



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

January 4, 2017

Ms. Ana Vieira Ayala  
Assistant General Counsel & Public Information Coordinator  
Office of General Counsel  
The University of Texas System  
201 West 7<sup>th</sup> Street, Suite 600  
Austin, Texas 78701-2901

OR2017-00214

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# 640335 (OGC# 172329).

The University of Texas Southwestern Medical Center (the "university") received a request for forty-five categories of information pertaining to the requestor's employment with the university. You state the university does not maintain some of the requested information.<sup>1</sup> You state you have released some information to the requestor. 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.

Initially, we note you have marked some of the submitted information as non-responsive to the instant request. This ruling does not address the public availability of non-responsive information, and the university is not required to release such information in response to this request.

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

---

<sup>1</sup>The 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 dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

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;

(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 university 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 submitted information pertains to a completed investigation undertaken by the university’s Office of Equal Opportunity. You state the investigation was conducted in response to allegations of gender discrimination against a university employee and was initiated in order to assess and ensure compliance with all applicable laws, rules, regulations, and policies. Based on these representations, we find this information relates to an investigation conducted under the university’s compliance program. *See id.* § 51.971(a)(1).

You seek to withhold the information you have marked in its entirety. You inform us only a small subset of individuals were involved in the investigation at issue, and release of the information would directly or indirectly reveal the identities of those individuals who participated in the investigation. You further explain the requestor has specific knowledge of the events at issue and the employees involved. Accordingly, you assert release of the information you have marked would directly or indirectly identify the individuals seeking guidance from or participating in the compliance program investigation. You inform us none of the individuals at issue have consented to release of their 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 university 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.

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, 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).

You state the information you have marked under section 552.107 consists of confidential communications involving university attorneys and university employees 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 the confidentiality of these communications has been maintained. Based on these representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the university may withhold the information it has marked under section 552.107(1) of the Government Code.

In summary, the university 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. The university may withhold the information you have marked under section 552.107(1) of the Government Code. The university 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](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,



Rahat Huq  
Assistant Attorney General  
Open Records Division

RSH/som

Ref: ID# 640335

Enc. Submitted documents

c: Requestor  
(w/o enclosures)