



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 18, 2022

Mr. Hao Le
General Counsel
Texas Southern University
3100 Cleburne Street, Suite 340
Houston, Texas 77004

OR2022-24784

Dear Mr. Le:

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# 964105.

Texas Southern University (the "university") received a request for complaints, investigation records, disciplinary records, and communications involving a named individual.¹ You state you do not have information responsive to a portion of the request.² You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code.³ We have considered the exception you claim and reviewed the submitted representative sample of information.⁴

¹ You state the university sent the requestor a cost estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615.

² The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

³ We note you may have violated section 552.301 of the Government Code in requesting a ruling from this office. *See* Gov't Code § 552.301(b), (e). Nonetheless, because section 552.101 of the Government Code can provide a compelling reason to overcome the presumption of openness, we will consider its applicability to the submitted information. *See id.* §§ 552.007, .302, .352.

⁴ 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

Initially, we note the United States Department of Education Family Policy Compliance Office has informed this office the Family Educational Rights and Privacy Act (“FERPA”), section 1232g of title 20 of the United States Code, 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.⁵ Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which “personally identifiable information” is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). You have submitted education records for our review. Because our office is prohibited from reviewing these records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records. *See* 20 U.S.C. § 1232g(a)(1)(A). Such determinations under FERPA must be made by the university. However, we will consider your arguments against disclosure of the submitted information.

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes, such as section 51.291 of the Education Code, which provides, in relevant part:

(a) The protections provided by this section apply to:

- (1) an alleged victim of an incident of sexual harassment, sexual assault, dating violence, or stalking reported to a postsecondary educational institution;
- (2) a person who reports to a postsecondary educational institution an incident of sexual harassment, sexual assault, dating violence, or stalking, who sought guidance from the institution concerning such an incident, or who participated in the institution’s investigation of such an incident; and
- (3) a person who is alleged in a report made to a postsecondary educational institution to have committed or assisted in the commission of sexual harassment, sexual assault, dating violence, or stalking if, after completing an investigation, the institution determines the report to be unsubstantiated or without merit.

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.

⁵ A copy of this letter may be found on the Office of the Attorney General’s website at <https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/open-government/20060725-USDOE-FERPA.pdf>.

(b) Unless waived in writing by the person, the identity of a person described by Subsection (a):

(1) is confidential and not subject to disclosure under [the Act]; and

(2) may be disclosed only to:

(A) the postsecondary educational institution to which the report described by Subsection (a) is made as necessary to conduct an investigation of the report;

(B) a law enforcement officer as necessary to conduct a criminal investigation of the report described by Subsection (a); or

(C) a health care provider in an emergency situation, as determined necessary by the institution.

Educ. Code § 51.291(a)-(b). We understand the university is a postsecondary educational institution for purposes of section 51.291. *See id.* § 51.281(3) (defining “postsecondary educational institution” as institution of higher education or private or independent institution of higher education, as those terms are defined by Educ. Code § 61.003). You state the information at issue relates to a completed investigation of alleged sexual harassment conducted by the university’s Office of Title IX. We note the submitted information reveals the investigation at issue did not result in a determination the report of the conduct at issue was unsubstantiated or without merit. Thus, the university may not withhold any portion of the submitted information under section 552.101 of the Government Code in conjunction with section 51.291(a)(3) of the Education Code. Upon review, we find the information we have marked and indicated identifies alleged victims and individuals who reported and participated in the investigation. You do not indicate any of these individuals have consented to the disclosure of their identifying information. *See id.* § 51.291(b). Accordingly, the university must withhold the information we have indicated under section 552.101 of the Government Code in conjunction with sections 51.291(a)(1) and 51.291(a)(2) of the Education Code.⁶ However, we find no portion of the remaining information identifies alleged victims, individuals who reported and participated in the investigation, or individuals who sought guidance from the university concerning the incidents at issue. Therefore, the university may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with section 51.291(a) of the Education Code.

Section 552.101 of the Government Code also encompasses section 51.256 of the Education Code, which provides, in relevant part:

⁶ As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

(a) Unless waived in writing by the alleged victim, the identity of an alleged victim of an incident reported under Section 51.252:

(1) is confidential and not subject to disclosure under [the Act]; and

(2) may be disclosed only to:

(A) persons employed by or under contract with the postsecondary educational institution to which the report is made who are necessary to conduct an investigation of the report or any related hearings;

(B) a law enforcement officer as necessary to conduct a criminal investigation of the report;

(C) the person or persons alleged to have perpetrated the incident, to the extent required by other law; or

(D) potential witnesses to the incident as necessary to conduct an investigation of the report.

Id. § 51.256(a); *see also id.* § 51.252 (listing reporting requirements for employees of a postsecondary educational institution in certain instances). Upon review, we find no portion of the remaining information identifies an alleged victim of an incident reported under section 51.252 of the Education Code. Accordingly, we find the university may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with section 51.256(a) of the Education Code.

You also raise section 552.101 of the Government Code in conjunction with section 3.17 of title 19 of the Texas Administrative Code. Section 3.17 provides:

(a) The protections provided by this section apply to:

(1) an alleged victim;

(2) a person who reports an incident to an institution;

(3) a person who sought guidance from the institution concerning an incident;

(4) a person who participated in the institution's investigation of an incident; or

(5) a person who is alleged in a report made to an institution to have committed or assisted in the commission of sexual harassment, sexual assault, dating violence, or stalking, if after completing an

investigation, the institution determines the report to be unsubstantiated or without merit.

(b) Unless waived in writing by the person, the identity of a person described by Subsection(a):

(1) is confidential and not subject to disclosure under [the Act]; and

(2) may be disclosed only to:

(A) persons employed by or under contract with the postsecondary educational institution to which the report is made who are necessary to conduct an investigation of the report or any related hearings;

(B) a law enforcement officer as necessary to conduct a criminal investigation of the report by persons described by Subsection (a);

(C) a health care provider in an emergency, as determined necessary by the institution;

(D) the person or persons alleged to have perpetrated the incident, to the extent required by other law; and

(E) potential witnesses to the incident as necessary to conduct an investigation of the report and to the extent required by other law.

(c) For the purposes of this section, investigation includes the coordination of the incident response, implementation of interim measures, adjudication of the report, and disclosure by the institution as required under state or federal law.

19 T.A.C. § 3.17. As noted above, the submitted information reveals the investigation at issue did not result in a determination the report of the conduct at issue was unsubstantiated or without merit. Furthermore, we find no portion of the remaining information identifies alleged victims, individuals who reported and participated in the investigation, or individuals who sought guidance from the university concerning the incidents at issue. Accordingly, the university may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with section 3.17 of title 19 of the Texas Administrative Code.

Section 552.101 of the Government Code also 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. However, this office has concluded the public has a legitimate interest in information that relates to public employees and their conduct in the workplace. *See, e.g.*, Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs but in fact touches on matters of legitimate public concern), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), 392 (1982) (reasons for employee's resignation ordinarily not private).

You assert the remaining information at issue is confidential under common-law privacy and the holding in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied). In *Ellen*, the court addressed the applicability of common-law privacy to information relating to an investigation of alleged sexual harassment in the workplace. We note the information at issue does not pertain to a sexual harassment investigation in an employment context for the purposes of *Ellen*. Therefore, the university may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. Further, we find you have not demonstrated any of the remaining information at issue is highly intimate or embarrassing and not of legitimate public concern. Thus, the university may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

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).⁷ *See* Gov't Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website 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 maintained by a governmental entity for one of its officials or employees, or a personal e-mail address belonging to a city employee or official used to conduct official government business. *See id.* § 552.137(c); *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)). Accordingly, to the extent the e-mail addresses within the remaining information belong to members of the public and are not excluded by subsection 552.137(c) of the Government Code, the university must withhold such e-mail addresses under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to

⁷ The 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 Nos. 481 (1987), 480 (1987), 470.

their release. *See* Gov't Code § 552.137(b). However, to the extent an e-mail address within the remaining information at issue is excluded by subsection 552.137(c) or belongs to a university employee or official, the university may not withhold that e-mail address under section 552.137 of the Government Code.

In summary, the university must withhold the information we have indicated under section 552.101 of the Government Code in conjunction with sections 51.291(a)(1) and 51.291(a)(2) of the Education Code. To the extent the e-mail addresses within the remaining information belong to members of the public and are not excluded by subsection 552.137(c) of the Government Code, the university must withhold such e-mail addresses under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong 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 <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,

Tim Neal
Assistant Attorney General
Open Records Division

TN/jm

Ref: ID# 964105

Enc. Submitted documents

c: Requestor
(w/o enclosures)