



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 5, 2012

Ms. Zeena Angadicheril
Office of the General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701

OR2012-00179

Dear Ms. Angadicheril:

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# 439325 (OGC# 139828).

The University of Texas System (the “system”) received a request for information related to a settlement or a specified incident involving sexual harassment allegations brought against a named individual and a related separation agreement. You represent the system has no information responsive to the portion of the request pertaining to a separation agreement.¹ You state the system will release some responsive information to the requestor. You also state the system is redacting the following information: (1) student identifying information pursuant to the Family Educational Rights and Privacy Act (“FERPA”), section 1232g of

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dism’d); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

title 20 of the United States Code²; (2) the personal information of current and former system employees under section 552.117 of the Government Code as permitted by section 552.024(c) of the Government Code; and (3) e-mail addresses of members of the public under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).³ You claim the remaining requested information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code.⁴ We have considered the exceptions you claim and reviewed the submitted representative sample of information.⁵

Initially, we note you have marked some of the submitted information as non-responsive. In addition, by letter dated December 16, 2011, you submitted additional information, in the form of a summary, for our review. The summary is also not responsive, as it was created after the system received the request for information. *See* Open Records Decision No. 605 (1992) (governmental body has no obligation to compile or prepare new information in response to request) (1992). This ruling does not address the public availability of non-responsive information, and the system is not required to release non-responsive information in response to this request.

²The United States Department of Education Family Policy Compliance Office (the “DOE”) has informed this office 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>.

³Section 552.024(c) of the Government Code authorizes a governmental body to redact, without the necessity of requesting a decision from this office, the home address, home telephone number, emergency contact information, social security number, and family member information of a current or former employee who properly elected to keep this information confidential. *See* Gov't Code § 552.024(c); *see id.* § 552.024(c-1) (requestor may appeal governmental body's decision to withhold information under section 552.024(c) to attorney general), .024(c-2) (governmental body withholding information pursuant to section 552.024(c) must provide certain notice to requestor). In addition, this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general opinion.

⁴Although, you initially raised section 552.136 of the Government Code as an exception to disclosure of the requested information, you have provided no arguments regarding the applicability of this section. Since you have not submitted arguments concerning this exception, we assume that you no longer urge it. *See* Gov't Code §§ 552.301(b), (e), .302.

⁵This 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).

We next note some of 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 some of 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 portions of this information under section 552.107, this section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.107 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the system may not withhold the information subject to section 552.022 under 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 information subject to section 552.022.

We first address section 552.107 for the submitted information that is not subject to required release under section 552.022. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. 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. ORD 676 at 6-7. First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins.*

Exch., 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.*, meaning it was “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).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain the confidentiality of a communication has been maintained. 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 assert the information you have marked consists of privileged attorney-client communications between and among the system’s legal counsel, officials, and employees that were made in furtherance of the rendition of professional legal services to the system. You state the communications were intended to be, and have remained, confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information we have marked. However, you have marked e-mails that reflect they were sent to a non-privileged party. Consequently, to the extent the marked non-privileged e-mails exist separate and apart from the otherwise privileged e-mail strings in which they were submitted, they may not be withheld under section 552.107. However, to the extent the non-privileged e-mails do not exist separate and apart from the strings in which they were submitted, they may be withheld along with the privileged portions of the strings under section 552.107(1) of the Government Code.

Next, we address your claim that some of the information subject to section 552.022(a)(1) is protected by the attorney-client privilege. Rule 503(b)(1) of the Texas Rules of Evidence 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). The elements of the privilege under rule 503 are the same as those discussed for section 552.107. Upon a demonstration of the elements, 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 assert portions of the information subject to section 552.022 constitute confidential communications between system attorneys, officials, and employees that were made in furtherance of the rendition of professional legal services to the system. You state the communications were intended to be, and have remained, confidential. Based on your representations and our review, we find the system has demonstrated that some of the information at issue is privileged. Thus, the system may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. However, we note some of the submitted e-mail strings include communications with a non-privileged party. If the communications with the non-privileged party, which we have marked, exist separate and apart from the otherwise privileged e-mails, then the system may not withhold the communication with the non-privileged party under rule 503 of the Texas Rules of Evidence. However, to the extent the non-privileged communications do not exist separate and apart from the e-mails in which they were submitted, they may be withheld along with the privileged portions of the e-mails under rule 503.

You assert some of the remaining information is excepted from public disclosure under section 552.101 of the Government Code in conjunction with section 51.971 of the Education Code. Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision[,]" and

encompasses information made confidential by other statutes. Gov't Code § 552.101. Section 51.971 provides in relevant part:

(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

(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 represent some of the information subject to section 552.022 pertains to a completed compliance investigation concerning ethical questions and standards of conduct of university employees that was undertaken by the system's Office of Institutional Equity and Workforce Diversity (the "office"). 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 a completed investigation conducted under the system's compliance program. *See id.* § 51.971(a).

You have marked the information you claim is protected 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 contend 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. You explain the individuals who participated in and provided information for the investigation work in a small group. Further, you provide a statement from a supervisor who explains that releasing the submitted information would directly or indirectly reveal the identities of those individuals who participated in the investigation or provided information because the person's statement would reveal his or her involvement in the events at issue. You state that none of the individuals who made the complaint or participated in the investigation have consented to the disclosure of their identifying information. *See id.* § 51.971(d). Based on these representations and our review, we agree that release of portions of the information at issue would directly or indirectly reveal the identity of the individuals who participated in the investigation or provided information. Accordingly, we find the system must withhold the identifying information we have marked under section 552.101 in conjunction with section 51.971(c)(1) of the Education Code.⁶ However, because the office determined the report was substantiated, the identifying information of the individual alleged to have committed the activities that are the subject of the complaint is not confidential under section 51.971. *See id.* § 51.971(c)(2). Further, you have failed to demonstrate how the remaining information at issue identifies an individual who made a report to, sought guidance from, or participated in a compliance program investigation for purposes of section 51.971(c). Consequently, you have failed to show any of the remaining information you seek to withhold is confidential under section 51.971(c) of the Education Code, and it may not be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also 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

⁶As our ruling is dispositive, we do not address your remaining argument against disclosure of this information.

S.W.2d 668, 685 (Tex.1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82.

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, 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 the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *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 sexual harassment, the summary must be released along with the statement of the person accused of sexual harassment, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure. If no adequate summary of the investigation exists, then detailed statements regarding the allegations must be released, but the identities of victims and witnesses must be redacted from the statements. In either event, the identity of the individual accused of sexual harassment is not protected from public disclosure. We note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

Portions of the remaining information relate to a sexual harassment investigation. Upon review of this information, we find it does not contain an adequate summary of this investigation. Because there is no adequate summary, information pertaining to the sexual harassment investigation must be released. However, the system must withhold the identities of the sexual harassment victim and witnesses, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy and the decision in *Ellen*.

In summary, to the extent the marked non-privileged e-mails exist separate and apart from the otherwise privileged e-mail strings in which they were submitted, they may not be withheld under section 552.107(1) of the Government Code or rule 503 of the Texas Rules of Evidence and must be released. However, to the extent the non-privileged e-mails do not exist separate and apart from the strings in which they were submitted, they may be withheld along with the privileged portions of the strings, which we have marked, under

section 552.107(1) of the Government Code or rule 503 of the Texas Rules of Evidence. The system must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 51.971 of the Education Code. The system also must withhold the identities of the sexual harassment victim and witnesses, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy and the decision in *Ellen*. The remaining information must be released to the requestor.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 439325

Enc. Submitted documents

c: Requestor
(w/o enclosures)