KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 25, 2015

Ms. Ana Vieira Ayala
Senior Attorney & Public Information Coordinator
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2015-20190

Dear Ms. Ayala:

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# 580615 (OGC# 16304).

The University of Texas at Austin (the "university") received a request for all information relating to or referencing sexual harassment complaints submitted to the university since a specific date. The university states it will redact information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.[1] The university states it will redact information subject to section 552.117(a)(1) of the Government Code pursuant to section 552.024(c)(2) of the Government Code and e-mail addresses subject to section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).[2] The university claims the submitted information is excepted from

[1]The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined FERPA determinations must be made by the educational authority in possession of the educational records. We have posted a copy of the letter from the DOE on the Attorney General's website at http://www.oag.state.tx.us/open/20060725usdoe.pdf.

[2]Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions the university claims and reviewed the submitted representative sample of information.[3]

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. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that (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 (Tex. 1976). 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 "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 alleged sexual harassment, the investigation summary must be released under *Ellen*, but the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. *See* Open Records Decision Nos. 393 (1983), 339 (1982). 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. We note that, because 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, the identity of the individual accused of sexual harassment is not protected from public disclosure. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978). We also note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

Additionally, we note, the ruling in *Ellen* was applicable to investigations involving workplace harassment. Some of the information at issue, which we have marked, relates to allegations of sexual harassment of students of the university. Upon review, we find this information does not constitute sexual harassment investigations in the employment context of the university for purposes of *Ellen*. Accordingly, we conclude the ruling in *Ellen* is not

---

[3]We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

applicable and the university may not withhold any portion of this information, which we have marked, under section 552.101 of the Government Code on that basis.

However, we agree the remaining information pertains to sexual harassment investigations subject to the ruling in *Ellen*. Upon review, we find the information at issue includes an adequate summary of the investigation, as well as a statement by the person accused of sexual harassment, corresponding with each investigation. Thus, with the exception of the summaries and the statements of the accused, the university must withhold the remaining information, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*.[4] The summaries and statements of the accused are not confidential under section 552.101 in conjunction with common-law privacy; however, information within the summaries and statements identifying victims and witnesses must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. *See Ellen*, 840 S.W.2d at 525. Therefore, pursuant to section 552.101 in conjunction with common-law privacy and the holding in *Ellen*, the university must withhold the identifying information of the victims and witnesses, which the university has marked, within the adequate summaries and statements of the accused.

Section 552.101 of the Government Code also encompasses section 51.971 of the Education Code. Section 51.971 provides, in relevant part, the following:

> (a) In this section:
>
> > (1) "Compliance program" means a process to assess and ensure compliance by the officers and employees of an institution of higher education with applicable laws, rules, regulations, and policies, including matters of:
> >
> > > (A) ethics and standards of conduct;
> >
> > > (B) financial reporting;
> >
> > > (C) internal accounting controls; or
> >
> > > (D) auditing.
> >
> > (2) "Institution of higher education" has the meaning assigned by Section 61.003.
>
> . . .
>
> (c) The following are confidential:

---

[4]As our ruling is dispositive, we need not address the university's remaining arguments against disclosure of this information.

> (1) information that directly or indirectly reveals the identity of an individual who made a report to the compliance program office of an institution of higher education, sought guidance from the office, or participated in an investigation conducted under the compliance program; and
>
> (2) information that directly or indirectly reveals the identity of an individual as a person who is alleged to have or may have planned, initiated, or participated in activities that are the subject of a report made to the compliance program office of an institution of higher education if, after completing an investigation, the office determines the report to be unsubstantiated or without merit.
>
> (d) Subsection (c) does not apply to information related to an individual who consents to disclosure of the information.

Educ. Code § 51.971(a), (c)-(d). The university states it is an institution of higher education for purposes of section 61.003 of the Education Code. *See id.* § 51.971(a)(2). The remaining information pertains to completed investigations of allegations of sexual harassment the university states were conducted by the university's Office of Institutional Equity. The university states its conducts an internal process of review to assess sexual harassment complaints to ultimately ensure that its employees complied with all applicable law, rules, regulations and polices relating to sexual harassment. Thus, we agree the remaining information pertains to the university's compliance program for the purposes of section 51.971. *See id.* § 51.971(a).

Section 51.971(c)(2) makes confidential information that identifies individuals alleged to have committed the activities that are the subject of a complaint made to a compliance program office if the office determines the report is unsubstantiated. *Id.* § 51.971(c)(2). However, subsection (c) does not apply to information related to an individual who consents to disclosure of the information. *Id.* § 51.971(d). The university states the investigations at issue concluded in determinations the complaints were unsubstantiated or without merit. Upon review, we find portions of the remaining information identify individuals as individuals alleged to have committed the activities that are the subjects of the unsubstantiated complaints, and individuals who participated in the investigations conducted under the compliance program. The university states these individuals have not consented to release of their information. Upon review, we find, with the exception of the information we have marked for release, the university must withhold the information it has marked, and the additional information we have marked, under section 552.101 in conjunction with section 51.971(c). However, the university has failed to demonstrate how the information we have marked for release identifies a complainant, a participant, or an individual alleged to have committed the activities which are the subject of the complaints for purposes of section 51.971(c). Consequently, no portion of the information we have marked for release may be withheld under section 552.101 in conjunction with section 51.971(c).

Section 552.107(1) of the Government Code 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 "to facilitate 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 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). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, 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. Lastly, 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: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit the communication." *Id.* 503(a)(5). Whether a communication meets this definition 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, orig. proceeding). 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).

The university states the information it has marked consists of confidential communications involving attorneys for the university and employees of the university in their capacities as clients. The university states these communications were made in furtherance of the rendition of professional legal services to the university. The university states the confidentiality of these communications has been maintained. Based on these representations and our review, we find the university has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the university may withhold the information it has marked under section 552.107(1) of the Government Code.[5]

---

[5]As our ruling is dispositive, we need not address the university's remaining arguments against disclosure of this information.

In summary, with the exception of the summaries and the statements of the accused, 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*. Pursuant to section 552.101 in conjunction with common-law privacy and the holding in *Ellen*, the university must withhold the identifying information of the victims and witnesses, which the university has marked, within the adequate summaries and statements of the accused. With the exception of the information we have marked for release, the university must withhold the information it has marked, and the additional information we have marked, under section 552.101 in conjunction with section 51.971(c) of the Education Code. The university may withhold the information it has marked under section 552.107(1) of the Government Code. The university must release the remaining 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

Rahat Huq
Assistant Attorney General
Open Records Division

RSH/som

Ref: ID# 580615

Enc. Submitted documents

c: Requestor
(w/o enclosures)