



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

February 3, 2017

Ms. Ana Viera 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

OR2017-02477

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# 644466.

The University of Texas Southwestern Medical Center (the "university") received a request for all records concerning specified incidents. You state you redacted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the submitted arguments and reviewed the representative sample of information.<sup>2</sup> We have also received and considered

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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. A copy of this letter may be found on the Office of the Attorney General's website at <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

<sup>2</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

comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the requestor has excluded from her request the names and identifying information of the complainants, victims, and witnesses in the submitted information. Accordingly, this information is not responsive to the present request for information. The university need not release nonresponsive information in response to this request, and this ruling will not address that information.

Next, you state some of the responsive information was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2016-24873 (2016) and 2016-25025 (2016). In Open Records Letter No. 2016-24873, we determined the university, with the exception of the information subject to section 552.022 and the information we marked for release, may withhold the information it marked under section 552.103; must withhold the information it marked and we marked under section 552.101 of the Government Code in conjunction with section 51.971 of the Education Code and section 161.032 of the Health and Safety Code; must withhold the information we marked under section 552.102(a) of the Government Code; must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy; must withhold the information we marked under section 552.117(a)(1) of the Government Code to the extent the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code; must withhold the information we have marked under section 552.136 of the Government Code; must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure; and must release the remaining responsive information.

In Open Records Letter No. 2016-25025, we determined the university must continue to rely on Open Records Letter No. 2016-24873 as a previous determination and withhold the information at issue, which we indicated, in accordance with that ruling. We determined 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; must withhold the information it marked and we marked under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code; must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy; to the extent the individual whose cellular telephone number we marked timely requested confidentiality under section 552.024 of the Government Code and a governmental body does not pay for the cellular telephone service, must withhold the information we marked under section 552.117(a)(1) of the Government Code; and must release the remaining responsive information. You state the law, facts, and circumstances

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extent those records contain substantially different types of information than that submitted to this office.

on which the prior rulings were based have not changed. Accordingly, the university must continue to rely on Open Records Letter Nos. 2016-24873 and 2016-25025 as previous determinations and withhold or release the information in accordance with those rulings. *See* Open Records Decision No. 673 at 6-7 (2001) (discussing criteria for first type of previous determination).

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 it marked. Thus, the university may withhold the information it marked under section 552.107(1) of the Government Code.<sup>3</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. This section encompasses information protected by other statutes, such as section 51.971 of the Education Code, which provides, in relevant 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; 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

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<sup>3</sup>As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

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). We understand the university is an institution of higher education for purposes of section 61.003 of the Education Code. *See id.* § 51.971(a)(2). The university states the information it marked pertains to completed investigations undertaken by the university's Title IX Coordinator and the investigations are closed. The university states the investigations were conducted in response to allegations of employee misconduct and were 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 investigations conducted under the university's compliance program. *See id.* § 51.971(a)(1).

The university seeks to withhold the remaining information in its entirety. You inform us the information you marked pertains to completed compliance investigations that concluded in determinations that two of the complaints were unsubstantiated and the remaining complaints were substantiated. The university claims only a small subset of individuals were involved in the investigations. Accordingly, the university asserts release of the information at issue would directly or indirectly identify the individuals seeking guidance from or participating in the compliance program investigations. The university states none of these individuals 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 university must withhold the remaining information under section 552.101 of the Government Code in conjunction with section 51.971(c)(1) of the Education Code.

In summary, the university must continue to rely on Open Records Letter Nos. 2016-24873 and 2016-25025 as previous determinations and withhold or release the identical information in accordance with those rulings. The university may withhold the information it marked under section 552.107(1) of the Government Code. The university must withhold the remaining information under section 552.101 of the Government Code in conjunction with section 51.971(c)(1) of the Education 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,

A handwritten signature in black ink, appearing to be 'JW', written over the word 'Sincerely,'.

Jahna Ward  
Assistant Attorney General  
Open Records Division

JW/eb

Ref: ID# 644466

Enc. Submitted documents

c: Requestor  
(w/o enclosures)