



December 1, 1999

Mr. Scott A. Kelly
Deputy General Counsel
The Texas A&M University System
John B. Connally Building
301 Tarrow, 6th Floor
College Station, Texas 77840-7896

OR99-3457

Dear Mr. Kelly:

You have asked whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 129395.

The Texas A&M University System (the "university") received a clarified request for the files concerning all reported incidents since 1988 of discrimination, not limited to illegal discrimination, specifically involving any students, staff and faculty. *See* Gov't Code § 552.223. You have provided for our review representative samples of information responsive to the request.¹ You assert the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have marked the submitted samples "1," "2," "3," and "4."

You state that, pursuant to Open Records Decision No. 634, you have withheld some of the requested information as student records under the federal Family Educational Rights and

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, and sections 552.026 and 552.114 of the Government Code. Open Records Decision No. 634 (1995) (a governmental body need not request an attorney general decision to withhold information that constitutes a "student record"). We note at the outset that some of the submitted information, which we have labeled as sample "4," contains information that must additionally be withheld from disclosure under FERPA. In Open Records Decision No. 634 (1995), this office concluded: (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, 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.

We remind you that Open Records Decision No. 634 applies only to "education records" under FERPA. "Education records" are records that

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A). *See also* Open Records Decision Nos. 462 (1987), 447 (1986). Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982), 206 (1978).² You must withhold any information that identifies the student from the documents we have marked as sample "4." If you have further questions as to the applicability of FERPA to information that is the subject of an open records request, you may consult with the United States Department of Education's Family Policy Compliance Office. *See* Open Records Decision No. 634 at 4 n.6, 8 (1995).

Some of the responsive information contains social security numbers. Social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or "related record" may 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

²*But see* 20 U.S.C. § 1232g(a)(1)(A), (d) (parent or adult student has affirmative right of access to that student's education records). *See also* Open Records Decision No. 431 (1985) (Public Information Act's exceptions to required public disclosure do not authorize withholding of "education records" from adult student).

provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the responsive information are confidential under section 405(c)(2)(C)(viii)(I), and therefore, excepted from public disclosure under section 552.101 of the Open Records Act on the basis of that federal provision. We caution, however, that section 552.353 of the Open Records Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the university pursuant to any provision of law, enacted on or after October 1, 1990.

We note that the submitted information includes certain personal information of current or former university employees. It is possible that this information may be confidential under section 552.117 of the Government Code. Of those public employees who elected to withhold from public disclosure certain personal information pursuant to section 552.024 of the Government Code, section 552.117 excepts from required public disclosure information that relates to the home address, home telephone number, social security number, or that reveals whether the employee has family members. *See* Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold such information of a current or former employee who made the section 552.024 request for confidentiality *after* this request for information was made. Whether a particular piece of information is public must be determined at the time of the request for the information. Open Records Decision No. 530 at 5 (1989). Therefore, if the employee elected to not allow public access to this information in accordance with the procedures of section 552.024 of the Government Code, and prior to when the present request for information was made, we believe that the university must withhold this information from required public disclosure pursuant to section 552.117.

You assert samples “1,” “2,” and “3,” in their entirety, are excepted from disclosure under section 552.101. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. Section 552.101 also encompasses common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public 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).

Samples “1” and “2” are files of grievances by university employees alleging sexual harassment by other employees. 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 such files. 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 those 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.*

Samples "1" and "2" contain no document that may be considered an adequate summary of the investigation. Unlike the situation in *Ellen*, the sample "1" and "2" files contain no document that could satisfy the public interest in the information at issue and which could serve as a substitute for any detailed statements contained in the files. We thus believe all of the documents in samples "1" and "2" must be released. However, we have marked for redaction any information that identifies or tends to identify the complainants or any witnesses, as this information is protected from disclosure by the common-law privacy doctrine as applied in *Ellen* and *Industrial Foundation*. You must withhold the information in samples "1" and "2" that would identify the complainant or individual witnesses. *Id.*

Sample "3" relates to a complaint and investigation into the university's e-mail resources. The complainant asks the university to investigate information distributed by e-mail to a "chat group." Both the complainant and person complained of are apparently out of state, and are neither employees nor students of the university. The chat group uses a server owned by the university, and a university employee is apparently responsible for maintaining the chat group "mailing list." You have labeled the file as an investigation of "alleged sexual harassment." However, the complainant states she has not filed a sexual harassment complaint against the employee. The issue here appears to be whether a university employee properly maintained the "chat group" mailing list. We find this sample does not implicate the doctrine set out *supra* in *Ellen*. The common-law right of privacy does not protect facts about a public employee's alleged misconduct on the job or complaints made about his performance. *See, e.g.,* Open Records Decision Nos. 438 (1986), 230 (1979), 219 (1978). As sample "3" concerns a complaint of alleged improper conduct by a university employee, we find a legitimate public interest exists as to this sample and the file may not be withheld under the common-law right of privacy. Except for the social security number information discussed above, you must release sample "3."

Sample "4" relates to litigation in which the university was a party. You indicate the "entire file should be withheld pursuant to [section] 552.103." Section 552.103(a) excepts from disclosure information:

[R]elating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party[.]

[Information is excepted from disclosure] only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103. Section 552.103(a) was intended to prevent the use of the Public Information Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-1048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990). The applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Our review of sample "4" indicates the litigation has concluded. We thus find you may not withhold this sample under section 552.103.

Furthermore, the sample includes a mediated settlement agreement in which the university ostensibly agreed to keep confidential certain information involving the plaintiff, and the terms of the settlement agreement also purportedly make the agreement itself confidential. We note that information is not confidential under the Public Information Act simply because the party submitting the information to the governmental body anticipates or requests that it be kept confidential, nor can a governmental body promise to keep information confidential absent statutory authorization. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied* 430 U.S. 931 (1977). In other words, a governmental body cannot, through a contract, overrule or repeal provisions of the Public Information Act. Attorney General Opinion JM-672 (1987). A governmental body's final mediated settlement agreement is public information. Gov't Code § 2009.054(c) (as amended); Open Records Decision No. 658 (1998). Except for information otherwise made confidential by FERPA or as noted in this ruling, you must release the information in sample "4."

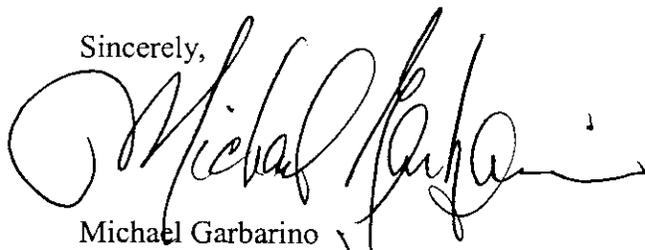
Your request letter states that the "records may contain information" excepted by section 552.107. However, you have not provided this office with the reasons why section 552.107 applies to withhold the information, nor have you labeled the specific information to indicate which portions of the information are excepted by section 552.107. *See* Gov't Code § 552.301(e). Therefore, you have waived your section 552.107 claim. *See* Open Records Decision Nos. 575 (1990), 574 (1990).

The Texas Legislature enacted the Texas Alternative Dispute Resolution Procedures Act (the "ADR Act"), codified as chapter 154 of the Civil Practice and Remedies Code, in 1987. Section 154.023 recognizes mediation as an alternative dispute resolution ("ADR") procedure. The information in sample "4" indicates the litigation included the use of mediation. Section 154.073 accords confidentiality to "a communication . . . made by a participant in an alternative dispute resolution procedure," Civ. Prac. & Rem. Code § 154.073(a), and "[a]ny record made at an alternative dispute resolution procedure." *Id.*

§ 154.073(b). The Governmental Dispute Resolution Act (the "GDR Act"), chapter 2009 of the Government Code, more recently enacted, authorizes the use of ADR procedures by state agencies and incorporates the confidentiality provisions of the ADR Act. Gov't Code § 2009.054(a) (as amended by the 76th Legislature). These provisions make confidential a communication relevant to the dispute and certain records of communications made during the course of the ADR procedure. *Id.* § 2009.054(b)(1). In Open Records Decision No. 658, this office concluded that section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code does not make confidential mediated final settlement agreements to which a governmental body is a party. *See* Open Records Decision No. 658 at 4 (1998). *See also* Gov't Code § 2009.054(c). In accordance with these provisions, the university must withhold those documents in sample "4" which consist of communications made during the mediation process, other than the final settlement agreement, which is public information and must therefore be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

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/jc

Ref.: ID# 129395

Encl: Submitted documents

cc: Mr. David Kessler
Student Conflict Resolution Services
201 YMCA Building
College Station, Texas 77843
(w/o enclosures)