



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 1, 2012

Ms. Jennifer E. Bloom  
Senior Assistant General Counsel  
Office of the General Counsel  
University of Houston System  
311 E. Cullen Building  
Houston, Texas 77204-2028

OR2012-13960A

Dear Ms. Bloom:

This office issued Open Records Letter No. 2012-13960 (2012) on September 4, 2012. We have examined this ruling and determined Open Records Letter No. 2012-13960 is incorrect. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for Open Records Letter No. 2012-13960. *See generally* Gov't Code § 552.011 (providing that Office of the Attorney General may issue a decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the "Act"))).

The University of Houston (the "university") received a request for the following four categories of information: (1) information pertaining to a specified complaint made against the requestor; (2) all notes and investigative findings pertaining to the investigation regarding the specified complaint; (3) information created during or because of a discussion or interview in connection with any complaints against the requestor or the previously specified investigation, including any information pertaining to the specified complaint and any previous allegations relevant to the specified investigation; and (4) all video recordings from cameras on a specified floor of a specified building for a specified time period. You state the university has released some information responsive to categories one through three of the request. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.117, and 552.137 of the Government Code and privileged

under Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted information, a portion of which you state constitutes a representative sample.<sup>1</sup>

Initially, we understand the university sought clarification of category four of the request. See Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). You state the university has not received a response to the request for clarification. Thus, for the portion of the requested information for which you have sought but have not received clarification, we find the university is not required to release information in response to this portion of the request. However, if the requestor clarifies this portion of the request for information, the university must seek a ruling from this office before withholding any responsive information from the requestor. See Gov't Code § 552.222; *City of Dallas*, 304 S.W.3d at 387.

Next, we note some of the submitted information in Exhibit 6, which we have marked, is not responsive to the present request for information because it was created after the present request for information was received.<sup>2</sup> This ruling does not address the public availability of any information that is not responsive to the request, and the university need not release such information in response to this request.

The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.<sup>3</sup> Consequently, state and local educational authorities that receive a request for education records from a member of the

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<sup>1</sup>This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

<sup>2</sup>The Act does not require a governmental body to release information that did not exist when it received a request or to create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

<sup>3</sup>A copy of this letter may be found on the Office of the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

public under the Act must not submit education records to this office in unredacted form, that is, in a form in which “personally identifiable information” is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). In this instance, you have submitted redacted and unredacted education records for our review. Because our office is prohibited from reviewing education records, we will not address the applicability of FERPA to any of the responsive information. Such determinations under FERPA must be made by the educational authority in possession of the education records.<sup>4</sup> We will, however, address the applicability of the university’s arguments for this information.

We note the responsive information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” unless it is excepted by section 552.108 of the Government Code or “made confidential under [the Act] or other law[.]” Gov’t Code § 552.022(a)(1). The responsive information consists of a completed investigation of a complaint. This information is subject to section 552.022(a)(1) and must be released unless it is either excepted under section 552.108 of the Government Code or is confidential under the Act or other law. You do not claim section 552.108. Although you assert this information is excepted from disclosure under section 552.107, this section is discretionary and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the university may not withhold the responsive information under section 552.107. However, you also raise sections 552.101, 552.117, and 552.137 of the Government Code. Section 552.101 protects information made confidential under law and sections 552.117 and 552.137 each make information confidential under the Act. *See* Gov’t Code §§ 552.101, .117 (providing for “confidentiality” of information under section 552.117), .137 (providing for “confidentiality” of information under section 552.137). In addition, the Texas Supreme Court has held the Texas Rules of Evidence are “other law” that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your arguments under sections 552.101, 552.117, and 552.137, as well as your assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the responsive information.

Section 552.101 of the Government Code 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

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<sup>4</sup>In the future, if the university does obtain parental or an adult student’s consent to submit unredacted education records and the university seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. However, information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and is, therefore, generally not protected from disclosure under common-law privacy. See Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow).

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of common-law privacy to information relating to an investigation of alleged 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. See 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.* 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.* Thus, if there is an adequate summary of an investigation of sexual harassment, the summary must be released along with the statement of the person accused of sexual harassment, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure. If no adequate summary of the investigation exists, then detailed statements regarding the allegations must be released, but the identities of victims and witnesses must be redacted from the statements. In either event, the identity of the individual accused of sexual harassment is not protected from public disclosure. We note that supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

You assert the submitted information falls within the scope of *Ellen* because it pertains to the allegation of sexual harassment by a university professor of a university graduate student who was also a paid teaching assistant at the time of the alleged harassment. Based on your representations and our review, we find the information at issue consists of records of an investigation of sexual harassment. You contend, and we agree, Exhibit 4 is an adequate summary of the investigation. The summary in Exhibit 4 and the statement of the accused in Exhibit 5 are not confidential under section 552.101 in conjunction with common-law privacy. However, information within the summary and the statement of the accused identifying the victim of the sexual harassment is confidential under common-law privacy and must be withheld pursuant to section 552.101. See *id.* Accordingly, the university must withhold the information we have marked within the summary and the statement of the accused that identifies the victim, as well as the remaining records of the investigation in

Exhibits 5 and 6, which we have marked, under section 552.101 in conjunction with common-law privacy and *Ellen*.<sup>5</sup> The university may not withhold any of the remaining information within the summary or the statement of the accused under section 552.101 on this basis.

You contend the portions of the summary in Exhibit 4 and the statement of the accused in Exhibit 5 you have marked are also protected under common-law privacy. Common-law privacy also protects other types of information. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. See ORDs 470 (illness from severe emotional and job-related stress), 455 (prescription drugs, illnesses, operations, and physical handicaps). Some of the information you have marked pertains to a deceased individual. The common-law right to privacy, however, is a personal right that “terminates upon the death of the person whose privacy is invaded.” *Moore v. Charles B. Pierce Film Enters.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref’d n.r.e.); see also Attorney General Opinions JM-229 (1984) (“the right of privacy lapses upon death”), H-917 (1976) (“We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death.”); Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death). As such, the university may not withhold the information that pertains to a deceased individual under section 552.101 on this basis. The remaining information you seek to withhold is not highly intimate or embarrassing information of legitimate public concern of an identified individual. Accordingly, the university may not withhold any of the remaining responsive information under section 552.101 in conjunction with common-law privacy.

In summary, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. The university must release the remaining responsive information.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public

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<sup>5</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script that reads "Lindsay E. Hale". The signature is written in black ink and is positioned above the typed name.

Lindsay E. Hale  
Assistant Attorney General  
Open Records Division

LEH/tch

Ref: ID# 472468

Enc. Submitted documents

c: Requestor  
(w/o enclosures)