ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 21, 2013

Ms. Ruth E. Shapiro
Senior Assistant General Counsel
Office of the General Counsel
University of Houston System
311 E Cullen Building
Houston, Texas 77004

OR2013-04679

Dear Ms. Shapiro:

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# 481879 (University File No. IR02536).

The University of Houston System (the "system") received a request for a complete report of a MySafeCampus complaint pertaining to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. You also claim release of a portion of the requested information may implicate the proprietary interests of Business Controls, Inc. d/b/a MySafeCampus ("MySafeCampus"). Accordingly, you notified MySafeCampus of the request 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) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the circumstances). We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note, and you acknowledge, the submitted information pertains to a completed investigation subject to section 552.022(a)(1) of the Government Code. Section 552.022(a) provides in relevant part the following:

> (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 unless made confidential under this chapter or 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). Although you assert Exhibit 5 is excepted under section 552.107 of the Government Code, and Exhibits 4 and 5 are excepted under section 552.111 of the Government Code, these sections are discretionary and do not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under section 552.107 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). Therefore, pursuant to section 552.022(a)(1), the system may not withhold Exhibit 5 under section 552.107 of the Government Code or Exhibits 4 and 5 under section 552.111 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for Exhibit 5. Furthermore, because section 552.101 of the Government Code makes information confidential under the Act, we will address the applicability of this section 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:
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> > (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. *Id.* Upon a demonstration of all three factors, the entire communication is 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state Exhibit 5 constitutes a communication made between privileged parties, the system's General Counsel and an employee with the system's Office of Equal Opportunity Services ("OES"). You state this communication was made for the purpose of facilitating the rendition of professional legal services to the system. You further state that this communication has remained confidential. Based on your representations and our review, we find the system may withhold Exhibit 5 under Texas Rule of Evidence 503.

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

(D) auditing.

(2) "Institution of higher education" has the meaning assigned by Section 61.003.

. . .

(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 inform us the system is an institution of higher education for purposes of section 61.003 of the Education Code. *See id.* § 51.971(a)(2). You also inform us MySafeCampus is a program utilized by the system as a compliance program under section 51.971 of the Education Code. You state the remaining information pertains to an investigation that was conducted by the system's OES in response to allegations of a hostile work environment and racists comments made by a system employee. You further state the investigation concluded in a determination the allegations were "generally unsubstantiated" for purposes of section 51.971(c)(2). Based on your representations, and our review, we find the remaining information relates to an investigation conducted under the system's compliance program. *See id.* 51.971(a)(1).

You state the remaining information identifies individuals as complainants or participants in the compliance program investigation. You state none of the individuals involved have consented to the disclosure of their identifying information. *See id.* § 51.971(d). Upon review, we agree portions of the remaining information directly or indirectly identify individuals as participants in the compliance program investigation or an individual alleged

to have committed the activities that are the subject of the unsubstantiated complaint. However, 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 his 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 individuals requests information concerning himself.) Therefore, the system 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, we find you have failed to demonstrate how the remaining information at issue is confidential under section 51.971(c) of the Education Code, and none of the remaining information may be withheld on this basis.

Section 552.101of the Government Code 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. The types of information considered intimate or 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. *See* 540 S.W.2d 668, 683. We note the work behavior of a public employee and the conditions for the employee's continued employment are generally matters of legitimate public interest not protected by the common-law right of privacy. *See* Open Records Decision Nos. 438 (1986), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under either the constitutional or common-law right of privacy). Upon review, we find you have failed to demonstrate any portion of the submitted information is highly intimate or embarrassing and not of legitimate public interest. Accordingly, the system may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy.

We note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received arguments from MySafeCampus. Thus, MySafeCampus has not demonstrated it has a protected proprietary interest in any of the submitted information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, 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. Accordingly, the system may not withhold any information on the basis of any proprietary interests MySafeCampus may have in the information.

In summary, the system may withhold Exhibit 5 under Texas Rule of Evidence 503. The system must 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.[1]

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,

Thana Hussaini
Assistant Attorney General
Open Records Division

TH/som

Ref: ID# 481879

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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[1]We note the requestor has a special right of access to some of the information being released in this instance. Gov't Code § 552.023 (person or person's authorized representative has special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests). Because such information may be confidential with respect to the general public, if the system receives another request for this information from a different requestor, the system must again seek a ruling from this office.

Mr. Steven Foster
President
Business Controls, Inc.
Dba MySafeCampus
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Littleton, Colorado 80127
(w/o enclosures)