KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action. The ruling and judgment can be viewed in PDF format below.

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 7, 2015

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

Ms. Audra Gonzalez Welter
Attorney & Public Information Coordinator
The University of Texas System
201 West Seventh Street
Austin, Texas 78701

OR2015-13586

Dear Ms. Welter:

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# 570767 (OGC Nos. 161200, 161211).

The University of Texas System (the "system") received two requests from different requestors for seven specified categories of e-mails referenced in the Kroll Report during a specified time period. You state you have redacted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g(a).[1] You also state you will redact information under section 552.117(a)(1) of the Government Code pursuant to section 552.024(c)(2) of the Government Code and personal e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684

[1]The 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 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. The DOE has determined FERPA determinations must be made by the educational authority in possession of the educational records. We have posted a copy of the letter from the DOE on the Attorney General's website at http://www.oag.state.tx.us/open/20060725usdoe.pdf.

(2009).[2] You state you are releasing some information to the requestors. You claim some of the submitted information is not subject to the Act. You also claim some of the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.106, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[3]

Initially, we understand you to assert the information you have marked is not responsive to the present request. This ruling does not address the public availability of the non-responsive information, and the system need not release such information in response to this request.

Next, you contend the information you have marked is not subject to the Act. The Act is applicable only to "public information." *See* Gov't Code §§ 552.002, .021. Section 552.002(a) defines "public information" as information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

> (1) by a governmental body;
>
> (2) for a governmental body and the governmental body:
>
> > (A) owns the information;
> >
> > (B) has a right of access to the information; or
> >
> > (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
>
> (3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

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[2]Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2). Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

[3]We assume that 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.

Id. § 552.002. Thus, virtually all the information in a governmental body's physical possession constitutes public information and is subject to the Act. *Id.*; *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). You inform us the information you have marked consists of personal e-mails that have no connection with the system's business and constitute incidental use of the system's resources. You state the system allows for incidental use of such resources by employees and officials. You further state the use of the system's resources to create and maintain the marked information was *de minimis*. *See* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Based on your representations and our review of the information at issue, we agree the information you have marked does not constitute "information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the system. *See* Gov't Code § 552.002. Therefore, we conclude the information you have marked is not subject to the Act and need not be released in response to the present request for information.

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

> (a) [T]he 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 [.]

Id. § 552.022(a)(1). The submitted responsive information is part of a completed investigation subject to section 552.022(a)(1). The system must release the completed investigation pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. Although you raise sections 552.103, 552.106, 552.107, and 552.111 of the Government Code, these sections are discretionary exceptions to disclosure and do not make information confidential under the Act. 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 waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). Thus, the system may not withhold the submitted information under section 552.103, 552.106, 552.107, or 552.111 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336

(Tex. 2001). Thus, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503. Further, because section 552.101 can make information confidential under the Act, we will address this exception for the information at issue.

Texas Rule of Evidence 503(b)(1) provides the following:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:
>
> > (A) between the client or the client's representative and the client's lawyer or the lawyer's representative;
> >
> > (B) between the client's lawyer and the lawyer's representative;
> >
> > (C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;
> >
> > (D) between the client's representatives or between the client and the client's representative; 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 to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, 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. *See* Open Records Decision No. 676 (2002). 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 communication does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996)

(privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You state the information you have marked relates to communications between system attorneys or their representatives, attorneys for the University of Texas at Austin (the "university") or their representatives, system employees, and university employees. You state the communications at issue were made to provide or seek legal advice on behalf of the system or university. You also state the communications were intended to be confidential and have remained confidential. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to the information you have marked. Thus, the system may withhold the information you have marked under Texas Rule of Evidence 503.

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 of the Government Code also encompasses the doctrine of constitutional privacy, which consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently, and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). You state the information you have marked is confidential under constitutional privacy. Upon review, we find the information at issue falls within the zones of privacy. Accordingly, the system must withhold the identifying information of non-enrolled applicants to the university, which you have marked, under section 552.101 of the Government Code on the basis of constitutional privacy.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the system

must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, the remaining information at issue either pertains to an individual who has been de-identified and whose privacy interests are, thus, protected, or is not highly intimate or embarrassing and of no legitimate public concern. Thus, none of the remaining information at issue may be withheld under section 552.101 on the basis of common-law privacy.

In summary, the system may withhold the information you have marked under Texas Rule of Evidence 503. The system must withhold the identifying information of non-enrolled applicants to the university, which you have marked, under section 552.101 of the Government Code on the basis of constitutional privacy. The system must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The system must release the remaining responsive information.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/dls

Ref: ID# 570767

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

CAUSE NO. D-1-GN-15-003254

THE UNIVERSITY OF TEXAS SYSTEM, *Plaintiff,*	§	IN THE DISTRICT COURT OF
v.	§	201st JUDICIAL DISTRICT
KEN PAXTON, ATTORNEY GENERAL OF TEXAS, *Defendant.*	§	TRAVIS COUNTY, TEXAS

AGREED FINAL JUDGMENT

This is an open records lawsuit brought under the Texas Public Information Act ("PIA"), Texas Government Code chapter 552. All matters in controversy between Plaintiff University of Texas System (the "System") and Defendant Ken Paxton, Attorney General of Texas, have been resolved, and the Parties agree to the entry and filing of this Agreed Final Judgment. *See* Exhibit A (Settlement Agreement).

Pursuant to Tex. Gov't Code § 552.325(d), the Court shall allow a requestor a reasonable period of time to intervene after the Attorney General attempts to notify the requestor of a proposed settlement in an open records lawsuit. The Attorney General represents to the Court and the Court hereby takes judicial notice that, in compliance with Tex. Gov't Code § 552.325(c), the Attorney General sent notice by certified mail to each requestor's last known address on Nov. 13th, 2017, providing reasonable notice of this setting and of each requestor's right to intervene in the suit. *See* Ex. B (proof of mailing). The requestors were informed of the proposed Settlement Agreement under which the System must withhold the information at issue in this lawsuit, as agreed upon by the Parties. The requestors were also informed of the right to intervene in this lawsuit to contest the withholding of the information. Neither of the requestors has informed the Attorney General of the intention to intervene and no plea in intervention has been filed.

After considering the agreement of the Parties and the law, the Court is of the opinion that entry of this Agreed Final Judgment is appropriate, disposing of all claims between the Parties in this suit.

THE COURT THEREFORE FINDS AND ORDERS THAT:

1. The System and the Attorney General have agreed that, in accordance with the PIA and under the facts presented, the information at issue in this suit is confidential and excepted from disclosure under section 552.114(b) of the Texas Government Code (hereinafter, the Excepted Information);

2. The System must withhold the Excepted Information described in Paragraph 1 of this order;

3. The System must release any remaining requested information that was not otherwise determined to be excepted from disclosure by Attorney General Open Records Letter Ruling OR2015-13586, to the extent it has not already done so;

4. All court cost and attorney fees are taxed against the parties incurring the same;

5. All relief not expressly granted is denied; and

6. This Agreed Final Judgment finally disposes of all claims between the District and the Attorney General in this cause and is a final judgment.

Signed this 20 day of December, 2017.

JUDGE PRESIDING

AGREED:

JENNIFER S. JACKSON
State Bar No. 2406004
Assistant Attorney General
Financial Litigation, Tax, and
Charitable Trusts Division
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P.O. Box 12458
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ATTORNEY FOR PLAINTIFF

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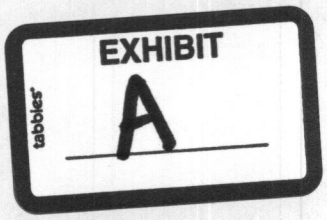
ATTORNEY FOR DEFENDANT



CAUSE NO. D-1-GN-15-003254

THE UNIVERSITY OF TEXAS SYSTEM, *Plaintiff*,	§	IN THE DISTRICT COURT OF
v.	§	201st JUDICIAL DISTRICT
KEN PAXTON, ATTORNEY GENERAL OF TEXAS, *Defendant*.	§	TRAVIS COUNTY, TEXAS

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is made between Plaintiff University of Texas System (the "System") and Defendant Ken Paxton, Attorney General of Texas. The Agreement is made on the terms set forth below.

BACKGROUND

The System received two written requests for information, pursuant to the Texas Public Information Act (PIA), seeking certain emails concerning the Kroll Report—the final report of an investigation concerning the University of Texas's admissions practices. The System requested an open records opinion from the Attorney General as to whether the requested records were excepted from required public disclosure. The Attorney General issued Open Records Letter Ruling OR2015-13586 (the "Letter Ruling") in response to the System's request. The ruling concluded, in part relevant to this lawsuit, that certain portions of the requested records were not excepted from required disclosure and must be released.

The System disputed the Attorney General's determination as to portions of the requested records (the "Information at Issue") and filed suit to challenge the Letter Ruling pursuant to Texas Government Code section 552.324. Texas Government Code section

552.325(c) allows the Attorney General to enter into a settlement agreement under which the Information at Issue may be withheld. The Parties wish to resolve this matter without further litigation.

TERMS

For good and sufficient consideration, the receipt of which is acknowledged, the Parties to the Agreement agree and stipulate that:

1. The System has determined the Information at Issue is either information that constitutes education records as that term is defined by the Family Educational Rights and Privacy Act of 1974 (20 U.S.C. Section 1232g(a)(4)), or is information in a record of an applicant for admission to an educational institution.

2. Based on the System's determination, the Information at Issue is confidential under section 552.114(b) of the Government Code and must be withheld from public disclosure by the System.

3. The System agrees to follow the Letter Ruling with regards to the remaining requested information.

4. The System and the Attorney General agree to the entry of an agreed final judgment, the form of which has been approved by each party's attorney. The Agreed Final Judgment will be presented to the Court for approval, on the uncontested docket, with at least 21 days' prior notice to the requestors. The Agreement will be attached to the Agreed Final Judgment as "Exhibit A."

5. Pursuant to Tex. Gov't Code Section 552.325(c), the Attorney General will notify the requestors of the Agreement and of each requestor's right to intervene to contest the Agreement and the Court's entry of any agreed final judgment in the case.

6. If any requestor intervenes to contest the Agreement, a final judgment entered in this lawsuit will prevail over the Agreement, to the extent of any conflict.

7. Each party to the Agreement will bear its own costs, including attorneys' fees relating to this litigation.

8. The terms of the Agreement are contractual and not mere recitals, and the agreements contained herein and the mutual consideration transferred is to compromise disputed claims fully, and nothing in the Agreement shall be

construed as an admission of fault or liability, all fault and liability being expressly denied by all parties to the Agreement.

9. The System warrants that its undersigned representative is duly authorized to execute the Agreement on its behalf and that its representative has read the Agreement and fully understands it to be a compromise and settlement and release of all claims that the System has against the Attorney General arising out of the matters described herein.

10. The Attorney General warrants that his undersigned representative is duly authorized to execute the Agreement on behalf of the Attorney General and his representative has read the Agreement and fully understands it to be a compromise and settlement and release of all claims that the Attorney General has against the System arising out of the matters described in this Agreement.

11. The Agreement shall become effective, and be deemed to have been executed, on the date on which the last of the undersigned parties sign the Agreement.

UNIVERSITY OF TEXAS SYSTEM

By: _____
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Date: 12·18·17

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Date: 12-19-17