



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 25, 2020

Mr. Ronny H. Wall
Senior Associate General Counsel
Texas Tech University System
Box 45031
Lubbock, Texas 79409-5031

OR2020-09211

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# 817509.

Texas Tech University (the "university") received two requests for information related to all sexual misconduct allegations filed against university employees during specified periods.¹ You state the university is redacting information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g(a).² You claim the submitted information is excepted from disclosure under section 552.101 of the

¹ The university states it sought and received clarification of the information requested by the first requestor. See Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

² 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>.

Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, you state Exhibit B was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2019-27330 (2019). In response to Open Records Letter No. 2019-27330, a lawsuit was filed against our office. *See J. Doe v. Ken Paxton, Attorney Gen.*, No. D-1-GN-19-007627 (201st Dist. Ct., Travis County, Tex.). Accordingly, with regard to the information at issue in the *J. Doe* lawsuit, we will allow the trial court to resolve the issue of whether the information that is the subject of the pending litigation must be released to the public.³

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.

Exhibit C relates to investigations into alleged sexual harassment. Upon review, we determine the investigations in Exhibit C contain adequate summaries of the alleged sexual harassment. We also determine the investigations in Exhibit C 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. *See Ellen*, 840 S.W.2d at 525. However, because there are adequate summaries, the university must withhold the

³As we are able to make this determination, we need not address the submitted arguments against disclosure of this information.

remaining information, which you marked, pursuant to section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*.

In summary, with regard to the information at issue in the *J. Doe* lawsuit, we will allow the trial court to resolve the issue of whether the information that is the subject of the pending litigation must be released to the public. The university must withhold the information you marked pursuant to 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.

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 <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,

Sean McCormick
Attorney
Open Records Division

SMC/jxd

Ref: ID# 817509

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)