



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 4, 2022

Ms. Cynthia Dean
Public Information Coordinator
Lamar University
P. O. Box 10003
Beaumont, Texas 77710

Ms. Nelly R. Herrera
Vice Chancellor and General Counsel
The Texas State University System
601 Colorado Street
Austin, Texas 78701-2904

OR2022-06577

Dear Ms. Dean and Ms. Herrera:

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# 933206 (PIR# 20211004-001).

Lamar University (the "university") received a request for e-mails sent or received by named employees pertaining to the requestor during a certain time period.¹ You state the university will release some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, portions of which are representative samples.²

¹ The university sought and received clarifications of the information requested. *See* Gov't Code § 552.222 (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) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

² We 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

We note the information submitted as Attachment B is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

(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). Attachment B consists of a completed investigation that is subject to subsection 552.022(a)(1). The university must release the information at issue pursuant to subsection 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 552.111 of the Government Code for some of the information at issue, we note section 552.111 is a discretionary exception and does not make information confidential under the Act. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (governmental body may waive section 552.111). As such, the university may not withhold any portion of Attachment B under section 552.111. However, we will consider your arguments under section 552.101 for this information.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. 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* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “to facilitate the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.*, meaning it was “not intended to be disclosed to third persons other

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.

than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain the confidentiality of a communication has been maintained. 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 v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state Attachment C consists of communications between university attorneys and employees that were made for the purpose of providing legal services to the university. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find attachment C consists of privileged attorney-client communications. Therefore, the university may withhold Attachment C under section 552.107(1) of the Government Code.

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.

In this instance, Attachment B pertains to a sexual harassment investigation and, thus, is subject to the ruling in *Ellen*. Upon review, we find the submitted information includes an adequate summary of this investigation, submitted as Attachment E, as well as a statement by the person accused of sexual harassment. The summary and statement of the accused are not confidential under section 552.101 in conjunction with common-law privacy. *See Ellen*, 840 S.W.2d at 525. Therefore, with the exception of the statement of the accused, the university must withhold Attachment B under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*.³ We note, however, information within the summary and accused's statement that identifies the victims is generally confidential under common-law privacy. *See id.* Therefore, the identifying information of the victims we marked within the summary and the accused's statement must be withheld under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*.

Section 552.101 of the Government Code also encompasses information protected by other statutes, including section 51.971 of the Education Code, which provides, in relevant 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,

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

or participated in an investigation conducted under the compliance program; and

...

(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)(1), (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 remaining information pertains to a completed investigation undertaken by the university's Human Resources Division. You further state the investigation was in response to allegations against a university employee and was initiated in order to assess and ensure compliance with all applicable laws, rules, regulations, and policies. Based on these representations, we find the remaining information relates to an investigation conducted under the university's compliance program. *See id.* § 51.971(a)(1).

The submitted information reflects the investigation concluded in a determination the allegations were substantiated. The university informs us the requestor was the subject of the investigation at issue and has specific knowledge of the incidents at issue. Accordingly, the university asserts release of the remaining information would directly or indirectly identify the individuals seeking guidance from or participating in the compliance program investigations. The university states these individuals have not consented to the disclosure of their identifying information. *See id.* § 51.971(d). Upon review, we agree release of some of the information at issue would directly or indirectly identify individuals as participants in the compliance program investigation. *See id.* § 51.971(c). Accordingly, the university must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 51.971(c)(1) of the Education Code. However, we find the release of the remaining information would not directly or indirectly identify an individual as a complainant or as a participant in the investigation at issue. Thus, the university may not withhold the information under section 552.101 in conjunction with section 51.971(c).

In summary, the university may withhold Attachment C under section 552.107(1) of the Government Code. With the exception of the statement of the accused, which must be released, the university must withhold Attachment B under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. In releasing the summary and the statement of the accused, the university must withhold (1) the identifying information of the victims we marked under section 552.101 in conjunction with common-law privacy and the holding in *Ellen* and (2) the information we marked under section 552.101 of the Government Code in conjunction with section 51.971(c)(1) of the Education Code.

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,

Emily Kunst
Assistant Attorney General
Open Records Division

EK/mo

Ref: ID# 933206

Enc. Submitted documents

c: Requestor
(w/o enclosures)