



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 26, 2017

Ms. Julie Masek
Assistant General Counsel
Office of General Counsel
Texas A&M University System
301 Tarrow Street, Sixth Floor
College Station, Texas 77840-7896

OR2017-24443

Dear Ms. Masek:

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# 681688 (Ref. No. R001457-081017).

The Texas A&M University System (the "system") received a request for communications sent to or from named individuals. You claim the submitted information is excepted from disclosure under sections 552.101, 552.104, 552.107, 552.116, and 552.1235 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

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 51.951 of the Education Code. Section 51.951 provides in part:

¹We 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.

(a) Information related to the location, purchase price, or sale price of real property purchased or sold by or for an institution of higher education, as defined by Section 61.003 [of the Education Code], is confidential and exempt from disclosure under Chapter 552, Government Code, until a deed for the property is executed. Information that is confidential and exempted from disclosure under this subsection includes an appraisal, completed report, evaluation, investigation conducted for the purpose of locating or determining the purchase or sale price of the property, or any report prepared in anticipation of purchasing or selling real property.

Educ. Code § 51.951. You state the system is an institution of higher education under section 61.003 of the Education Code. You state the information in Exhibit B-2 discusses information regarding the location of real property that will be purchased or sold by the system. You explain the information has not been published and no deed for the property has been executed. Based on your representations and our review, we agree the system must withhold the information in Exhibit B-2 under section 552.101 of the Government Code in conjunction with section 51.951 of the Education Code.

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)). The system states the information it has marked pertains to a prospective applicant to a system university. Upon review, we find some of the information at issue falls within the zones of privacy and implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the system must withhold most of the information you marked under section 552.101 of the Government Code in conjunction with constitutional privacy. However, we conclude the remaining information, which we have marked for release, is not confidential under constitutional privacy, and the system may not withhold it under section 552.101 on that ground.

Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). You represent the information in Exhibit B-3

pertains to a competitive bidding situation where negotiations have not been completed and the agreements have not yet been executed. In addition, you state release of the submitted information would disadvantage the system's ability to negotiate final agreements with terms most favorable to the system. After review of the information at issue and consideration of the arguments, we find the system has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the system may withhold the information in Exhibit B-3 under section 552.104(a).

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 claim the information in Exhibits B-4 and B-5 are protected by section 552.107(1) of the Government Code. You state the information at issue consists of communications between the system attorney and system administrators. You state the communications were

made for the purpose of facilitating the rendition of professional legal services to the system. You further state these communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the system may withhold the information in Exhibits B-4 and B-5 under section 552.107(1) of the Government Code.

Section 552.116 of the Government Code provides:

(a) An audit, working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003 Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074 Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public-disclosure] by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You assert the information in Exhibit B-6 consists of audit working papers pertaining to an audit conducted by the system's internal audit department. We understand the audit was authorized under the Texas Internal Auditing Act, as set forth in chapter 2102 of the Texas Government Code. *See id.* §§ 2102.003 (defining types of audits), .005 (requiring state agencies to conduct internal audits), .007 (relating to duties of internal

auditor). You state the information at issue consists of a preliminary draft of an audit report. Based on your representations and our review, we agree the information in Exhibit B-6 constitutes audit working papers. Therefore, the system may withhold the information in Exhibit B-6 under section 552.116 of the Government Code.

Section 552.1235 of the Government Code excepts from disclosure “[t]he name or other information that would tend to disclose the identity of a person, other than a governmental body, who makes a gift, grant, or donation of money or property to an institution of higher education[.]” *Id.* § 552.1235(a). For purposes of this exception, “institution of higher education” is defined by section 61.003 of the Education Code. *Id.* § 552.1235(c). Section 61.003 defines an “institution of higher education” as meaning “any public technical institute, public junior college, public senior college or university, medical or dental unit, public state college, or other agency of higher education as defined in this section.” Educ. Code § 61.003(8). Because section 552.1235 does not provide a definition of “person,” we look to the definition provided in the Code Construction Act. *See* Gov’t Code § 311.005. “Person” includes a corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity. *Id.* § 311.005(2). You state the information you have marked in Exhibit B-7 identifies donors to the system. Based upon this representation and our review, we agree some of the information at issue identifies persons who are donors to the system. We note, however, the remaining information, which we have marked for release, does not identify or tend to identify donors to the system. Thus, with the exception of the information we have marked for release, the system must withhold the information you have marked and the additional information we have marked under section 552.1235 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c).² *See id.* § 552.137(a)-(c). Upon review, we find the system must withhold the personal e-mail addresses in the remaining information under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

In summary, the system must withhold the information in Exhibit B-2 under section 552.101 of the Government Code in conjunction with section 51.951 of the Education Code. With the exception of the information we have marked for release, the system must withhold of the information you marked under section 552.101 of the Government Code in conjunction with constitutional privacy. The system may withhold the information in Exhibit B-3 under section 552.104(a) of the Government Code. The system may withhold the information in

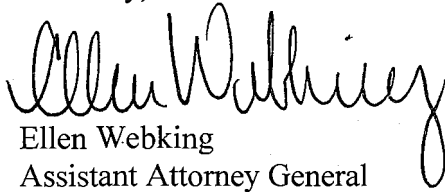
²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Exhibit B-4 under section 552.107(1) of the Government Code. The system may withhold the information in Exhibit B-6 under section 552.116 of the Government Code. With the exception of the information we have marked for release, the system must withhold the information you have marked and the additional information we have marked under section 552.1235 of the Government Code. The system must withhold the personal e-mail addresses in the remaining information under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The system must release the remaining 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,



Ellen Webking
Assistant Attorney General
Open Records Division

EW/tdw

Ref: ID# 681688

Enc. Submitted documents

c: Requestor
(w/o enclosures)