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ATTORNEY GENERAL OF TEXAS

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Ms. Kirsty Dymond
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OR2019-16488

Dear Ms. Dymond:

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# 768915.

Stephen F. Austin State University (the "university") received a request for four categories of information pertaining to a named individual, university policy, and certain investigations. You state the university will redact information protected by section 552.117(a)(1) of the Government Code pursuant to section 552.024(c)(2) of the Government Code.¹ You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information contains a press release. Section 552.007 of the Government Code provides information that has been voluntarily released to a member of the public may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007; Open Records Decision Nos. 518 at 3

¹Section 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).

²We note the university did not comply with the requirements of section 552.301(e) of the Government Code in providing the information at issue. *See* Gov't Code § 552.301(e). Nonetheless, because section 552.101 of the Government Code and the attorney-client privilege can provide compelling reasons to overcome the presumption of openness, we will consider the applicability of sections 552.101 and 552.107 of the Government Code to the submitted information. *See id.* § 552.302; *see also Paxton v. City of Dallas*, 509 S.W.3d 247 (Tex. 2017).

(1989), 490 at 2 (1988). Accordingly, the university may not withhold previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although you raise section 552.107 of the Government Code, this provision does not expressly prohibit release of the information at issue or make information confidential. *See* Gov't Code § 552.007; Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the university may not withhold the press release, which we marked, under section 552.107 of the Government Code. However, because section 552.101 of the Government Code can make information confidential for the purposes of section 552.007, we will consider the university's argument under this section for the press release.

Next, we note some of the remaining information is subject to section 552.022 of the Government Code. Section 552.022 provides in part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

...

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(1), (15). We note submitted information contains completed investigations subject to section 552.022(a)(1). The university must release this information pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* § 552.022(a)(1). Additionally, some of the submitted information consists of an employee policy, which we note the university posts on its website. Thus, we find the university considers this information to be open to the public under the university's policies, and therefore, is subject to section 552.022(a)(15). The university must release this information pursuant to section 552.022(a)(15), unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(15). Although you seek to withhold the information subject to section 552.022 under section 552.107 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision No. 676 at 6 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived); *see also* ORD 665 at 2. Thus, the university may not withhold this information under section 552.107 of the Government Code. However, 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 assertion of the attorney-

client privilege under Texas Rule of Evidence 503. Further, because section 552.101 protects information made confidential under law, we will consider your arguments under section 552.101 for the submitted information. Additionally, we will consider your argument under section 552.107 for the information not subject to section 552.022.

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 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, 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 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.

However, the right to privacy is a personal right that lapses at death and the common-law right to privacy does not encompass information that relates only to a deceased individual. *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. Civ. App.—Texarkana 1979, writ ref’d n.r.e.); *see also Justice v. Belo Broad. Corp.*, 472 F. Supp. 145, 147 (N.D. Tex. 1979) (“action for invasion of privacy can be maintained only by a living individual whose privacy is invaded” (quoting RESTATEMENT (SECOND) OF TORTS § 652I (1977))); 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 (1981) (“the right of privacy is personal and lapses upon death”).

In this instance, some of the submitted information pertains to sexual harassment investigations that are subject to the ruling in *Ellen*. Upon review, we find the information at issue includes adequate summaries of the investigations, as well as a statement by the person accused of sexual harassment. The summaries and statement of the accused are not confidential under section 552.101 in conjunction with common-law privacy. *See id.* However, information within the summaries and statement identifying the living victim and witnesses must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. *See id.* Therefore, pursuant to section 552.101 in conjunction with common-law privacy and the holding in *Ellen*, with the exception of the adequate summaries and the statement of the accused, the university must withhold the information we marked under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*.³ However, upon review, we find no portion of the remaining information pertains to a sexual harassment investigation subject to the holding in *Ellen*, or is highly intimate or embarrassing and of no legitimate public concern, and the university may not withhold any of the remaining information under section 552.101 of the Government Code on the basis of common-law privacy.

Texas Rule of Evidence 503(b)(1) provides the following:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

- (A) between the client or the client's representative and the client's lawyer or the lawyer's representative;
- (B) between the client's lawyer and the lawyer's representative;
- (C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;
- (D) between the client's representatives or between the client and the client's representative; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if it is 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).

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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. *See* ORD 676 at 6-7. Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. *Id.* Upon a demonstration of all three factors, the entire communication is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege extends to entire communication, including factual information).

The university states some of the information subject to section 552.022 of the Government Code consists of communications between the university and attorneys for the university that were made for the purpose of facilitating the rendition of professional legal services to the university. The university does not indicate it has waived the attorney-client privilege with regard to the communications. Upon review, we find the university may withhold the information we indicated under Texas Rule of Evidence 503.⁴ However, we find the remaining information at issue does not indicate it was communicated for purposes of rule 503. Therefore, the university has not demonstrated the remaining information at issue constitutes privileged attorney-client communications for the purposes of Texas Rule of Evidence 503. Thus, the university may not withhold the remaining information subject to section 552.022 of the Government Code on that basis.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). The elements of the privilege under section 552.107(1) are the same as those discussed above for rule 503. 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. ORD 676 at 6-7. 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*, 922 S.W.2d at 923.

You state some of the remaining information consists of communications between attorneys for the university and university employees that were made for the purpose of providing legal services to the university. You indicate the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the some of the remaining information, which we marked, consists of privileged attorney-client communications the university may generally withhold under section 552.107(1) of the

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

Government Code.⁵ We note, however, some of these otherwise privileged e-mail strings include e-mails received from or sent to non-privileged parties. Furthermore, if the e-mails received from or sent to non-privileged parties are removed from the otherwise privileged e-mail strings in which they appear and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails, which we marked, are maintained by the university separate and apart from the otherwise privileged e-mail strings in which they appear, then the university may not withhold these non-privileged e-mails under section 552.107(1). Further, you have failed to establish how the remaining information at issue constitutes privileged attorney-client communications for the purposes of section 552.107(1). Accordingly, the university may not withhold any of the remaining information under section 552.107(1) of the Government Code.

Section 552.101 of the Government Code also encompasses information protected by other statutes. Section 51.971 of the Education Code provides, in pertinent 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:

(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

⁵As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

(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 state the information at issue pertains to investigations undertaken by the university's compliance program concerning allegations of violations of university policy. We note the allegations were found to be substantiated. Based on these representations, we find the information at issue relates to investigations conducted under the university's compliance program. *See id.* § 51.971(a)(1).

You seek to withhold the remaining information in its entirety under section 51.971. You assert release of the remaining information would directly or indirectly reveal the identities of those individuals who participated in the investigations. We understand none of these individuals have consented to release of their information. We note that, because the allegations were substantiated, the identifying information of the individual who allegedly committed the activities at issue in the investigations is not confidential under section 51.971(c)(2). However, upon review, we find the release of the remaining information would not directly or indirectly identify individuals as complainants or as participants in the investigation. Thus, the university may not withhold any portion of the remaining information under section 552.101 in conjunction with section 51.971(c).

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c).⁶ Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). We are unable to determine whether the personal e-mail addresses within the remaining information at issue, which are located within e-mails communicating official business of the university, belong to university officials or employees. Thus, we rule conditionally. To the extent the e-mail addresses within the remaining information are the

⁶The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision No. 481 (1987), 480 (1987), 470 (1987).

personal e-mail addresses of university officials or employees, or to the extent subsection (c) applies, this information is not subject to section 552.137 and may not be withheld on that basis. *See Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.) (holding personal e-mail addresses of government officials used to conduct official government business are not e-mail addresses of “members of the public” for purposes of Gov’t Code § 552.137(a)). However, to the extent the e-mail addresses within the remaining information are not the personal e-mail addresses of university officials or employees and subsection (c) does not apply, this information is subject to section 552.137 and must be withheld under section 552.137, unless the owners of the e-mail addresses affirmatively consent to their release.

In summary, with the exception of the adequate summaries and the statement of the accused, the university must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy and the ruling in *Ellen*. The university may withhold the information we indicated under Texas Rule of Evidence 503. The university may generally withhold the information we marked under section 552.107(1) of the Government Code; however, the university may not withhold the marked non-privileged e-mails if they are maintained separate and apart from the otherwise privileged e-mail strings in which they appear. To the extent the e-mail addresses within the remaining information are not the personal e-mail addresses of university officials or employees and subsection (c) does not apply, this information is subject to section 552.137 of the Government Code and must be withheld under section 552.137, unless the owners of the e-mail addresses affirmatively consent to their release. 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,



Emily Kurst
Assistant Attorney General
Open Records Division

EK/gw

Ref: ID# 768915

Enc. Submitted documents

c: Requestor
(w/o enclosures)