



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

December 12, 2017

Mr. Renaldo Stowers  
Ms. Caitlin Sewell  
Associate General Counsels  
The University of North Texas  
1155 Union Circle #310907  
Denton, Texas 76203

OR2017-28227

Dear Mr. Stowers and Ms. Sewell:

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# 687505 (PIR Nos. 005297 & 005405).

The University of North Texas (the "university") received two requests from the same requestor for (1) all information related to the Kuehne Speaker Series; (2) all information pertaining to a named individual, including communications to or from multiple named university employees; and (3) information pertaining to the investment and management of university funds.<sup>1</sup> You state the university will release some information. You inform us the university will redact information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.<sup>2</sup> You claim some of the submitted information is excepted from disclosure under sections 552.107(1) and 552.1235 of the Government Code. We have

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<sup>1</sup>You state the university received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

<sup>2</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 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 education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>3</sup> We have also received and considered the requestor's comments. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Section 552.1235(a) 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 at issue identifies donors. To the extent the information at issue identifies a donor that has made a gift that has not been publicized, the university must withhold the donor's identifying information under section 552.1235 of the Government Code in relation to that gift. However, to the extent the information at issue identifies a donor who has already been publicly identified for that particular gift, the university may not withhold the donor's identifying information under section 552.1235.

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

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

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.*, 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 at issue constitutes a communication between an attorney for the university and university officials in their capacity as clients that were made for the purpose of providing professional legal services to the university. You state the communication was intended to be confidential and has remained confidential. Based on your representations and our review, we find the information you have marked consists of a privileged attorney-client communication the university may withhold under section 552.107(1) of the Government Code.

You indicate the university will redact the marked employee family member information and cellular telephone numbers under section 552.117(a)(1) of the Government Code.<sup>4</sup> We note the remaining information contains additional information that may be subject to section 552.117. Section 552.117(a)(1) applies to records a governmental body holds in an employment capacity and excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov’t Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. Therefore, a governmental body must withhold information under section 552.117 on behalf of a current or former official or employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the individuals whose information is at issue timely requested confidentiality pursuant to section 552.024 of the

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<sup>4</sup>Section 552.024 authorizes a governmental body to redact from public release a current or former employee’s home address and telephone number, emergency contact information, social security number, and family member information excepted from disclosure under section 552.117(a)(1) without the necessity of requesting a decision from this office under the Act, if the employee timely elected to withhold such information. *See* Gov’t Code §§ 552.024(a)-(c), .117(a)(1).

Government Code, the university must withhold the information we have marked under section 552.117(a)(1) 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). Gov’t Code § 552.137(a)-(c). We are unable to determine whether the remaining personal e-mail addresses, which are located within e-mails communicating official business of the university, belong to university officials or employees. Thus, we must rule conditionally. To the extent the personal e-mail addresses are the personal e-mail addresses of university officials or employees, this information is not subject to section 552.137 and may not be withheld on that basis. See *Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.) (holding personal e-mail addresses of government officials used to conduct official government business are not e-mail addresses of “members of the public” for purposes of Gov’t Code § 552.137(a)). Conversely, to the extent the personal e-mail addresses are not the personal e-mail addresses of the university officials or employees, this information is subject to section 552.137 and must be withheld under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release or subsection (c) applies.

In summary, to the extent the information at issue identifies a donor that has made a gift that has not been publicized, the university must withhold the donor’s identifying information under section 552.1235 of the Government Code in relation to that gift. The university may withhold the information you have marked under section 552.107(1) of the Government Code. If the individuals whose information is at issue timely requested confidentiality pursuant to section 552.024 of the Government Code, the university must withhold the information we have marked under section 552.117(a)(1) of the Government Code. To the extent the personal e-mail addresses in the remaining information are not the personal e-mail addresses of the university officials or employees, the university must withhold this information under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release or subsection (c) applies. The university 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](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 that reads "Cole Hutchison". The signature is written in a cursive style with a large, prominent "C" at the beginning.

Cole Hutchison  
Assistant Attorney General  
Open Records Division

CH/sb

Ref: ID# 687505

Enc. Submitted documents

c: Requestor  
(w/o enclosures)