



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 3, 2019

Ms. Claudene Marshall
Assistant General Counsel
The Texas A&M University System
301 Tarrow Street, 6th Floor
College Station, Texas 77840-7896

OR2019-08954

Dear Ms. Marshall:

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# 757731 (ID Nos. C000053-010919 and C000345-021419).

The Texas A&M University – Kingsville (the "university") received two requests from the same requestor for specified information pertaining to the requestor and a named employee.¹ You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.1235, 552.130, and 552.136 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information, portions of which consist of representative samples.³

¹We note the university sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

²Although you do not raise sections 552.130 and 552.136 of the Government Code in your brief, we understand you to raise these exceptions based on your markings in the documents.

³We 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.

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[.]” Gov’t Code § 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). We agree the university must withhold the submitted name of a donor to the university, which we marked, under section 552.1235 of the Government Code. However, we find the university has failed to demonstrate the remaining information you marked tends to disclose the identity of a donor to the university. Therefore, this information may not be withheld under section 552.1235 of the Government 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. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate 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 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. *See*

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 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 Exhibit B-3 consists of communications between a university attorney and employees that were made for the purpose of providing legal services to the university. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find Exhibit B-3 consists of privileged attorney-client communications. Therefore, the university may withhold Exhibit B-3 under section 552.107(1) of the Government Code.

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. Section 552.101 encompasses information protected by 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.

(e) Information is excepted from disclosure under [the Act] if it is collected or produced:

(1) in a compliance program investigation and releasing the information would interfere with an ongoing compliance investigation[.]

Educ. Code § 51.971 (a), (c)(1), (d)-(e)(1). 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). You state the remaining information pertains to complaints investigated by the university's compliance program. Based on these representations, we find the information at issue relates to an investigation conducted under the university's compliance program. *See id.* § 51.971(a)(1).

The university seeks to withhold portions of the remaining information under section 51.971(c)(1) of the Education Code. Section 51.971(c)(1) makes confidential information that identifies individuals as complainants, as having sought guidance from a compliance program, or as participants in an investigation conducted under a compliance program. *Id.* § 51.971(c)(1). However, subsection (c) does not apply to information related to an individual who consents to disclosure of the information. *Id.* § 51.971(d). The university asserts release of the information it marked "directly or indirectly reveals the identities of persons who participated in an investigation conducted under the compliance program." Additionally, the university does not indicate the individuals at issue have consented to the disclosure of the identifying information. Upon review, we agree release of the information at issue would identify individuals who made a report to the compliance program office or participated in the investigation of the complaint. *See id.* § 51.971(c)(1). Accordingly, with the exception of the information we marked for release, the university must withhold the information you marked, and the additional information we marked, under section 552.101 of the Government Code in conjunction with section 51.971(c)(1) of the Education Code. However, we find you have failed to show the information we marked for release is confidential under section 51.971 of the Education Code, and the university may not withhold it under section 552.101 of the Government Code on that basis.

Additionally, you state a portion of the remaining information pertains to an ongoing investigation undertaken by the university's compliance program. You indicate the investigation is being conducted in response to a complaint filed by a university employee and was initiated in order to assess and ensure compliance with all applicable laws, rules, regulations, and policies. Based on your representations and our review, we agree the information you marked pertains to the university's compliance program for purposes of section 51.971. *See id.* § 51.971(a). You state release of the information at this time would interfere with, and potentially compromise, the ongoing investigation. Accordingly, we conclude the university must withhold the information at issue under section 552.101 of the Government Code in conjunction with section 51.971(e)(1) of the Education Code.

Section 552.130 of the Government Code exempts from disclosure information that relates to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by this state or another state or country. Gov't Code § 552.130(a)(1), (2). Accordingly, the university must withhold the motor vehicle record information you marked under section 552.130 of the Government Code.

Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136. Accordingly, the university must withhold the credit card numbers you marked under section 552.136. The university also seeks to withhold hotel and flight reward numbers under section 552.136. However, you have not explained how these numbers may be used to obtain money, goods, services, or anything of value, or initiate a transfer of funds. Therefore, we find that you have failed to explain how the reward numbers constitute "access device numbers" for purposes of section 552.136, and they may not be withheld on this basis.

Section 552.101 of the Government Code also 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. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. However, we note some of the information at issue pertains to individuals who are de-identified and whose privacy interests are, thus, protected. Upon review, we find the university has failed to demonstrate any of the remaining information is highly intimate or embarrassing and not of legitimate public interest. Accordingly, the university may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the university must withhold the submitted name of a donor to the university, which you marked, under section 552.1235 of the Government Code. The university may

withhold the information you marked under section 552.107(1) of the Government Code. With the exception of the information we marked for release, the university must withhold the information you marked, and the additional information we marked, under section 552.101 of the Government Code in conjunction with section 51.971(c)(1) of the Education Code. The university must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 51.971(e)(1) of the Education Code. The university must withhold the motor vehicle record information you marked under section 552.130 of the Government Code. The university must withhold the credit card numbers you marked under section 552.136 of the Government Code. 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, 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,



Ashley Crutchfield
Assistant Attorney General
Open Records Division

AC/mo

Ref: ID# 757731

Enc. Submitted documents

c: Requestor
(w/o enclosures)