



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 26, 2011

Ms. Neera Chatterjee
Office of General Counsel
University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2011-15742

Dear Ms. Chatterjee:

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# 434297 (OGC #139041) .

The University of Texas at Austin (the "university") received a request for (1) any and all anonymous and complaint letters and BOLO alerts submitted to two named individuals, the College of Liberal Arts Human Resources, the Department of Classics personnel, Human Resource personnel, the Office of the President, and any other university governing office and (2) all anonymous documents or complaints that specifically name the Department of Classics and eight named individuals. You state the university will release some responsive information to the requestor. You also state the university has withheld some information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(g).¹ Additionally, you state the university will redact personal e-mail addresses under

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA 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. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

section 552.137 of the Government Code in accordance with Open Records Decision No. 684 (2009).² You claim the remaining requested information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

Initially, we note the requestor has excluded from her request information that would identify the sender of the requested information. Thus, any such information is not responsive to the present request. We also note you have marked portions of the submitted information as non-responsive. This ruling does not address the public availability of non-responsive information, and the university need not release such information.

Next, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(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). You inform us the submitted information pertains to a completed compliance program investigation. Section 552.022(a)(1) makes this information expressly public unless it is confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Although you seek to withhold this information under section 552.103 and section 552.107, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See 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 Gov't Code § 552.103); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be

²This office issued Open Records Decision No. 684, a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including personal e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

³This letter ruling assumes the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103 and 552.107 are not other laws that make information confidential for the purposes of section 552.022. Therefore, the university may not withhold the information subject to section 552.022 under section 552.103 or section 552.107 of the Government Code. The Texas Supreme Court, however, has held the Texas Rules of Evidence are “other law” within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege is also found under Rule 503 of the Texas Rules of Evidence. Accordingly, we will consider your assertion of the attorney-client privilege under Rule 503 for the information at issue that is subject to section 552.022. In addition, because section 552.101 constitutes other law for purposes of section 552.022, we will address the applicability of this exception to the submitted information.

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* ORD 676 at 6-7.

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 portions of the submitted information, which you have marked, constitute confidential communications between the university's legal counsel, university officials, and university employees that were made in furtherance of the rendition of professional legal services to the university. You also state the communications were intended to be, and have remained, confidential. Based on your representations and our review, we find the university may withhold the information we have marked under Texas Rule of Evidence 503.⁴ However, we note one of the submitted e-mail strings includes a communication with a nonprivileged party. If the communication with the nonprivileged party, which we have marked, exists separate and apart from the e-mail string in which it appears, then the university may not withhold the communication with the non-privileged party under Rule 503 of the Texas Rules of Evidence.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses section 51.971 of the Education Code, which provides:

(a) In this section:

(1) "Compliance program" means a process to assess and ensure compliance by the officers and employees of an institution of higher education with applicable laws, rules, regulations, and policies, including matters of:

(A) ethics and standards of conduct;

(B) financial reporting;

(C) internal accounting controls; or

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure.

(D) auditing.

...

(c) The following are confidential:

(1) information that directly or indirectly reveals the identity of an individual who made a report to the compliance program office of an institution of higher education, sought guidance from the office, or participated in an investigation conducted under the compliance program; and

(2) information that directly or indirectly reveals the identity of an individual as a person who is alleged to have or may have planned, initiated, or participated in activities that are the subject of a report made to the compliance program office of an institution of higher education if, after completing an investigation, the office determines the report to be unsubstantiated or without merit.

(d) Subsection (c) does not apply to information related to an individual who consents to disclosure of the information.

Educ. Code § 51.971(a), (c)–(d). You state the remaining information pertains to a completed compliance investigation concerning ethical questions and standards of conduct of university employees that was undertaken by the university’s Office of the Dean within the College of Liberal Arts, the Office of Human Resources, and the Office of Institutional Equity. You state the investigation was initiated in order to assess and ensure compliance with all applicable laws, rules, regulations, and policies. Upon review, we agree the information at issue relates to an investigation conducted under the university’s compliance program. *See id.* § 51.971(a). You state none of the individuals who made the complaints, participated in the investigation, or were alleged to have participated in the activities subject to the complaints have consented to the disclosure of their identifying information. *See id.* § 51.971(d).

You seek to withhold the remaining information under section 51.971(c). Section 51.971(c)(1) makes confidential information that identifies individuals as complainants, as having sought guidance from a compliance program, or as participants in an investigation conducted under a compliance program. *Id.* § 51.971(c)(1). Section 51.971(c)(2) makes confidential information that identifies individuals alleged to have committed the activities that are the subject of a complaint made to a compliance program office if the office determines the report is unsubstantiated. *Id.* § 51.971(c)(2). You explain releasing the information at issue would directly or indirectly reveal the identity of those individuals making a report to, seeking guidance from, or participating in a compliance

program investigation. Based on your representations and our review, we agree release of some of the remaining information, which we have marked, would directly or indirectly reveal the identity of the individuals who made complaints or participated in the investigation at issue and did not consent to disclosure of their information. Thus, the university must withhold this marked information under section 552.101 of the Government Code in conjunction with section 51.971(c)(1) of the Education Code.

You also state releasing the information at issue would directly or indirectly reveal the identity of the individuals alleged to have committed the activities that are the subject of the investigation. You inform us the investigation concluded in a determination the complaints were “generally unsubstantiated.” Accordingly, if the complaints at issue were determined to be unsubstantiated or without merit, the university must withhold the identity of the individual alleged to have committed the activities being investigated, which we have marked, under section 552.101 of the Government Code in conjunction with section 51.971(c)(2) of the Education Code. We note the requestor is one of the individuals whose information is subject to section 51.971(c). Thus, pursuant to section 51.971(d), we find the requestor has a right of access to her information and it may not be withheld under section 51.971(c). *Cf.* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Furthermore, we find you have failed to demonstrate how the remaining information identifies a complainant, an individual who sought guidance, a participant, or an individual alleged to have committed the activity which is the subject of the complaints for purposes of section 51.971(c). Consequently, no portion of the remaining information may be withheld on that basis.

In summary, the university may withhold the information we have marked under Texas Rule of Evidence 503; however, to the extent the non-privileged e-mail we have marked exists separate and apart from the submitted e-mail string, the university may not withhold it under Rule 503. The university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 51.971(c) of the Education Code. However, if the complaints at issue were determined to be substantiated or with merit, the university may not withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 51.971(c)(2) of the Education Code. The remaining information must be released.⁵

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.

⁵Because the requestor has a special right of access to some of the information being released, the university must again seek a ruling from this office if it receives another request for this information from a different requestor.

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,

A handwritten signature in cursive script that reads "Kirsten Brew".

Kirsten Brew
Assistant Attorney General
Open Records Division

KB/em

Ref: ID# 434297

Enc. Submitted documents

c: Requestor
(w/o enclosures)