



November 21, 2002

Ms. Carol Longoria
Office of the General Counsel
University of Texas System
201 West Seventh Street
Austin, Texas 78701-2981

OR2002-6685

Dear Ms. Longoria:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 172622.

The University of Texas System (the "system") received a request for "any and all records and/or information regarding any and all controversies and/or claims related to [a named individual]" during the period he was associated with the system. You claim that the requested information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

The information at issue concerns an investigation of alleged sexual harassment. Section 552.101 of the Government Code encompasses, among other things, the common law right of privacy. For information to be protected by common law privacy it must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976). The *Industrial Foundation* court stated that information is excepted from disclosure if it (1) contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Id.* at 685.

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

¹We assume that the 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.

into allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the accused individual responding to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *Id.* 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*, a governmental body must withhold information that would tend to identify a witness or victim.

The submitted records contain information that we find to be analogous to the summary released in *Ellen*, as well as the accused's statement. You assert that information relating to the alleged sexual harassment must be withheld in its entirety to protect the privacy interests of the students involved because "[t]here is no way to disengage the students involved from the materials collected" and because "the core group of students is so relatively small it is still possible for them to be identified" even if student-identifiable information were removed. We have reviewed the documents at issue and do not believe that release of redacted documents would identify the victim and witnesses involved. Accordingly, the system must release the summary and statement, which we have marked, in accordance with the holding in *Ellen*. However, before releasing these documents, the system must redact the information that we have indicated tends to identify the complainant and witnesses. All other submitted information, including individual complainant and witness statements and other supporting documentary evidence, must be withheld under section 552.101 of the Government Code in accordance with the common law privacy concerns expressed in *Ellen*.²

The summary and the accused's statement also contain personal information of a former system employee. Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, under section 552.117 the system must withhold the employee's home address and telephone numbers, social security number, and any information that reveals whether this employee has family

²We have marked for redaction all student-identifying information in accordance with the common law privacy principles expressed in *Ellen*. Based on our decision on this issue, we need not address your arguments regarding the Family Educational Rights and Privacy Act of 1974 ("FERPA") and section 552.114, because these provisions except information from disclosure only to the extent "reasonable and necessary to avoid personally identifying a particular student" and would afford no greater protection in this instance. *See* Open Records Decision Nos. 332 (1982), 206 (1978); *see also* Open Records Decision No. 539 (1990) (this office generally applies same analysis under section 552.114 and FERPA).

members only if he made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. The system may not withhold this information under section 552.117 if this employee did not make a timely election to keep the information confidential. We have indicated the information in the summary and the accused's statement that you must redact if section 552.117 of the Government Code applies.

To summarize, the department must withhold the submitted information with the exception of the summary and the alleged harasser's statement, which must be released. Prior to releasing the summary and statement, the system must redact the information we have marked that identifies the victim of and witnesses to the alleged sexual harassment. In addition, the system must withhold the information we have marked as being subject to section 552.117 if the employee in question timely elected to keep his personal information confidential.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 172622

Enc. Submitted documents

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(w/o enclosures)