ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 5, 2005

Mr. Eddie D. Gose
The Texas A&M University System
Office of General Counsel
200 Technology Way, Suite 2079
College Station, Texas 77845-3424

OR2005-07089

Dear Mr. Gose:

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# 229707.

The Texas A&M University- Texarkana (the "university") received a request for information related to allegations of a named professor's misconduct, and any actions taken by the university regarding the misconduct. You claim that the requested information is excepted from disclosure under sections 552.101, 552.107, 552.114, 552.117, 552.136, and 552.137 of the Government Code.[1] We have considered the exceptions you claim and reviewed the submitted information.

You assert that a portion of the submitted information must be withheld under the Family Educational Rights and Privacy Act of 1974 ("FERPA"), which 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). "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). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990).

[1] The university failed to assert section 552.136 within the ten business day time period mandated by section 552.301(b) of the Government Code. However, because this provision can constitute a compelling reason to withhold information, and we will address your arguments under this exception. See Gov't Code §§ 552.301, 552.302.

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Gov't Code § 552.114. 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.

Gov't Code § 552.026. In Open Records Decision No. 634 (1995), this office concluded that 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. *See id.* at 6-8 (1995). In this instance, however, you have submitted the requested information at issue to this office for consideration. Therefore, we will consider whether this information is excepted from disclosure under FERPA.

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). Such information includes information that directly identifies a student as well as information that, if released, would allow the student's identity to be easily traced. We have marked the student-identifying information in Exhibits B-1 and B-4 that must be withheld pursuant to FERPA.[2]

The university also asserts that the names of employee-witnesses in Exhibit B-1 are excepted under section 552.101 of the Government Code. 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. This section 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 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 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common law privacy doctrine to files of an

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[2] As we are able to make this determination, we need not address your remaining arguments regarding this information.

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. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. We further note that common law privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about a public employee's job performance. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

In this instance, a portion of the submitted information relates to an investigation of alleged sexual harassment. Therefore, *Ellen* is applicable to this information. However, the submitted information does not contain an adequate summary of the investigation. Consequently, the university must only withhold the witnesses' identifying information in Exhibit B-1, which we have marked, under section 552.101 in conjunction with *Ellen*.

The university raises section 552.107 of the Government Code for the information in Exhibit B-2. Section 552.107(1) excepts from disclosure information protected by the attorney-client privilege. Gov't Code § 552.107. 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.[3] TEX. R. EVID. 503(b)(1).

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[3] The privilege does not apply when an attorney or representative is acting in a capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. 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.[4] TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body seeking to establish that a communication is protected by the attorney-client privilege must inform this office of the identity and capacity of each individual involved in the communication. Finally, the attorney-client privilege applies only to a communication that is confidential. *Id.* 503(b)(1). A confidential communication is a communication that 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) of the Government Code 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). You state that the information in Exhibit B-2 reveals communications between attorney representatives for the university and university employees. You also assert that these communications were not intended to be disclosed to persons other than those to whom the communications were made in furtherance of the rendition of professional legal services. Based on your representations and our review of the information in Exhibit B-2, we conclude that section 552.107 is applicable to this information. Thus, the university may withhold the information in Exhibit B-2 under section 552.107 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former employees of a governmental body who request that this information be kept confidential under section 552.024. Gov't Code § 552.117(a)(1). 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

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[4] Specifically, the privilege applies only to confidential communications between the client or a representative of the client and the client's lawyer or a representative of the lawyer; between the lawyer and the lawyer's representative; by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; between representatives of the client or between the client and a representative of the client; or among lawyers and their representatives representing the same client. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E); *see also id.* 503(a)(2), (a)(4) (defining "representative of the client," "representative of the lawyer").

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. In this instance, the university states the former employee timely elected to withhold his section 552.117 information. Thus, the university must withhold the section 552.117 information we have marked in Exhibits B-3 and B-4.

Finally, the university raises section 552.136 of the Government Code for the bank account numbers in Exhibit B-4. Section 552.136 states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. The university must, therefore, withhold the bank account numbers we have marked under section 552.136 of the Government Code.

In summary, the university must withhold the marked student-identifying information under FERPA. The university must withhold the marked witnesses' identifying information under section 552.101 in conjunction with *Ellen*. The university may withhold the attorney-client communications in Exhibit B-2 under section 552.107. Finally, the university must withhold the marked section 552.117 information, and the marked bank account numbers under section 552.136. The remaining submitted information 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, 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,

Lauren E. Kleine
Assistant Attorney General
Open Records Division

LEK/jev

Ref: ID# 229707

Enc. Submitted documents

c: Mr. George W. Reamy
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(w/o enclosures)