



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 25, 2005

Mr. Scott A. Kelly
Deputy General Counsel
The Texas A&M University System
Office of the General Counsel
200 Technology Way, Suite 2079
College Station, Texas 78845-3424

OR2005-06615

Dear Mr. Kelly:

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# 228653.

Texas A&M University (the "university") received a request for information concerning allegations of sexual misconduct by university employees since January 1, 2004.¹ You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.117, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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. You argue that student-identifying information contained in the submitted documents, which you have marked, is excepted from disclosure under section 552.101 of the Government Code in conjunction with the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. FERPA provides that no federal funds will be made available under any applicable program to an educational agency

¹ We note that the university sought and received clarification from the requestor. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

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). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A).

Section 552.026 provides as follows:

This 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.

In Open Records Decision No. 634 (1995), this office concluded that 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. In this instance, you have submitted information that you contend is confidential under FERPA. Accordingly, we will address your claim.

Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). Upon review of the information at issue, we find that the university must withhold the information you have marked under FERPA, except for the information we have marked for release. We have also marked additional information that is confidential under FERPA.

Section 552.101 also encompasses the common-law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types 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, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: personal financial information not relating to a financial transaction between an individual and a governmental body, see Open Records Decision Nos. 600 (1992), 545 (1990); 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); and identities of victims of sexual abuse, see Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

Additionally, 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 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.* When there is an adequate summary of a sexual harassment investigation, the summary must be released along with the statement of the accused, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure. However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of witnesses and victims must still be redacted from the statements.

You have submitted four separate investigative files, which you have labeled Exhibits B-1, B-2, B-3, and B-4. Exhibits B-1, B-2, and B-3 contain adequate summaries of the respective investigations into alleged sexual harassment. We have marked the summaries. Except for information protected by FERPA, the university must release the summaries, as well as the statement made by the individual under investigation in Exhibit B-1, which we have also marked. We note that you seek to withhold information in the Exhibit B-2 summary that identifies the alleged victim's advisor, to whom she reported the alleged incident at issue, as well as the identifying information of another administrator. Neither the advisor nor the administrator is a witness for purposes of *Ellen*, and their identities, therefore, may not be withheld under section 552.101 and common-law privacy. The university must withhold the remaining documents in Exhibits B-1, B-2, and B-3, which we have marked, pursuant to *Ellen*. Additionally, we have marked information in the Exhibit B-1 summary and statement of the individual under investigation that is confidential under common-law privacy, and that the university must withhold under section 552.101. With respect to the summaries and the statement of the individual under investigation, we find that the remaining information you seek to withhold on the basis of common-law privacy is not confidential under *Ellen* or under common-law privacy, and the university may not withhold it under section 552.101 on such grounds.²

² As our ruling is dispositive, we need not consider your remaining arguments against disclosure for this information.

Further, because there is no adequate summary of the sexual harassment investigation in Exhibit B-4, the portions of these submitted documents that the university is not withholding under FERPA pertaining to this investigation must be released.

You also assert that section 552.117 of the Government Code is applicable to portions of the information to be released. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this information be kept confidential under section 552.024. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *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 employee who made a request for confidentiality under section 552.024 prior to the date of the university's receipt of this request for information. The university may not withhold information under section 552.117(a)(1) on behalf of a current or former employee who did not make a timely election for confidentiality under section 552.024.

You inform us that the section 552.117 information that you have highlighted in the Exhibit B-2 summary and in Exhibit B-4 relate to employees who elected to keep their information confidential under section 552.024. You advise us that the employees at issue both elected to keep their information confidential prior the date the university received the present request for information. We therefore agree that the highlighted section 552.117 information excepted from disclosure under section 552.117(a)(1). We have also marked an additional home address in Exhibit B-4 that must be withheld under section 552.117(a)(1).

You also raise section 552.137 of the Government Code as applicable to portions of the information to be released. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail address at issue in Exhibit B-4 does not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that a member of the public has affirmatively consented to the release of this e-mail address. Therefore, the university must withhold the e-mail address you have marked in Exhibit B-4 under section 552.137.

Finally, we note that a portion of the information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception

applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the university must withhold the information you have marked under FERPA, except for the information we have marked for release. The university must also withhold the additional FERPA information we have marked. The university must withhold the marked documents in Exhibits B-1, B-2, and B-3 pursuant to *Ellen*. The university must withhold the information we have marked in the Exhibit B-1 summary and statement of the individual under investigation under section 552.101 in conjunction with common-law privacy. The university must withhold the highlighted section 552.117 information in the Exhibit B-2 summary and in Exhibit B-4, as well as the home address we have marked in Exhibit B-4, under section 552.117(a)(1). The university must withhold the e-mail address you have marked in Exhibit B-4 under section 552.137. The remaining information must be released; however, the copyrighted information may only be released in compliance with copyright law.

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,

A handwritten signature in cursive script that reads "Cary Grace". The signature is written in black ink and extends across the width of the page.

Cary Grace
Assistant Attorney General
Open Records Division

ECCG/jev

Ref: ID# 228653

Enc. Submitted documents

c: Mr. Mark McCaig
P.O. Box 15152
College Station, Texas 77841
(w/o enclosures)