplace, or cooperate in the investigation of such a complaint, only at risk of embarrassing and offensive publicity. While this may occasionally be a necessary evil in the enforcement of prohibitions against sexual harassment, we do not believe it is warranted here and decline to order the disclosure of documents which would have such a chilling effect.

Id. at 526. Unlike the conclusions of the board of inquiry in *Ellen*, our review of the submitted information indicates that it contains no report that may comprise an adequate summary of the result of the investigation and thereby serve the legitimate public interest in

the information at issue. We therefore believe that the statements taken as part of the investigation are not excepted from disclosure in this instance. However, we have marked for redaction information that reveals the identity of both the complainant and witnesses. We believe pursuant to *Ellen* that the district must not release this information to the public. Other than the identity of the victim and witnesses, we do not find any additional information that is protected by a right of privacy and that must be withheld on that basis. See Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees).

Section 552.101 also encompasses information protected by other statutes. One of the submitted documents is a completed Employee's Withholding Allowance Certificate, Form W-4 of the Internal Revenue Service. This office has held that such information, in its entirety, is made confidential under title 26, section 6103(a), of the United States Code. Open Records Decision No. 600 at 9 (1992). Thus, we determine you must not release the W-4 form pursuant to section 552.101 in conjunction with this federal provision.

Finally, we note that some of the submitted documents contain social security number information of the named individual, which we have marked. This information may be excepted from disclosure under section 552.101 or section 552.117 of the Government Code. Section 552.117(1) excepts from required public disclosure the home addresses, home telephone number, social security number, or personal family member information of public employees who request that this information be kept confidential under section 552.024 of the Government Code. See Gov't Code §§ 552.024, .117. You may not, however, withhold this information under section 552.117 if the named individual made the request for confidentiality under section 552.024 after the present request for information was received by the district. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 at 5 (1989). Thus, section 552.117 requires you to withhold the social security number information of the named individual only if he requested that this information be kept confidential under section 552.024 prior to the district's receipt of the present request. See also Open Records Decision Nos. 622 (1994), 455 (1987). If the social security number information is not excepted under section 552.117, the information may nevertheless be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). See Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. See *id.* We have no basis for concluding that the social security number information in the records here is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for

the release of confidential information. *See* Gov't Code § 552.352. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the district pursuant to any provision of law, enacted on or after October 1, 1990.

In summary, you must not release the information we have marked for redaction and you must not release the named individual's W-4 form. The social security number information we have marked may be excepted under sections 552.101 and/or section 552.117, as provided above. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

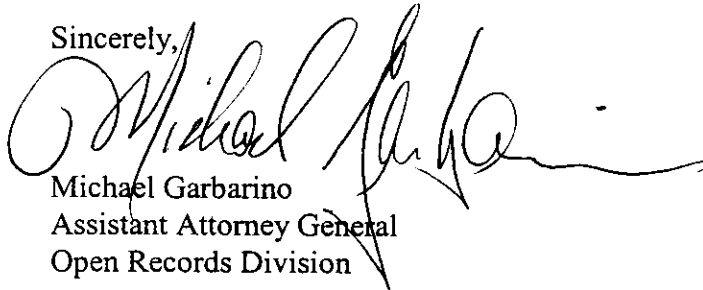
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Garbarino". The signature is fluid and cursive, with a long horizontal stroke at the end.

Michael Garbarino
Assistant Attorney General
Open Records Division

MG/pr

Ref: ID# 137447

Encl. Submitted documents

cc: Mr. Mitchell Custinger
1122 Shillington
Katy, Texas 77450
(w/o enclosures)