



Office of the Attorney General

State of Texas

December 17, 1996

DAN MORALES
ATTORNEY GENERAL

Mr. J. Robert Giddings
Office of General Counsel
201 West Seventh Street
Austin, Texas 78701-2981

OR96-2419

Dear Mr. Giddings:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 102721.

The University of Texas at El Paso (the "university") received a request for "all sexual harassment charges filed with the EEO/AA from the spring semester of 1990 to the present." You claim that the requested information is excepted from disclosure by sections 552.101 and 552.114 of the Government Code. We have considered the exceptions you claim and have reviewed the sample of documents that you have submitted.¹

Initially, you argue that some of the requested information is excepted from disclosure because it is an education record made confidential by the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, or sections 552.026 and 552.114 of the Government Code. In Open Records Decision No. 634 (1995), this office concluded: (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception.

¹In reaching our conclusion here, 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 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.

In this instance, however, you have submitted to this office a sampling of de-identified information. "Education records" are records that

- (i) contain information directly related to a student; and
- (ii) 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). *See also* Open Records Decision Nos. 462 (1987), 447 (1986). Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982), 206 (1978).² You state that you have redacted the personally identifying information which must be withheld. Since the records that you have submitted are de-identified and do not personally identify any particular student, the material no longer contains information which is confidential under FERPA.

You assert that the de-identified records are excepted from disclosure by common-law privacy under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1.

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 that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "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.*

Based on *Ellen*, the university must withhold the identities of the witnesses to the

²*But see* 20 U.S.C. § 1232g(a)(1)(A), (d) (parent or adult student has affirmative right of access to that student's education records). *See also* Open Records Decision No. 431 (1985) (Open Records Act's exceptions to required public disclosure do not authorize withholding of "education records" from adult student).

alleged harassment and the identity of the alleged victim in the submitted documents. However, we find that the public interest in the statement and identity of the alleged harasser outweighs any privacy interest which he may have in that information. Therefore, the university may not withhold his statement. Thus, if the alleged harasser's identity is not protected by FERPA, the university may not withhold it. As an example, we have marked those portions of the documents that have not been de-identified which the department must withhold under *Ellen and Industrial Foundation* as applied through section 552.101 of the Government Code. We do not believe, however, that the remaining information or the information which you have highlighted is protected from disclosure under section 552.101.

Furthermore, it is possible that some other information within the documents may be confidential under section 552.117 of the Government Code. Therefore, this information, depending on the specific circumstances, may not be released. Section 552.117 of the Government Code excepts from required public disclosure the home addresses, telephone numbers, social security numbers, or information revealing whether a public employee has family members of public employees who request that this information be kept confidential under section 552.024. Section 552.117 requires you to withhold the home telephone number or social security number of a current or former employee or official who requested that this information be kept confidential under section 552.024. See Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold the information of a current or former employee who made the request for confidentiality under section 552.024 after this request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 (1989) at 5.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you questions about this ruling, please contact our office.

Yours very truly,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref: ID# 102721

Enclosures: Marked documents

cc: Mr. Mauro Doaz
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(w/o enclosures)