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ATTORNEY GENERAL OF TEXAS

May 16, 2017

Ms. Jennifer Burnett
Attorney & Public Information Coordinator
Office of General Counsel
The University of Texas System
201 West 7th Street, Suite 600
Austin, Texas 78701-2901

OR2017-10553

Dear Ms. Burnett:

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# 658112 (OGC #s 174071, 174536, 174538, 174539, 174540, 174541, 174605, and 174689).

The University of Texas System (the "system") received eight requests for information pertaining to a specified investigation involving a named individual. You state you have released some information to the requestors. You claim some of 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 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. 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.

Upon review, we agree the submitted information pertains to a sexual harassment investigation subject to the ruling in *Ellen*. We further find the information at issue includes an adequate summary of the investigation, as well as a statement by the person accused of sexual harassment. Thus, with the exception of the summary and the statement of the accused, the system must withhold the remaining information, which you have marked, under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. The summary and statement of the accused are not confidential under section 552.101 in conjunction with common-law privacy; however, information within the summary and statement 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 system must withhold the identifying information of the victims and witnesses, which the system has marked, within the adequate summary and statement of the accused.¹

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:

¹As our ruling is dispositive, we need not address the system's remaining arguments against disclosure of this information.

(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). The system states it is an institution of higher education for purposes of section 61.003 of the Education Code. *See id.* § 51.971(a)(2). You also state some of the remaining information relates to a completed investigation of allegations of misconduct regarding ethical questions and standards of conduct. You inform us the system conducts an internal review process to assess and ultimately ensure the system complies with all applicable laws, rules, regulations and policies. Thus, we agree the information at issue pertains to the system’s compliance program for the purposes of section 51.971 of the Education Code. *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 system states the investigation at issue concluded in determinations that certain allegations were substantiated and certain allegations were unsubstantiated. Accordingly, you assert release of the information you marked would directly or indirectly reveal the identity of an individual alleged to have committed the activity that is the subject of an unsubstantiated allegation. You inform us the individual has not consented to release of his information. Upon review, we find the system must withhold the information it has marked under section 552.101 of the Government Code in conjunction with section 51.971(c).

In summary, with the exception of the summary and the statement of the accused, the system must withhold the information it has 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 system must withhold the identifying information of the victims and witnesses, which the system has marked, within the adequate summary and statement of the accused. The system must also withhold the information it has marked under section 552.101 of the Government Code in conjunction with section 51.971(c) of the Education Code within the adequate summary and statement of the accused. The remaining information must be released.

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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/som

Ref: ID# 658112

Enc. Submitted documents

c: 6 Requestors
(w/o enclosures)