



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 13, 2012

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

OR2012-10865

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# 458890 (UT System OGC# 143545).

The University of Texas Southwestern Medical Center (the "university") received a request for (1) all personnel documents concerning the requestor, including handwritten and typed notes pertaining to the requestor's employment and performance at the university; (2) the university's policy regarding the appointment and termination of administrative and professional personnel; and (3) a copy of the document from the university's president authorizing the requestor's termination. You state you do not have any information responsive to items 2 and 3 of the request.¹ You further state you have released most of the requested information responsive to item 1. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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

¹The Act does not require a governmental body to release information that did not exist when it received a request or to create responsive information. See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

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

...

(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 information you have marked pertains to a completed investigation undertaken by the university’s Office of Employee Relations for University Hospitals. You state the investigation was in response to allegations involving university employees and was initiated in order to assess and ensure compliance with all applicable laws, rules, regulations, and policies. Upon review, we agree the submitted information relates to an investigation conducted under the university’s compliance program. *See id.* § 51.971(a).

You seek to withhold the information at issue in its entirety and argue that “merely withholding the names of the individuals involved is not sufficient to ensure the protections afforded” by section 51.971. In support of this argument, you provide a statement from the manager in the Office of Employee Relations who conducted the investigation, which explains that the investigation involved a small subset of individuals, all of whom the requestor is familiar with. The statement further explains that the requestor has specific knowledge of the events under investigation because he was a party to many of these events. The statement asserts that because the requestor has specific knowledge of the individuals and allegations involved in the investigation, release of the information at issue would directly or indirectly reveal the identities of those individuals who participated in the investigation or provided information. The statement further informs us none of these

individuals have consented to release of their information. Upon review, we agree release of portions of the information at issue, which we have marked, would directly or indirectly identify individuals as complainants or as participants in the compliance program investigation. *See id.* § 51.971(c)(1). Accordingly, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 51.971(c)(1) of the Government Code. However, none of 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 of the Education Code. Consequently, you have failed to show how any of the remaining information is confidential under section 51.971 of the Education Code, and it may not be withheld under section 552.101 of the Government Code on that basis.

Section 552.107(1) of the Government Code protects information that comes 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. *See Open Records Decision No. 676 at 6-7 (2002)*. 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. *See 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. *See 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 capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See 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. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). 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 state portions of the submitted information, which you have marked, consist of attorney-client privileged communications between a university attorney and employees of the university in their capacities as clients. You state these communications were made in furtherance of the rendition of professional legal services to the university. You state these communications were intended to be confidential 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 you have marked. Accordingly, the university may withhold the information you have marked under section 552.107(1) of the Government Code.

In summary, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 51.0791 of the Education Code. The university may withhold the information you have marked under section 552.107 of the Government Code. The remaining information must be released.

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,



Kristi L. Wilkins
Assistant Attorney General
Open Records Division

KLW/eb

Ref: ID# 458890

Enc. Submitted documents

c: Requestor
(w/o enclosures)