



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 30, 2019

Mr. Ronny H. Wall  
Senior Associate General Counsel  
The Texas Tech University System  
P.O. Box 4503  
Lubbock, Texas 79409-5031

OR2019-27330

Dear Mr. Wall:

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# 787159.

Texas Tech University (the "university") received a request for information pertaining to specified investigations during a specified time period. You state the university is redacting information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g(a).<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.117, 552.136, and 552.137 of the Government Code.<sup>2</sup> You also state you notified Kerby & Wade, P.C. ("Kerby") of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why

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<sup>1</sup> 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 <https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/open-government/20060725-USDOE-FERPA.pdf>.

<sup>2</sup> We note although you raise section 552.101 of the Government Code in conjunction with constitutional privacy, you make no arguments to support this assertion. Therefore, we assume you have withdrawn your claim that this doctrine applies to the submitted information. *See* Gov't Code §§ 552.301, .302.

information should or should not be released).<sup>3</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>4</sup>

Initially, we note the university seeks to withdraw its request for an open records decision because it asserts the request for information was withdrawn by operation of law when the requestor failed to timely respond to a cost estimate for providing the requested records. Section 552.2615(a) of the Government Code provides if a request for a copy of public information or a request to inspect a paper record will result in the imposition of a charge that exceeds \$40, the governmental body shall provide the requestor with an itemized statement that details all estimated charges. *Id.* § 552.2615(a). Section 552.2615(b) states if the requestor does not respond in writing to an itemized statement as described in section 552.2615(a) within 10 business days after the date the statement is sent to the requestor, the request is considered to have been withdrawn. *Id.* § 552.2615(b). However, we conclude the request for information was not withdrawn by operation of law. *See id.* Therefore, we will consider the exceptions you claim for the requested information.

Next, we note some of the requested information may have been the subject of a previous ruling from this office. In Open Records Letter No. 2018-15490 (2018), this office ruled the university must withhold certain information under section 552.101 of the Government Code in conjunction with section 51.971(c) of the Education Code, but must release the remaining information. We have no indication the law, facts, or circumstances upon which the prior ruling was based have changed. Accordingly, to the extent the requested information is identical to the information previously requested and ruled upon, the university must continue to rely on Open Records Letter No. 2018-15490 as a previous determination and withhold or release the previously ruled upon information in accordance with it. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, to the extent the information in the current request is not encompassed by the prior ruling, we will consider the exception you raise.

We note the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

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<sup>3</sup> As of the date of this letter, we have not received any comments from Kerby explaining why any portion of the submitted information should not be released to the requestor.

<sup>4</sup> 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 that those records contain substantially different types of information than that submitted to this office.

(a) [T]he 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[.]

Gov't Code § 552.022(a)(1). The submitted information consists of completed investigations that are subject to section 552.022(a)(1). The university must release the submitted 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. Although you raise section 552.103 of the Government Code for the submitted information, this section is a discretionary exception to disclosure and does not make information confidential under the Act. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, none of the submitted information may be withheld under section 552.103 of the Government Code. However, because sections 552.101, 552.117, 552.136, and 552.137 of the Government Code make information confidential under the Act, we will address your remaining arguments against disclosure of the submitted information.

Section 552.101 of the Government Code excepts from public 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 that is 1) highly intimate or embarrassing, such that its release 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 (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 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 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 investigations into alleged sexual harassment. Upon review, we determine the submitted investigations in Attachment E-1 contain adequate summaries of the alleged sexual harassment. We also determine some of the submitted investigations in Attachment E-1 contain statements by the persons accused of sexual harassment. The summaries and statements are not confidential under section 552.101 in conjunction with common-law privacy; however, information within the summaries 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*, with the exception of the information we marked for release, the university must withhold the identifying information of the victims and witnesses, which you marked and we marked, within the adequate summaries and statements of the accused. However, we find you have not demonstrated how the information we marked for release within the summaries identifies the victims or witnesses. Accordingly, the information we marked for release within the summaries and statements is not confidential and may not be withheld on that basis. However, because there are adequate summaries, the university must also withhold the remaining information in the sexual harassment investigations in Attachment E-1 under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*.<sup>5</sup>

We note the submitted investigations in Attachment E-2 pertain to sexual harassment investigations that do not contain adequate summaries of the sexual harassment investigations. Because there is no adequate summary of these investigations, the information pertaining to these investigations generally must be released. However, the information at issue contains the identities of the alleged sexual harassment victims and witnesses. Accordingly, we conclude the university must withhold the information you marked, and the additional information we marked, in the information at issue pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy and the holding in *Ellen*.<sup>6</sup> The remaining information at issue does not constitute highly intimate or embarrassing information of no legitimate public interest. Thus, none of the remaining information at issue may be withheld under section 552.101 on this basis.

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

<sup>6</sup> As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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

(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 inform us 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 generally seek to withhold the remaining information at issue in Attachments E-1 and E-2 under section 51.971(c) of the Education Code. Upon review, however, we find you

have failed to demonstrate any of the remaining information is confidential under section 51.971(c). Accordingly, the university may not withhold the remaining information at issue under section 552.101 of the Government Code in conjunction with section 51.971(c) of the Education Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code* § 552.117(a)(1). Upon review, we find the university has failed to demonstrate any of the remaining information pertains to a current or former employee or official of the university. Therefore, the university may not withhold any of the remaining information under section 552.117 of the Government Code.

Section 552.136(b) of the Government Code provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). However, we find you have not demonstrated any of the remaining information consists of a credit card, debit card, or charge card number, or is an access device number used to obtain money, goods, services, or any item of value, or used to initiate the transfer of funds. *See id.* §§ 552.136(a), .301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). Therefore, we find you have failed to demonstrate the applicability of section 552.136 of the Government Code to any of the remaining information and the university may not withhold it on this ground.

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). *See id.* § 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). The remaining e-mail addresses are subject to section 552.137(c). Accordingly, the university may not withhold the remaining e-mail addresses under section 552.137 of the Government Code.

In summary, with the exception of the adequate summaries and statements of the accused, the university must generally withhold Attachment E-1 under section 552.101 of the Government Code with the common-law right to privacy and the holding in *Ellen*; however, with the exception of the information we marked for release, the university must withhold the information you marked and we marked in the adequate summaries and statements of the accused. The university must withhold the information you marked, and the additional

information we marked, in Attachment E-2 pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy and the holding in *Ellen*. The university must release the remaining information.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Ashley Crutchfield  
Assistant Attorney General  
Open Records Division

AC/jxd

Ref: ID# 787158.

Enc. Submitted documents

c: 2 Requestors  
(w/o enclosures)