



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

November 29, 2016

Ms. Ana Vieira Ayala  
Assistant General Counsel  
Office of General Counsel  
The University of Texas System  
201 West 7th Street, Suite 600  
Austin, Texas 78701-2901

OR2016-26415

Dear Ms. Ayala:

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# 635593 (OGC# 171721).

The University of Texas System (the "system") received a request for a specified investigation file, documentation on past violations of code of conduct, and a specified personnel file. You state you have released some information. You state you will redact some information in accordance with section 552.1175 of the Government Code, and we understand you will redact some information pursuant to Open Records Decisions No. 670 (2001).<sup>1</sup> You also state you will redact information pursuant to Open Records Decision

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<sup>1</sup>Section 552.1175(f) of the Government Code authorizes a governmental body to redact under section 552.1175(b), without the necessity of requesting a decision from this office, the home addresses and telephone numbers, emergency contact information, dates of birth, social security number, and family member information of certain individuals who properly elect to keep this information confidential. *See* Gov't Code § 552.1175(b), (f). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.1175(h). *See id.* § 552.1175(g), (h). Open Records Decision No. 670 authorizes all governmental bodies to withhold the current and former home addresses and telephone numbers, personal cellular telephone and pager numbers, social security numbers, and family member information of peace officers under section 552.117(a)(2) of the Government Code without the necessity of requesting an attorney general decision. ORD 670 at 6.

No. 684 (2009).<sup>2</sup> You assert some of the submitted information is not subject to the Act. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107 and 552.108 of the Government Code. We have considered the your arguments and reviewed the submitted representative sample of information.<sup>3</sup> We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note the requestor agrees to the redaction of Texas Commission on Law Enforcement identification numbers, criminal history information under section 411.083 of the Government Code, medical records and patient information under section 159.002 of the Occupations Code and polygraph examination reports under section 1703.306 of the Occupations Code. Accordingly, to the extent the requested information contains any such information, it is not responsive to the instant request. This ruling does not address the public availability of any information that is not responsive to the request, and the system need not release such information in response to this request.<sup>4</sup>

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 encompasses information protected by other statutes, such as section 51.971 of the Education Code, which provides, in pertinent 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;

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<sup>2</sup>Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information without the necessity of requesting an attorney general opinion.

<sup>3</sup>We assume 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 those records contain substantially different types of information than that submitted to this office.

<sup>4</sup>As our ruling is dispositive, we need not address your arguments against disclosure of this information.

(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[.]

...

(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)(1), (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 state the information at issue pertains to completed investigations undertaken by the University of Texas at Dallas police department's internal affairs division, and the allegations were found to be substantiated. You state the investigations were conducted in response to allegations against system employees and were initiated in order to assess and ensure compliance with all applicable laws, rules, regulations, and policies. Based on your representations, we find this information relates to investigations conducted under the system's compliance program. *See id.* § 51.971(a)(1).

You seek to withhold a portion of the submitted information pertaining to investigations filed against the requestor's client in its entirety. You inform us only a small subset of individuals were involved in the investigations. You further explain the requestor's client has specific knowledge of the events at issue and the employees involved. Accordingly, you assert release of the information at issue would directly or indirectly identify the individuals seeking guidance from or participating in the compliance program investigations. 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 release of this information would directly or indirectly identify individuals as participants in the compliance program investigation. *See id.* § 51.971(c). Accordingly, the system must withhold the information

you have marked in its entirety under section 552.101 of the Government Code in conjunction with section 51.971(c)(1) of the Education Code.<sup>5</sup>

You also seek to withhold additional information you have marked, which does not involve the requestor's client, pursuant to section 51.971 (c) of the Education Code. You state the information at issue relates to closed compliance matters which resulted in final determinations that the allegations were substantiated. You claim release of the information you have marked would directly or indirectly reveal the identities of those individuals who participated in the investigations. You inform us none of the individuals at issue have consented to release of their information. Based upon these representations, we agree release of the information you have marked would directly or indirectly identify individuals who participated in the compliance program investigations. Thus, the system must withhold the identifying information you have marked under section 552.101 of the Government Code in conjunction with section 51.971(c)(1) of the Education Code.

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. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "to facilitate 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). 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, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). 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.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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,

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<sup>5</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

because the client may elect to waive the privilege at any time, a governmental body must explain that 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).

The system states a portion of the remaining information consists of a communication involving system attorneys and other system employees and officials. The system states the communication was made for the purpose of facilitating the rendition of professional legal services to the system and this communication has remained confidential. Upon review, we find the system has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the system may withhold the information you marked under section 552.107(1) of the Government Code.

Section 552.108(b)(1) of the Government Code excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov’t Code § 552.108(b)(1); *see City of Fort Worth v. Cornyn*, 86 S.W.3d at 327 (Tex. App.—Austin 2002, no pet.) (Gov’t Code 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws). The statutory predecessor to section 552.108(b)(1) protected information that would reveal law enforcement techniques. *See, e.g., Open Records Decision Nos. 531* (1989) (detailed use of force guidelines), 456 (1987) (information regarding location of off-duty police officers), 413 (1984) (sketch showing security measures to be used at next execution). The statutory predecessor to section 552.108(b)(1) was not applicable to generally known policies and procedures. *See, e.g., Open Records Decision Nos. 531* at 2-3 (Penal Code provisions, common-law rules, and constitutional limitations on use of force not protected), 252 at 3 (1980) (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known). You state the information you marked constitutes a police department shift roster maintained by the system’s Office of Director of Police (“ODOP”). You argue release of the submitted shift roster would interfere with law enforcement and compromise the ability of ODOP to secure the system’s campuses and protect the safety and welfare of those campuses. Based on your representations and our review, we agree release of the information you marked would interfere with law enforcement. Accordingly, the system may withhold the information you have marked under section 552.108(b)(1) of the Government Code.

In summary, the system must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 51.971(c)(1) of the Education Code. The system may withhold the information you marked under

section 552.107(1) of the Government Code. The system may withhold the information you have marked under section 552.108(b)(1) of the Government Code.

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](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,



Kelly McWethy  
Assistant Attorney General  
Open Records Division

KSM/eb

Ref: ID# 635593

Enc. Submitted documents

c: Requestor  
(w/o enclosures)