



February 28, 2002

Mr. Dennis P. Duffy
General Counsel
University of Houston System
311 East Cullen Building, Suite 212
Houston, Texas 77204-2028

OR2002-0981

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# 159210.

The University of Houston System (the "system") received a request for a specific complaint letter. You state that you will release some of the responsive information. However, you claim that the victim's name and identifying information are excepted from disclosure under principles of common law privacy incorporated by section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

The common law right of privacy is incorporated into the Public Information Act by section 552.101 of the Government Code.¹ For information to be protected by common law privacy it must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976). The *Industrial Foundation* court stated that information is excepted from disclosure if: (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685.

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 *Ellen* contained individual witness statements, an affidavit by the accused individual 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

¹ Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101.

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.*

Here, the complaint letter appears to relate to allegations of sexual harassment. Because there is no adequate summary of these allegations, you must release the document. However, based on *Ellen*, the system must withhold the information that tends to identify the victim. We have marked the information that must be withheld.

On the other hand, the public interest in the identity and statement of the alleged harassers outweighs any privacy interest the alleged harassers may have in that information; therefore, the system may not withhold information identifying the alleged harassers under common law privacy as incorporated by section 552.101. *Ellen*, 840 S.W.2d at 525. We note, however, that at least one of the alleged harassers is a student. Ordinarily, this student's identifying information would be withheld from disclosure in accordance with the Family Educational Rights and Privacy Act of 1974 ("FERPA"). 20 U.S.C. § 1232g. *See* Open Records Decision Nos. 332 (1982), 206 (1978) (information must be withheld under FERPA only to extent reasonable and necessary to avoid personally identifying particular student). In this instance, however, the requestor has a special right of access to his identifying information. *See* 20 U.S.C. §§ 1232g(a)(1)(A) (providing for parental access to education record), 1232g(d) (providing that student attending post-secondary institution assumes all rights accorded to parents under FERPA). If the system should receive a subsequent request for this information from an individual who does not have a special right of access under FERPA, the system must request a decision or redact the identifying information in accordance with Open Records Decision No. 634 (1995).

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 Hadassah Schloss at the Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/seg

Ref: ID# 159210

Enc. Submitted documents

bc: (w/o enclosures)