



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 12, 2005

Ms. Gita P. Bolt
Interim General Counsel
Texas Southern University
3100 Cleburne Street
Houston, Texas 77004

OR2005-06141

Dear Ms. Bolt:

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# 230263.

Texas Southern University (the "university") received a request for information concerning the university's investigation of a sexual harassment complaint made by the requestor, including communications between the requestor, certain witnesses, and university staff who conducted the investigation. You claim that portions of the submitted information are excepted from disclosure under sections 552.026, 552.101, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Section 552.026 of the Government Code incorporates the federal Family Educational Rights and Privacy Act of 1974 ("FERPA") into chapter 552 of the Government Code. See Open Records Decision No. 634 at 6-8 (1995). Section 552.026 provides:

¹ We note that, in your June 13, 2005 letter to this office, you also claimed that the requested information is excepted from disclosure pursuant to section 552.102 of the Government Code. Because you have not submitted arguments explaining how this exception is applicable, we assume you have withdrawn your claim that it applies to any of the submitted information.

[t]his chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). "Education records" under FERPA are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). Section 552.114(a) of the Government Code exempts from disclosure "information in a student record at an educational institution funded wholly or partly by state revenue." This office generally has treated "student record" information under section 552.114(a) as the equivalent of "education record" information that is protected by FERPA. *See* Open Records Decision No. 634 at 5 (1995).

In Open Records Decision No. 634 (1995), this office 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 sections 552.026 and 552.101 of the Government Code² 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 of the Government Code 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 at 6-8 (1995). In this instance, you have submitted information that you contend is confidential under FERPA. Accordingly, we will address your claims.

Under FERPA, a student and the student's parents have an affirmative right of access to the student's own education records, although this right does not extend to information in the student's records that identifies other students. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3; *see also* 34 C.F.R. § 99.12(a) ("If the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student."). Thus, as you acknowledge, the requestor in this case has the right under FERPA to inspect and review or be informed of information pertaining to the requestor, who is a university student, in the

² Section 552.101 exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes.

submitted education records. However, as noted, the requestor does not have a right of access to the FERPA documents that pertain to other students.

An educational agency must withhold information from records subject to FERPA only to the extent reasonable and necessary to avoid personally identifying a particular student. *See Open Records Decision Nos. 332 (1982), 206 (1978)*. Such information includes information that directly identifies a student or parent as well as information that, if released, would allow the student's identity to be easily traced. *See Open Records Decision No. 224 (1979)* (finding student's handwritten comments protected under FERPA because they make identity of student easily traceable through handwriting, style of expression, or particular incidents related). We have marked the FERPA documents that pertain to a student other than the requestor that must be withheld under section 552.101 of the Government Code in conjunction with FERPA.³

The marked FERPA records accessible by the student-requestor generally may not be withheld from the requestor pursuant to an exception to disclosure under the Act. *See Equal Employment Opportunity Comm'n v. City of Orange, Texas*, 905 F. Supp 381, 382 (E.D. Tex. 1995) (federal law prevails over inconsistent provision of state law); *see also* Open Records No. 431 (1985) (when conflict arises between provisions of Act and FERPA, federal statute prevails). Accordingly, we conclude that the university may not withhold any portion of these marked records under section 552.101 of the Government Code in conjunction with common-law privacy, or in conjunction with other common law principles, or under section 552.111 of the Government Code.⁴ However, since the Family Policy Compliance Office of the United States Department of Education has informed this office that a student's right of access under FERPA to information about the student does not prevail over a university's right to assert the attorney-client privilege or work product privilege, we will address your claims that portions of these particular marked records are excepted from disclosure pursuant to section 552.107 of the Government Code and the work product privilege as encompassed by section 552.111 of the Government Code along with your arguments that these exceptions apply to the submitted documents that are not education records for purposes of FERPA.

³ As our ruling for portions of the information you have marked is dispositive, we need not address your other arguments for withholding this information.

⁴ Specifically, you raise section 552.101 in conjunction with common-law privacy principles expressed in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976) (information must be withheld from public under common-law privacy when (1) it is highly intimate and embarrassing, such that release would be highly objectionable to person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure) and *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information), as well as in conjunction with the common-law informer's privilege. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928).

Section 552.107(1) protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Because government attorneys often act in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Finally, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets the definition of a confidential communication depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). Having considered your representations and reviewed the information at issue, we agree that some of the submitted information constitutes privileged attorney-client communications. Therefore, the information we have marked may be withheld pursuant to section 552.107(1) of the Government Code.⁵ However, we find the university has failed to establish that the remaining information consists of privileged communications, and the university may not withhold it from release pursuant to the attorney-client privilege.

⁵ As our ruling for this information is dispositive, we need not consider your remaining claimed exceptions for this information.

You also raise the work product privilege as encompassed by section 552.111 of the Government Code for some of the remaining documents, or portions thereof. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Section 552.111 encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. TEX. R. CIV. P. 192.5; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation. *Nat’l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204; ORD 677 at 7.

Upon review of the university’s arguments and the documents at issue, we find that the university has not demonstrated that this information was prepared for trial or in anticipation of litigation. Therefore, the university may not withhold this information under section 552.111 as attorney work product.

We next consider your arguments for the remaining submitted documents that are not education records for purposes of FERPA. Section 552.101 also encompasses the doctrine of common-law privacy. As previously noted, common-law privacy protects information that is 1) highly intimate or embarrassing, such that its release 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 at 682-83. The type of information considered intimate and

embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683.

In addition, in *Morales v. Ellen*, 840 S.W.2d 519, 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 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.* 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.*

Upon review, we find that one document at issue, specifically a letter from the university to the individual accused of sexual harassment, pertains to an investigation of sexual harassment allegations made by the requestor. We note, however, that *Ellen* provides no protection to those accused of sexual harassment. *See Ellen*, 840 S.W.2d at 525; *see also* Open Records Decision Nos. 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101 or 552.102), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under either the constitutional or common-law right of privacy). Therefore, the university may not withhold the letter at issue or the individual's identifying information under *Ellen*. We also find that the remaining information at issue pertains to an investigation into allegations by the requestor of inequitable treatment and retaliation concerning her enrollment in and completion of a specific academic program. There is a legitimate public interest in the workplace conduct of government employees. *Id.*; *see also* Open Record Decision Nos. 470 at 4 (1987) (public employee's job performance does not generally constitute his or her private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees). We therefore conclude that the university may not withhold any of the remaining information at issue under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 also encompasses the common-law informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of

the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. See Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). The privilege excepts an informer's statement only to the extent necessary to protect the informer's identity. See Open Records Decision No. 549 at 5 (1990). However, witnesses who provide information in the course of an investigation but do not make the initial report of the violation are not informants for the purposes of claiming the informer's privilege. After reviewing the information at issue, we find that, while some of the individuals identified by the university may be witnesses who provided information in the course of the investigations, they did not report any violations of law. Therefore, the common-law informer's privilege does not apply to any of the remaining identifying information you have marked.

Next, we address your argument that portions of all of the submitted information are excepted from disclosure under section 552.101 in conjunction with the doctrine of constitutional privacy.⁶ Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5; see *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985). Upon review of the entirety of the submitted information, we find that none of the submitted information contains information that is confidential under constitutional privacy; therefore, the university may not withhold any portion of the submitted information under section 552.101 on that basis.

Finally, we note that the submitted information contains a telephone number to which section 552.117 of the Government Code may be applicable.⁷ Section 552.117(a)(1) excepts

⁶ Section 552.101 also encompasses the doctrine of constitutional privacy.

⁷ The Office of the Attorney General will raise a mandatory exception like section 552.117 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the university may only withhold information under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the individual at issue is an employee who timely elected to keep her personal information confidential, the university must withhold the marked telephone number under section 552.117(a)(1). The university may not withhold this information under section 552.117(a)(1) if the employee did not make a timely election to keep the information confidential.

In summary, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with FERPA. The university may withhold the information we have marked under section 552.107 of the Government Code. If the individual at issue is an employee who timely elected to keep her personal information confidential, the university must withhold the marked telephone number under section 552.117(a)(1). The university may not withhold this information under section 552.117(a)(1) if the employee did not make a timely election to keep the information confidential. The remaining submitted 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the

Government Code. If the governmental body fails to do one of these things, 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); *Tex. Dep't of Pub. 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,



Cary Grace
Assistant Attorney General
Open Records Division

ECG/jev

Ref: ID# 230263

Enc. Submitted documents

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