



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 13, 2020

Ms. Countess Dudley
Attorney
Texas Southern University
Office of General Counsel
3100 Cleburne Street
Houston, Texas 77004

OR2020-13625

Dear Ms. Dudley:

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# 824891.

Texas Southern University (the "university") received a request for information related to specified audits during a certain date range and specified spending records. You state the university does not maintain a portion of the requested information.¹ You claim the submitted information is excepted from disclosure under sections 552.103, 552.108, 552.111, and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note the submitted information may have been the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2020-05864 (2020). We also note the information that was at issue in Open Records Letter No.

¹ The Act does not require a governmental body to create or release information that did not exist when a request for information was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dism'd); 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).

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.

2020-05864 is currently the subject of pending litigation (the “pending litigation”) between the university and the Office of the Attorney General. *See Texas S. Univ. v. Ken Paxton, Tex. Attorney Gen.*, No. D-1-GN-20-001703 (261st Dist. Ct., Travis County, Tex.). Accordingly, to the extent the submitted information is subject to the pending litigation, we will allow the trial court to resolve the issue of whether the information that is the subject of the pending litigation must be released to the public. To the extent the submitted information is not encompassed by the pending litigation, we will consider your arguments against disclosure.

Next, we note the submitted information may have been the subject of additional previous requests for information, as a result of which this office issued previous rulings.³ In these rulings, we ruled, in part, the university may withhold portions of the information at issue under Texas Rule of Evidence 503 and section 552.107 of the Government Code. There is no indication the law, facts, and circumstances on which the prior rulings were based have changed. Thus, we conclude the university may continue to rely on the prior rulings as previous determinations and withhold any identical information subject to Texas Rule of Evidence 503 and section 552.107 of the Government Code in accordance with those rulings. *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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, you seek to withhold information under sections 552.103, 552.108, 552.111, and 552.116 of the Government Code that may have been previously ordered released in the prior rulings. Section 552.007 of the Government Code provides, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure, unless its public release is expressly prohibited by law or the information is confidential by law. *See Gov’t Code § 552.007*. We note sections 552.103, 552.108, 552.111, and 552.116 are discretionary exceptions and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *Open Records Decision Nos. 677 (2002)* (governmental body may waive attorney work product privilege under section 552.111), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived), 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also Open Records Decision No. 665 at 2 n.5 (2000)* (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Thus, to the extent any of the information at issue was previously ordered released pursuant to the prior rulings, the university may not now withhold this information under sections 552.103, 552.108, 552.111, and 552.116 of the Government Code. However, sections 552.130 and 552.136 of the Government Code make information

³ The previous rulings are Open Records Letter Nos. 2020-05866 (2020), 2020-05869 (2020), 2020-10772 (2020), and 2020-12182 (2020).

confidential under the Act.⁴ Therefore, we will consider the applicability of these exceptions to the information that the university may have previously released. We will also consider your arguments under sections 552.103, 552.108, 552.111, and 552.116 of the Government Code for the information not subject to the prior rulings.

Section 552.116 of the Government Code provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You state the submitted information consists of audit working papers that were prepared or maintained by the university's Office of Internal Audit and Assurance, established by the university's Board of Regents, who is authorized by section 106.31 of the Education Code to establish and prescribe the duties of departments within

⁴ The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

the university and protect the “best interests and proper operation” of the university. *See* Educ. Code § 106.31. You also state the audit at issue is not yet complete. Based on your representations and our review, we agree the submitted information consists of audit working papers for purposes of section 552.116. Therefore, to the extent the submitted information was not previously ordered released, the university may withhold the submitted information under section 552.116 of the Government Code.⁵

To the extent the submitted information was previously ordered released, we address whether the information is excepted from release under sections 552.130 and 552.136 of the Government Code. Section 552.130 of the Government Code provides information relating to a motor vehicle operator’s license, driver’s license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See* Gov’t Code § 552.130. Thus, the university must withhold the motor vehicle record information we marked under section 552.130 of the Government Code.

Section 552.136 of the Government Code provides, “[n]otwithstanding any other provision of [the Act], 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(b); *see id.* § 552.136(a) (defining “access device”). Accordingly, the university must withhold the information we marked under section 552.136 of the Government Code.

In summary, with regard to any information that is at issue in *Texas S. Univ. v. Ken Paxton, Tex. Attorney Gen.*, we will allow the trial court to resolve the issue of whether the information that is the subject of Open Records Letter No. 2020-05864 must be released to the public. The university may continue to rely on Open Records Letter Nos. 2020-05866, 2020-05869, 2020-10772, and 2020-12182 as previous determinations and withhold any identical information subject to Texas Rule of Evidence 503 and section 552.107 of the Government Code in accordance with those rulings. To the extent the submitted information is not subject to previous rulings, the university may withhold the submitted information under section 552.116 of the Government Code. To the extent the submitted information was previously ordered released, the university must (1) withhold the information we marked under section 552.130 of the Government Code; (2) withhold the information we marked under section 552.136 of the Government Code; and (3) 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

⁵ As our ruling is dispositive, we need not address your remaining arguments against disclosure of the submitted information.

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
Assistant Attorney General
Open Records Division

DS/jlbm

Ref: ID# 824891

Enc. Submitted documents

c: Requestor
(w/o enclosures)