



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 3, 2017

Ms. Dolina "Dolly" Garcia
Associate General Counsel
University of North Texas System
1155 Union Circle, #310907
Denton, Texas 76203

OR2017-06893

Dear Ms. Garcia:

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# 651394 (UNTHSC PIR No. 001968).

The University of North Texas Health Science Center (the "university") received a request for a written transcript and audio recording related to a specified appeals hearing. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

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 information protected by other statutes. Section 51.971 of the Education Code provides, in pertinent part, the following:

(a) In this section:

¹We assume that 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 that those records contain substantially different types of information than that submitted to this office.

(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:

(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). You state the university is an institution of higher education for purposes of section 61.003 of the Education Code. *See id.* § 51.971(a)(2). You further state a portion of the submitted information pertains to allegations of policy and standards of conduct violations reported to and investigated by the university's Office of Equal Opportunity and Human Resources. Based on these representations, we find the information at issue relates to an investigation conducted under the university's compliance program. *See id.* § 51.971(a)(1).

You seek to withhold a portion of the submitted information under section 51.971(c) of the Education Code. Section 51.971(c)(1) makes confidential information that identifies individuals as complainants, as having sought guidance from a compliance program, or as participants in an investigation conducted under a compliance program. *Id.* § 51.971(c)(1). We understand the information at issue pertains to a compliance investigation. We note the submitted information reflects the investigation concluded in a determination the complaints were substantiated. Accordingly, we find the university must withhold the information we have indicated under section 552.101 of the Government Code in conjunction with section 51.971(c)(1) of the Education Code.² However, you have failed to demonstrate the remaining information at issue would directly or indirectly reveal the identities of the individuals who made the complaints, sought guidance from the university, or participated in the investigation at issue, or of individuals who were alleged to have or may have planned, initiated, or participated in activities that are the subject of the investigations at issue involving allegations that were determined to be unsubstantiated. Consequently, you have failed to show the remaining information at issue is confidential under section 51.971 of the Education Code, and the university may not withhold it under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which 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 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683.

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 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*, along with the statement of the accused. However, the identities of the victims

²As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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 victims and witnesses 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 also note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

The submitted information relates to an investigation into an alleged sexual harassment. Upon review, we determine the submitted information does not contain an adequate summary of the alleged sexual harassment. Because there is no adequate summary of the investigation, the university must generally release any information pertaining to the sexual harassment investigation. However, the information at issue contains the identity of witnesses to the alleged sexual harassment. Accordingly, the university must withhold such information, which we have indicated, under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. *See Ellen*, 840 S.W.2d at 525. However, we find you have not demonstrated any portion of the remaining information at issue is highly intimate or embarrassing and not of legitimate public concern. Thus, the university may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

You state the university does not have the technological capability to redact the information we have indicated from the submitted recording. However, because the university had the ability to copy the submitted audio recording for our review, we believe you have the capability to produce copies of only the non-confidential portions of the audio recording.

In summary, the university must withhold the information we have indicated under section 552.101 of the Government Code in conjunction with section 51.971(c)(1) of the Education Code and the information we have indicated 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 information.³

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.

³We note the requestor has a right of access to some of the information being released in this instance. *See* Gov't Code § 552.023(a) (governmental body may not deny access to person to whom information relates or person's agent on ground that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Thus, if the university receives another request for the same information from a different requestor, the university must again seek a decision from this office.

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,



Tim Neal
Assistant Attorney General
Open Records Division

TN/sdk

Ref: ID# 651394

Enc. Submitted documents

c: Requestor
(w/o enclosures)