

November 14, 2000

Mr. Dennis P. Duffy
General Counsel
University of Houston System
E. Cullen Building, Suite 311
Houston, Texas 77204-2162

OR2000-4409

Dear Mr. Duffy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 141261.

The University of Houston (the "university") received a written request for certain information pertaining to grievances filed with the university's Office of Affirmative Action/Equal Employment Opportunity. You state that most of the requested information has been released to the requestor. You contend, however, that certain other information, a representative sample of which you have submitted to this office, is excepted from required public disclosure pursuant to sections 552.026, 552.101, 552.103, and 552.117 of the Government Code.¹

You contend that the identities of university employees who have filed grievances based on disabilities are made confidential under Title I of the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101 *et seq.*, and thus must be withheld pursuant to

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 No. 490 (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.

section 552.101 of the Government Code.³ The ADA provides that information about the medical conditions and medical histories of applicants or employees must be 1) collected and maintained on separate forms, 2) kept in separate medical files, and 3) treated as a confidential medical record. In addition, information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his job, is to be treated as a confidential medical record. 29 C.F.R. § 1630.14(c). Although the records at issue do not reveal any specific information about employees' medical conditions or medical histories, we nevertheless conclude that the university must withhold pursuant to the ADA the identities of employees who have filed a grievance as a result of the employee's disability. See Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3-4 (Oct. 1, 1997) (Equal Employment Opportunity Commission determined that "medical information" for purposes of ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual").

You also contend that the identities of employees who filed grievances based on claims of sexual harassment or their sexual orientation are protected from public disclosure under section 552.101 of the Government Code in conjunction with the common law right of privacy. 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. See also *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1975), cert. denied, 430 U.S. 931 (1977) (common law privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and is of no legitimate concern to the public). The court held, *inter alia*, that the identities of the victims of sexual harassment were protected from public disclosure by common law privacy. *Ellen*, 840 S.W.2d at 525. In accordance with *Ellen*, we conclude that the university must withhold from the public the names of employees who have filed sexual harassment complaints. We similarly conclude that the university must also withhold the identities of employees who have filed complaints of discrimination based on the individual's sexual orientation.

You next contend that information pertaining to pending grievances is exempted from public disclosure pursuant to the "litigation exception," section 552.103 of the Government Code. Under section 552.103(a) and (c), the test for demonstrating the applicability of this exception is a showing that (1) litigation is pending or reasonably anticipated at the time of

³Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

the records request, and (2) the information at issue is related to that litigation. *See also University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103.

In this instance, however, we need not determine whether you have met your burden under section 552.103. Even if we were to assume *arguendo* that such is the case, we note that each of the respective grievants have had prior access to the information pertaining to themselves. Absent special circumstances, once information has been obtained by all parties to the litigation, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Consequently, we conclude that none of the information at issue may be withheld from the requestor pursuant to section 552.103.

You also seek to withhold the certain employees' home addresses and home telephone numbers pursuant to section 552.117 of the Government Code, which requires that the university withhold, among other things, the home address and telephone number of its employees. Accordingly, the department must redact from the records at issue the home address and telephone number of its employees, but only if the respective employee had elected to keep this information confidential in accordance with section 552.024 of the Government Code prior to the university's receipt of the current records request. *See* Open Records Decision No. 530 (1989).

Finally, you state that the university has withheld from the requestor "[a]ll information relating to grievances filed by students, other than information regarding the numbers of complaints filed by students," pursuant to the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. *See* Open Records Decision No. 634 (1995). Please note, however, that 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). Assuming the university is capable of compiling a summary of student grievances in the same manner it created the employee summary, we conclude that the university must release such a summary with the students' names, addresses, and telephone numbers redacted pursuant to FERPA. The remaining information pertaining to the student grievances must be released.

In summary, the university must withhold the identities of 1) employees alleged to have been victims of sexual harassment, 2) employees alleged to have been discriminated against as a result of their sexual orientation or their disabilities, and 3) student grievants. The university must also withhold the home addresses and home telephone numbers pursuant to section 552.117 of the Government Code of those employees who timely elected to have

these categories of information withheld from the public in accordance with section 552.024 of the Government Code. The remaining information at issue must be released.

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).

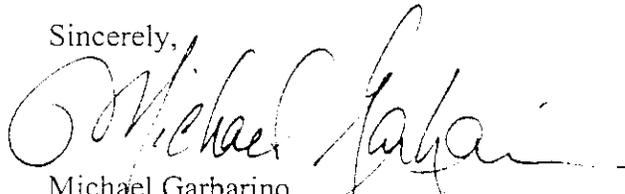
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

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 cursive script that reads "Michael Garbarino". The signature is written in black ink and is positioned above the typed name.

Michael Garbarino
Assistant Attorney General
Open Records Division

MG/RWP/seg

Ref: ID# 141261

Encl. Submitted documents

cc: Mr. Rod Chapa
P.O. Box 542333
Houston, Texas 77254
(w/o enclosures)