



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 15, 2019

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

OR2019-32331

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# 797054 (PIR# C001778-082819).

Texas A&M International University (the "university") received a request for information related to a specified incident involving the requestor's clients and information involving complaints against university coaches and police department employees during a specified time period. You state the university will release some information. You state the university will redact motor vehicle record information pursuant to section 552.130(c) of the Government Code and dates of birth pursuant to the previous determination issued in Open Records Letter No. 2017-17234 (2017).¹ You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.107, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹ Section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 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). Open Records Letter No. 2017-17234 is a previous determination issued to the university authorizing it 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.

² 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 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 section 51.971 of the Education Code. Section 51.971 of the Education Code 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; 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 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.

(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)-(e)(1). We understand the university is an institution of higher education under section 61.003 of the Education Code. *See id.* §§ 51.971(a)(2), 61.003. You state the information at issue relates to compliance investigations conducted by the university's compliance program. Based on your representations, we find this information relates to investigations conducted under the university's compliance program. *See id.* § 51.971(a)(1).

You assert release of the information you marked in Exhibit B-1 and some of the information you marked in Exhibit B-2 would directly or indirectly reveal the identities of individuals who participated in compliance program investigations. Subsection (c) does not apply to information related to an individual who consents to disclosure of the information. *Id.* § 51.971(d). You inform us the individuals at issue did not consent to release of their information. Upon review, we find some of the information at issue, which we marked, is confidential under section 51.971(c)(1). Therefore, the university must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 51.971(c)(1) of the Education Code. However, you have not established any of the remaining information at issue is confidential under section 51.971(c)(1) and may not withhold it under section 552.101 on that ground.

You assert the remaining information you marked in Exhibit B-2 pertains to a completed university compliance investigation that determined the allegations at issue were unsubstantiated. You assert release of this information would reveal the identities of individuals who are alleged to have or may have planned, initiated, or participated in activities that are the subject of the unsubstantiated allegations. You state the individuals at issue did not consent to release of their information. Upon review, we find some of the information, which we marked, is confidential under section 51.971(c)(2). Therefore, the university must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 51.971(c)(2) of the Education Code. However, you have not established any of the remaining information at issue is confidential under section 51.971(c)(2) and may not withhold it under section 552.101 on that ground.

You inform us the information you marked in Exhibit B-3 under section 51.971(e)(1) was collected or produced in an ongoing university compliance program investigation and asserts release of the information would interfere with that investigation. Based on these representations and our review, we agree 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.

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). 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. *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 stated the information you marked in Exhibit B-4 consists of communications involving attorneys for the university and university employees in their capacities as clients. You state these communications were made in furtherance of the rendition of professional legal services to the university. You state these communications were confidential, and do not indicate the university has waived the confidentiality of the information at issue. Based on these representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to some of the information at issue, which we marked. Accordingly, the university may withhold the information we marked under section 552.107(1) of the Government Code. However, upon review, we find some of the remaining information you seek to withhold has been shared with an individual who the you have not demonstrated is a privileged party. Therefore, we conclude you have failed to establish the remaining information at issue constitutes communications between or among employees and attorneys for the university for the purposes of section 552.107(1). Thus, the university may not withhold the remaining information at issue on that basis.

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must explain how and why the release of the requested

information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). We note section 552.108 is generally not applicable to the records of an internal affairs investigation that is purely administrative in nature and does not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.); *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App. —El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also* Open Records Decision No. 350 at 3-4 (1982). However, you state the information you marked in Exhibits B-5a and B-5b relates to a pending criminal investigation with the university's police department. Based on this representation, we conclude the release of the information at issue would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, section 552.108(a)(1) is applicable to the information at issue.

However, we note section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime: Gov't Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-88; Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of the basic information, which must be released, the university may withhold the information you marked under section 552.108(a)(1) of the Government Code.

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. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we find the information we marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the university must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.

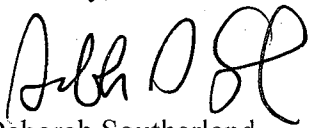
In summary, the university must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 51.971(c)(1) of the Education Code. The university must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 51.971(c)(2) 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 may withhold the information we marked under section 552.107(1) of the Government Code. With the exception of the basic information, which must be released,

the university may withhold the information you marked under section 552.108(a)(1) of the Government Code. The university must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Deborah Southerland
Attorney
Open Records Division

DS/rm

Ref: ID# 797054

Enc. Submitted documents

c: Requestor
(w/o enclosures)