



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

January 26, 2017

Ms. Cynthia Tynan  
Senior Attorney & Public Information Coordinator  
The University of Texas System  
201 West 7th Street, Suite 600  
Austin, Texas 78701-2901

OR2017-01812

Dear Ms. Tynan:

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# 643260 (OGC# 172490, 172493).

The University of Texas of the Permian Basin (the "university") received two requests from different requestors for information pertaining to a named individual. The university states it will release some information to the requestors. The university states it will redact information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g(a).<sup>1</sup> The university also states it will redact certain information pursuant to section 552.114(d) of the Government Code, information protected by section 552.117(a)(1) of the Government Code pursuant to section 552.024(c)(2) of the Government Code, and

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<sup>1</sup>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 <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

motor vehicle record information under section 552.130(c) of the Government Code.<sup>2</sup> The university claims some of the submitted information is not subject to the Act. The university also claims some of the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.107 of the Government Code. We have considered the university's arguments and reviewed the submitted representative samples of information.<sup>3</sup>

Initially, we note the university claims the submitted University of Texas Electronic Identification Number ("UTEID") is not subject to the Act. In Open Records Letter No. 2014-10050 (2014), this office issued a previous determination to the university stating that UTEIDs do not constitute public information under the Act, and need not be released in response to a request for information under the Act. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001). Thus, pursuant to Open Records Letter No. 2014-10050, the submitted UTEID is not subject to the Act, and need not be released in response this request for information under the Act.

Next, we note the university seeks to withhold public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. In Open Records Letter No. 2016-01245 (2016), this office issued a previous determination authorizing the university to withhold the dates of birth of public citizens under section 552.101 of the Government Code in conjunction with common-law privacy without requesting a decision from this office. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001). Accordingly, the university must withhold all dates of birth of public citizens under section 552.101 of the Government Code in conjunction with common-law privacy in accordance with the previous determination issued to the university in Open Records Letter No. 2016-01245.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101.

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<sup>2</sup>Section 552.114(d) of the Government Code authorizes a governmental body to redact information covered under section 552.114(b) of the Government Code without requesting a decision from this office under the Act. *See* Gov't Code § 552.114(d); *see also id.* § 552.114(b) (information is confidential in student record at educational institution funded wholly or partly by state revenue). 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 id.* § 552.024(c)(2). Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. *See id.* § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e).

<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.

Section 552.101 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. A compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (finding significant privacy interest in compilation of individual's criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of criminal history information). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. Upon review, we find the present requests, in part, require the university to compile unspecified law enforcement records concerning the named individual. Therefore, to the extent the university maintains unspecified law enforcement records depicting the named individual as a suspect, arrestee, or criminal defendant, the university must withhold such information under section 552.101 in conjunction with common-law privacy.

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).

The university states the information it marked consists of communications involving university attorneys and other university employees and officials in their capacities as clients. The university states the communications were made for the purpose of facilitating the rendition of professional legal services to the university and these communications have remained confidential. Upon review, we find the university has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the university may withhold the information it marked under section 552.107(1) of the Government Code.

Section 552.101 of the Government Code also encompasses information protected by other statutes, such as section 51.971 of the Education Code, which provides, in relevant part, the following:

(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 inform us the information you have indicated relates to a compliance investigation that was undertaken by the university. You state the investigation was conducted in response to allegations of university employee misconduct and was 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 an investigation conducted under the university's compliance program. *See id.* § 51.971(a)(1).

You assert release of the information at issue would directly or indirectly identify the individuals seeking guidance from or participating in the compliance program investigation. You state the individuals involved have not 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 university must withhold the information at issue under section 552.101 of the Government Code in conjunction with section 51.971(c)(1) of the Education Code.

In summary, pursuant to Open Records Letter No. 2014-10050, the submitted UTEID is not subject to the Act and need not be released in response to these requests. The university must withhold all dates of birth of private citizens under section 552.101 of the Government Code in conjunction with common-law privacy in accordance with the previous determination issued to the university in Open Records Letter No. 2016-01245. To the extent it exists, the university must withhold any information in the unspecified law enforcement records listing the named individual as a suspect, arrested person, or criminal defendant, under section 552.101 of the Government Code in conjunction with common-law privacy. The university may withhold the information it marked under section 552.107(1) of the Government Code. The university must withhold the information it marked under section 552.101 of the Government Code in conjunction with section 51.971(c)(1) of the Education Code. The remaining information must be released.

Additionally, you ask this office to issue a previous determination permitting the university to withhold the dates of birth of current and former employees of the university when the dates of birth are held in an employment context under section 552.102 of the Government Code. *See* Gov't Code § 552.301(a) (allowing governmental body to withhold information subject to previous determination); ORD 673. We decline to issue such a previous determination at this time. Accordingly, 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,



Kaelan A. Henze  
Assistant Attorney General  
Open Records Division

KAH/eb

Ref: ID# 643260

Enc. Submitted documents

c: 2 Requestors  
(w/o enclosures)