



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 29, 2020

Ms. Kristi Godden
Counsel for Texas Southern University
O'Hanlon, Demerath & Castillo
808 West Avenue
Austin, Texas 78701

OR2020-12182

Dear Ms. Godden:

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# 825179 (ORR# TSU 20-002).

Texas Southern University (the "university") received a request for information pertaining to specified employment agreements and correspondence, as well as contracts or agreements related to admissions review.¹ You state the university does not have information responsive to portions of the request.² You also state the university will release some information. You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code and privileged under rule 192.5 of the Texas Rules of Civil Procedure and rule 503 of the Texas Rules of Evidence. Additionally, you state release of this information may implicate the proprietary interests of Baker Tilly Virchow Krause, LLP; Berkeley Research Group, LLC; Martin, Disiere, Jefferson & Wisdom, LLP; and Thompson & Horton, LLP. Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their right to submit arguments to this office as to why the information

¹You inform us the requestor was required to make a deposit for payment of anticipated costs for the request under section 552.263 of the Government Code, which the university received on February 6, 2020. *See Gov't Code* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date that governmental body receives deposit or bond).

²The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

at issue should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

Initially, you acknowledge, and we agree, the submitted information contains information in a contract relating to the receipt or expenditure of public or other funds by a governmental body that is subject to section 552.022(a)(3) and attorney fee bills that are subject to section 552.022(a)(16) of the Government Code. Section 552.022(a)(16) provides for required public disclosure of "information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[,]" unless the information is confidential under the Act or other law. Gov't Code § 552.022(a)(16). This information must be released unless it is confidential under the Act or other law. You raise rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure for the information at issue. The Texas Supreme Court has held the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" that make information expressly confidential for purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider the university's assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence and the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure for the information at issue. Additionally, you raise section 552.101 of the Government Code for this information, which makes information confidential under the Act. Accordingly, we will also consider the applicability of this exception to the information subject to section 552.022.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any third party explaining why the submitted information should not be released. Therefore, we have no basis to conclude any third party has a protected proprietary interest in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the university may not withhold the submitted information on the basis of any proprietary interest any third party may have in the information.

Texas Rule of Evidence 503(b)(1) provides the following:

³ 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.

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

- (A) between the client or the client's representative and the client's lawyer or the lawyer's representative;
- (B) between the client's lawyer and the lawyer's representative;
- (C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;
- (D) between the client's representatives or between the client and the client's representative; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* Open Records Decision No. 676 (2002). Upon a demonstration of all three factors, the entire communication is confidential under Rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

The university states the information subject to section 552.022 consists of communications involving university attorneys and other university employees and officials. The university states the communications were made for the purpose of facilitating the rendition of professional legal services to the university and these communications have remained confidential. Upon review, we find the university has established the information at issue

constitutes privileged attorney-client communications under rule 503. Thus, the university may withhold the information you marked under Texas Rule of Evidence 503.⁴

The university claims section 552.107 of the Government Code for portions of the remaining information. Section 552.107(1) protects information that comes within the attorney-client privilege. *See* Gov't Code § 552.107(1). The elements of the privilege under section 552.107 are the same as those for rule 503. 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* ORD 676 at 6-7. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege. *See Huie*, 922 S.W.2d at 923.

The university states the information at issue consists of communications involving university attorneys and other university employees and officials. The university states the communications were made for the purpose of facilitating the rendition of professional legal services to the university and these communications have remained confidential. Upon review, we find the university has established the information at issue constitutes privileged attorney-client communications. Thus, the university may withhold the information you marked under section 552.107 of the Government Code.

In summary, the university may withhold the information you marked under Texas Rule of Evidence 503. The university may withhold the information you marked under section 552.107 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 <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,

Kelly McWethy
Assistant Attorney General
Open Records Division

KM/eb

⁴ As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Ref: ID# 825179

Enc. Submitted documents

c: Requestor
(w/o enclosures)