



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 26, 2020

Ms. Cynthia Tynan
Assistant General Counsel & Public Information Officer
The University of Texas System
210 West Seventh Street
Austin, Texas 78701-2901

OR2020-06192

Dear Ms. Tynan:

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# 813788 (OGC# 193775).

The University of Texas at Tyler (the "university") received a request for information pertaining to specified investigations during a stated time period.¹ You state the university will release some of the requested information. You also state the university does not maintain information responsive to a portion of the request.² You claim portions of the submitted information are excepted from disclosure under sections 552.101 and 552.107 of

¹ You state, and provide documentation demonstrating, the university sought and received clarifications of the information requested. See Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (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).

² The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

the Government Code.³ We have considered the exceptions you claim and reviewed the submitted representative sample of information.⁴

Initially, you state some of the submitted information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2020-02434 (2020). In that ruling, we determined the university: (1) must withhold the information it marked under section 552.101 of the Government Code in conjunction with section 51.971(c) of the Education Code; and (2) must release the remaining information. We have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, the university must rely on Open Records Letter No. 2020-02434 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, we will address your arguments for the submitted information that was not at issue in the previous ruling.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov't Code § 552.107(1). 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). 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,

³ We note the university did not comply with the procedural requirements of section 552.301 of the Government Code in requesting this decision. *See* Gov't Code § 552.301(e). Nonetheless, because section 552.107 of the Government Code can provide a compelling reason to overcome the presumption of openness, we will address your argument under this section for the submitted information. *See id.* §§ 552.007, .302, .352.

⁴ 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.

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 you marked consists of communications between university attorneys and officials that were made for the purpose of providing legal services to the university. You state these communications were intended to be, 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. Accordingly, the university may withhold the information you marked under section 552.107(1) of the Government Code.

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 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). You state 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 closed internal compliance investigations conducted by the university's Title IX Office and the university's Office of Compliance. You state the investigations were initiated in response to complaints alleging misconduct by university employees and were conducted in order to assess and ensure compliance with all applicable laws, rules, regulations, and policies. Based on your representations, we find the information at issue relates to investigations conducted under the university's compliance program. *See id.* § 51.971(a)(1).

You assert the information at issue pertains to completed investigations, portions of which are subject to section 51.971(c). 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). Section 51.971(c)(2) makes confidential information that identifies individuals alleged to have committed the activities that are the subject of a complaint made to a compliance program office if the office determines the report is unsubstantiated. *Id.* § 51.971(c)(2). However, subsection (c) does not apply to information related to an individual who consents to disclosure of the information. *Id.* § 51.971(d). You assert the information related to one of the reports at issue, which pertains to a completed investigation in which the university found the allegations to be unsubstantiated, is confidential in its entirety due to the nature of the investigation and the size of the department at issue. Upon review, we find you have failed to demonstrate the information at issue is confidential in its entirety pursuant to section 51.971(c). However, you assert release of the information you marked would directly or indirectly identify individuals making a report to, seeking guidance from, or participating in the compliance program investigations at issue, as well as the identities of the individuals alleged to have participated in the unsubstantiated alleged activities. You state none of the individuals at issue in the investigations have consented to the disclosure of their identifying information. *See id.* Upon review, we agree release of the information you marked would directly or indirectly identify individuals as participants in compliance program investigations or the individuals alleged to have participated in the unsubstantiated alleged activities. *See id.*

§ 51.971(c). Accordingly, the university must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 51.971(c) of the Education Code.

In summary, the university must rely on Open Records Letter No. 2020-02434 as a previous determination and withhold or release the identical information in accordance with that ruling. The university may withhold the information you marked under section 552.107(1) of the Government Code. The university must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 51.971(c) of the Education Code. The remaining information must be released.

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,

A handwritten signature in black ink, appearing to read 'Alex Burks', with a long horizontal flourish extending to the right.

Alexandra C. Burks
Attorney
Open Records Division

ACB/gw

Ref: ID# 813788

Enc. Submitted documents

c: Requestor
(w/o enclosures)