



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 14, 2011

Ms. Jennifer E. Bloom
Assistant General Counsel
University of Houston System
311 E. Cullen Building
Houston, Texas 77204-2028

OR2011-08421

Dear Ms. Bloom:

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# 420486.

The University of Houston (the "university") received a request for (1) the complete report of an investigation of the requestor by a named individual; (2) notes and findings from the named individual and other university offices and departments relating the investigation; and (3) e-mails, faxes, text messages, phone messages, written communications, audio tapes and any information regarding the investigation. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.117, and 552.151 of the Government Code, and privileged under Texas Rule of Evidence 503. You also state release of the requested information may implicate the proprietary interests of DeDe Church & Associates, LLC ("DeDe"). Accordingly, you state, and provide documentation showing, you notified DeDe of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances).* We have considered the exceptions you claim and reviewed the information you have submitted, a portion of which is a representative sample.¹

¹We 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 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 portions of the submitted information, which we have marked, are not responsive to the instant request for information because they were created after the university received the request for information. This ruling does not address the public availability of any information that is not responsive to the request and the university is not required to release such information in response to this request.

Next, we note the United States Department of Education Family Policy Compliance Office has informed this office the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, 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.² 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, among other things, redacted and unredacted education records for our review. Because our office is prohibited from reviewing these education 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 educational authority in possession of the education records. However, we will consider your arguments against disclosure of the submitted information.

Some of the submitted information is made expressly public under section 552.022 of the Government Code, which provides in relevant part as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, the Exhibits 6 through 12 are part of a completed investigation subject to section 552.022(a)(1). The university may only withhold Exhibits 6 through 12 if they are excepted from disclosure under section 552.108 of the Government Code or are expressly made confidential under other law. Although you raise section 552.103 of the Government Code for Exhibits 6 through 12 and section 552.107 for

²A copy of this letter may be found on the Office of the Attorney General's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

Exhibits 8 and 12, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally). As such, sections 552.103 and 552.107 are not “other law” that make information confidential for the purposes of section 552.022. Therefore, the university may not withhold any of Exhibits 6 through 12 under section 552.103 or section 552.107 of the Government Code. We note the Texas Supreme Court has held the Texas Rules of Evidence are “other law” within the meaning of section 552.022(a). *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 for Exhibits 8, 11, and 12. Additionally, sections 552.101, 552.117, 552.137, and 552.151 constitute other laws for section 552.022 purposes. Thus, we will also address the applicability of these sections for the information subject to section 552.022. Further, we will address all of your claimed arguments for the information not subject to section 552.022.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission

of the communication. *Id.* 503(a)(5). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002).

Thus, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under Rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state Exhibits 8 and 12 are communications between attorneys for the university, clients, and client representatives that were made for the purpose of facilitating the rendition of professional legal services to the university. Additionally, you explain the investigation at issue was conducted on behalf of the general counsel. You state Exhibit 11 consists of an investigation summary created by the investigator for the university's general counsel. You also state the confidentiality of the information at issue has been maintained. Therefore, based on your representations and our review, we conclude the university may withhold Exhibits 8, 11, and 12 under Texas Rule of Evidence 503.³

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that (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 (Tex. 1976). 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. 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

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Ellen court held “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.*

Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released under *Ellen*, but the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. *See* Open Records Decision Nos. 393 (1983), 339 (1982). However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of witnesses and victims must still be redacted from the statements. We note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

You state portions of the submitted information consists of an investigation of allegations of a hostile work environment pertaining to a named individual, including allegations of violence in the workplace and sexual harassment. Upon review of the information at issue, we find portions of it pertain to an investigation of sexual harassment and the submitted information contains an adequate summary of the investigation. Thus, the university must withhold the information we have marked in Exhibits 6, 9, and 10 under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. We note portions of the information at issue pertain to investigations of the named individual for hostile work environment and improper interactions with students. You have not demonstrated these portions of the investigation consisted of sexual harassment investigations. Therefore, we find you may not withhold any portion of the remaining responsive information at issue under section 552.101 in conjunction with common-law privacy and holding in *Ellen*.

You claim the remaining responsive information not subject to section 552.022 is excepted from public disclosure under section 552.103 of the Government Code. Section 552.103 provides in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* Concrete evidence to support a claim litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You state the university reasonably anticipated litigation on the date of the request at issue based on the nature of allegations raised in the investigation at issue and the requestor hiring an attorney during the investigation. You also state the university received correspondence from a student alleging sexual harassment and stating the university’s response to the allegation has not been adequate. Additionally, you state the student is working with an attorney. Upon review of your arguments, we find you have failed to adequately demonstrate any concrete steps toward litigation had been taken on the date the request was received. *See* Gov’t Code §§ 552.103(c) (governmental body must demonstrate that litigation was pending or reasonably anticipated on or before the date it received request for information), .301(e)(1)(A) (stating it is governmental body’s burden to establish applicability of claimed exception or otherwise explain why requested information should not be released). Therefore, we find the university may not withhold any portion of the remaining responsive information under section 552.103 of the Government Code.

Next, you claim section 552.107 of the Government Code for Exhibits 4 and 5. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *Id.* § 552.107(1). The elements of the privilege under

section 552.107 are the same as those discussed for Rule 503. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state Exhibits 4 and 5 consists of communications between attorneys for the university, clients, and client representatives that were made for the purpose of facilitating the rendition of professional legal services to the university. You also state the confidentiality of the communications has been maintained. Based on these representations and our review, we agree Exhibits 4 and 5 may generally be withheld under section 552.107(1). However, we note some of the privileged e-mail strings include e-mails with non-privileged parties that are responsive to the request at issue. If these e-mails, which we have marked, exist separate and apart from the otherwise privileged e-mail strings, then the university may not withhold the e-mails with non-privileged parties under section 552.107(1) of the Government Code.

Section 552.151 of the Government Code relates to a public employee's safety and provides:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Gov't Code § 552.151. In this instance, you state "the nature of the investigation, the conclusions of the investigation, the fears expressed by witnesses for their safety, [and] the concern expressed by witnesses relating to [a named individual's] instability . . . make clear that the disclosure of information" at issue would subject the individuals involved in the investigation to a substantial threat of physical harm. Upon review of your arguments and the information at issue, we find you have failed to demonstrate release of the remaining responsive information would subject the individuals at issue to a substantial threat of physical harm. Therefore, we conclude section 552.151 is inapplicable to the remaining responsive information, and the university may not withhold any portion of it under section 552.151.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See id.* § 552.117(a)(1). We note section 552.117 is also applicable to personal cellular telephone numbers provided the

cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. You state one of the individuals whose personal information is at issue timely elected confidentiality under section 552.024. However, we are unable to determine if the remaining individual at issue timely elected confidentiality under section 552.024. Accordingly, to the extent the individuals whose information we have marked timely elected confidentiality, the university must withhold the information we have marked under section 552.117(a)(1). If the individuals at issue did not timely elect confidentiality, then the university may not withhold the information we have marked under section 552.117(a)(1).

Section 552.137 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). The e-mail address we have marked is not specifically excluded by subsection (c). The university must withhold personal e-mail address we have marked under section 552.137 of the Government Code, unless its owner has affirmatively consented to its public disclosure.

Finally, an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from DeDe explaining why any portion of the remaining responsive information should not be released. Therefore, we have no basis to conclude DeDe has a protected proprietary interest in the information at issue. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, third party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). Consequently, the university may not withhold any of the remaining responsive information on the basis of any proprietary interest DeDe may have in the information.

In summary, the university may withhold Exhibits 8, 11, and 12 under Texas Rule of Evidence 503. The university must withhold the information we have marked within Exhibits 6, 9, and 10 under section 552.101 in conjunction with common-law privacy and

the holding in *Ellen*. The university may generally withhold Exhibits 4 and 5 under section 552.107(1); however, if the e-mails we have marked exist separate and apart from the otherwise privileged e-mail strings, then the university may not withhold these e-mails under section 552.107(1) of the Government Code. To the extent the individuals whose information we have marked timely elected confidentiality, the university must withhold the information we have marked under section 552.117(a)(1). If the individuals at issue did not timely elect confidentiality, then the university may not withhold the information we have marked under section 552.117(a)(1). The university must withhold personal e-mail address we have marked under section 552.137 of the Government Code, unless its owner has affirmatively consented to its public disclosure. The remaining responsive information must be released.⁴

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 http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Melanie J. Villars
Assistant Attorney General
Open Records Division

MJV/dls

⁴We note the requestor has a right of access under section 552.023 of the Government Code to some of the information being released. *See* Gov't Code § 552.023(a) (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests). Because such information is confidential with respect to the general public, if the university receives another request for this information from an individual other than this requestor, the university must again seek a ruling from this office.

Ref: ID# 420486

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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