



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

April 28, 1994

Ms. Priscilla A. Lozano  
The University of Texas System  
Office of General Counsel  
201 West Seventh Street  
Austin, Texas 78701-2981

OR94-188

Dear Ms. Lozano:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (former V.T.C.S. article 6252-17a).<sup>1</sup> Your request was assigned ID# 19868.

The University of Texas at Austin (the "university") received an open records request for, *inter alia*<sup>2</sup>, all of its files pertaining to the "Woodruff Report," which concerns "workload equity" for graduate employees in the College of Liberal Arts. You have submitted to this office as responsive to this request a copy of the report at issue.<sup>3</sup> You contend that the report is a public record except for the "recommendation" portions of the report, which you contend come under the protection of former section 3(a)(11) of the Open Records Act.

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<sup>1</sup>The Seventy-third Legislature repealed article 6252-17a, V.T.C.S. Acts 1993, 73d Leg., ch. 268, § 46, at 988. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

<sup>2</sup>The requestor also sought, among other records which the university did not object to releasing, all university records pertaining to a "food franchise project" at the Texas Union. Although the university originally contended that the franchise records came under the protection of former section 3(a)(4), you have informed a member of our staff that because the competitive bidding process for a franchise holder has concluded, the university no longer intends to withhold these records from the requestor.

<sup>3</sup>This office assumes that the university possesses no other records coming within the ambit of this request. If it does, those records are now presumed to be public. *See* Open Records Decision No. 197 (1978).

Section 552.111 (former section 3(a)(11)) of the Government Code excepts interagency and intraagency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. Open Records Decision No. 615 (1993). The purpose of this section is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). In Open Records Decision No. 615 at 5, this office held that

to come within the [section 552.111] exception, information must be related to the *policymaking* functions of the governmental body. An agency's policymaking functions do not encompass routine internal administrative and personnel matters . . . (Emphasis in original.)

Section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. *Id.* If, however, the factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make separation of the factual data impractical, that information may be withheld. Open Records Decision No. 313 (1982). After reviewing the "recommendation" portions of the report, we have determined that a few of the portions constitute matters of educational policy as opposed to "routine internal administrative and personnel matters." We have marked those portions of the report that you may withhold pursuant to section 552.111; the university must release the remaining information.

The requestor also seeks:

All files pertaining to sexual harassment complaints and formal charges held by the Dean of Students Office, Executive Vice President and provost Gerhard Fonken, Vice Provost Patti Ohlendorf, UT Police, and the Equal Employment Opportunity Office.

You have submitted to this office for review a representative sample of records that reflect sexual harassment complaints filed by students against university employees and other students, complaints filed by employees against other employees, and, in one instance, a complaint filed by a university employee against a student. You contend that these records come under the protection of former sections 3(a)(1), 3(a)(2), 3(a)(14), and 14(e) of the Open Records Act.<sup>4</sup>

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<sup>4</sup>Although you contend that some of these files also come under the protection of section 552.111, the informer's privilege as incorporated into section 552.101, and section 552.103 (former section 3(a)(3)), the "litigation exception," we note that you did not raise these exceptions within the ten days following the university's receipt of the open records request. Because all applicable exceptions to required public disclosure must be raised within the initial ten day time period, *see* Open Records Decision No. 515 (1988)

Section 552.114(a) (former section 3(a)(14)) requires that the university withhold information in a student record at an educational institution funded wholly or partly by state revenue.

Section 552.026 (former section 14(e)) of the Open Records Act provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

The Family Educational Rights and Privacy Act of 1974 (FERPA) provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). When a student has attained the age of eighteen years or is attending an institution of post-secondary education, the student holds the rights accorded by Congress to inspect these records. 20 U.S.C. § 1232g(d). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. 20 U.S.C. § 1232g(a)(4)(A).

For purposes of FERPA, the sexual harassment files constitute "education records" to the extent that they contain information about identifiable students. Further, you state that the requestor has not provided the university with any student's consent to the disclosure of his or her records. However, information must be withheld from required public disclosure pursuant to section 552.114 only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982); 206 (1978); *see also Kneeland v. National Collegiate Athletic Association*, 650 F. Supp. 1076, 1090 (W.D. Tex. 1986) (educational records are public where personally identifiable information is deleted), *rev'd on other grounds*, 850 F.2d 224 (5th Cir. 1988). We have marked the types of information in the records that the university must withhold because they identify or tend to identify particular students, including those students who were accused of sexual harassment. *See* 34 C.F.R. § 99.3; *see also* Open Records Decision No. 224 (1979) (handwritten documents make identity of writer "easily traceable").

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at 6, the university has waived the protection of these exceptions with regard to the sexual harassment complaint files.

You have also submitted for our review documents relating to sexual harassment complaints filed by university employees against other employees, and contend that common-law privacy prohibits disclosure of these records. In Open Records Decision No. 579 (1990), this office held that common-law privacy did not apply to witness names and statements regarding allegations of sexual misconduct. Recently, however, the court in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The *Ellen* court ordered the disclosure of the affidavit of the person accused of the sexual harassment and the summary of the investigation but with the identities of the victims and witnesses deleted from the documents. The court held that the public interest in the matter was sufficiently served by disclosure of such documents and that in this instance "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements." *Id.* at 525. Because some of the complaints at issue in the pending request do not contain a summary of the investigation or cannot be easily de-identified, the application of the *Ellen* decision to these records raises new issues that we have not addressed in an open records decision. We therefore reserve a determination on this question to be answered in a formal open records decision. You may withhold the documents in Exhibits B and C pending the outcome of our decision on this matter.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay  
Assistant Attorney General  
Open Government Section

LRD/RWP/rho

Ref.: ID# 19868  
ID# 19958

Enclosures: Open Records Decision No. 615  
Marked documents

cc: Mr. Robert Ovetz  
P.O. Box 49814  
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(w/o enclosures)