



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 8, 2006

Mr. Renaldo L. Stowers
Associate General Counsel
University of North Texas
P. O. Box 310907
Denton, Texas 76203-0907

OR2006-13253

Dear Mr. Stowers:

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# 264146.

The University of North Texas (the "university") received a request for: (1) all written complaints of discrimination or harassment submitted to the Equal Opportunity Office at the university from January 2003 to the present; (2) all written replies and the results of any investigations of complaints; and (3) investigative reports, including interviews and recommendations based on information gathered during investigations, during the relevant time period. You inform us that you will release a portion of the requested information. However, you claim that portions of the remainder of the requested information are excepted from disclosure under sections 552.026, 552.101, 552.114, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the representative sample of information you have submitted.²

¹Although you did not timely raise section 552.137, this provision constitutes a compelling reason to withhold information, and thus, we will address your argument under this exception. *See* Gov't Code § 552.301.

²We 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.

Initially, we note that a portion of the submitted information consists of education records. Recently, the United States Department of Education Family Policy Compliance Office (the "DOE") informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a) does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.³ 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"). Because the educational authority in possession of the education records is now responsible for determining the applicability of FERPA, we will only address your claimed exceptions for the submitted information.

Next, we address your claim that section 552.101 of the Government Code is applicable to a portion of the submitted information. Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the Americans with Disabilities Act of 1990 (the "ADA"). See 42 U.S.C. §§ 12101 *et seq.* Title I of the ADA provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. Information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his or her job, is to be treated as a confidential medical record as well. See 29 C.F.R. § 1630.14(c); Open Records Decision No. 641 (1996). The federal Equal Employment Opportunity Commission (the "EEOC") has determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." See Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997).

Federal regulations define "disability" for purposes of the ADA as "(1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment." 29 C.F.R. § 1630.2(g). The regulations further provide that

physical or mental impairment means: (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more

³A copy of this letter may be found on the attorney general's website, available at http://www.oag.state.tx.us/opinopen/og_resources.shtml.

of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h). Upon review of your arguments and the information at issue, we find that you have failed to establish that any portion of the submitted information is confidential under the ADA, and therefore none of the information may be withheld under section 552.101 of the Government Code in conjunction with the ADA.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

You state that the names of victims and witnesses of alleged sexual harassment, as well as race and disability discrimination, contained in the submitted investigative documents are excepted from disclosure based on common-law privacy pursuant to the holding in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—1992, writ denied). In *Ellen*, 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.*

You state that you have released an adequate summary of the sexual harassment investigation. Accordingly, we find that the university must withhold the information that

you have marked pertaining to sexual harassment under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. See *Ellen*, 840 S.W.2d at 525. We note, however, that the identity of the individual accused of sexual harassment is not protected by common-law privacy and may not be withheld under section 552.101 on that basis. See Open Records Decision Nos. 438 (1986), 230 (1979), 219 (1978). Further, we note that the remaining information you have marked under *Ellen* pertains to race and disability discrimination. Because this information does not pertain to a sexual harassment investigation, the rationale in *Ellen* is inapplicable, and the university may not withhold any of the remaining information on this basis. Finally, we note that this office has held that there is a legitimate public interest in allegations of public employee misconduct and any investigations concerning such misconduct. See, e.g. Open Records Decision Nos. 444 (1986) (concluding that public has obvious interest in having access to information concerning performances of governmental employees, particularly employees who hold positions as sensitive as those held by members of law enforcement), 405 at 2-3 (1983) (public has interest in workplace conduct of public employee), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom not protected under statutory predecessor to section 552.101). We have marked personal medical information that is considered highly intimate or embarrassing information which must which the university must withhold under section 552.101 of the Government Code in conjunction with common-law privacy. However, none of the remaining information may be withheld on this basis.

We note that a portion of the submitted information may be subject to section 552.117(a)(1) of the Government Code, which 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, the university may withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. You have not indicated whether the employee whose information at issue made an election under section 552.024 to deny access to his personal information prior to the date this request for information was made. However, if the employee made such an election, we conclude that the university must withhold the information that we have marked under section 552.117(a)(1) of the Government Code.

Finally, you claim that section 552.137 of the Government Code protects a portion of the submitted information. 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). See Gov't Code § 552.137(a)-(c). Thus, the university must withhold the e-mail

addresses we have marked under section 552.137, unless the owners of these particular e-mail addresses have affirmatively consented to their release.

In summary, the university must withhold: (1) the marked information under section 552.101 of the Government Code in conjunction with common-law privacy; (2) the marked information under section 552.117 of the Government Code but only if the employee elected to deny access to this information prior to the date the request for information was made; and (3) the marked e-mail addresses under section 552.137 of the Government Code, unless the owners of these particular e-mail addresses have affirmatively consented to their release. The remaining information must be released to the requestor.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Dep't of Pub. 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 Office of the Attorney General 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. 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,



Alix K. Cornett
Assistant Attorney General
Open Records Division

AKC/krl

Ref: ID# 264146

Enc. Submitted documents

c: Mr. Eli Gemini
Eli Gemini Productions
191 Duchess Drive, Apt. 1225
Denton, Texas 76208-6361
(w/o enclosures)