



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

November 5, 2020

Ms. Lauri Schneidau Ruiz  
Senior Assistant General Counsel  
The University of Houston System  
4302 University of Drive, Room 311  
Houston, Texas 77204-2028

OR2020-27887

Dear Ms. Ruiz:

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# 853127 (UH OGC# IR06654).

The University of Houston (the "university") received a request for all communications involving three named university officials made during a specified time period involving seven specified terms. You state some of the requested information is subject to previous determinations. You further claim the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, you state some of the requested information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2018-13722 (2018), 2018-26981 (2018), and 2018-28748 (2018). In Open Records Letter No. 2018-13722, we determined the university (1) may withhold certain information we under section 552.111 of the Government Code and (2) must release the remaining information at issue. In Open Records Letter No. 2018-26981 we determined the university may withhold the submitted information under section 552.107(1) of the Government Code. In Open Records Letter No. 2018-28748 we determined the university may generally withhold the submitted information under section 552.107(1) of the Government Code;

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<sup>1</sup> 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.

however, if the non-privileged e-mails we have marked are maintained by the university separate and apart from the otherwise privileged e-mail strings in which they appear, then the university may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code and must release this information. We have no indication there has been any change in the law, facts, or circumstances on which Open Records Letter No. 2018-26981 was based. Accordingly, the university may continue to rely on Open Records Letter No. 2018-26981 as a previous determination and withhold any 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). Furthermore, we have no indication there has been any change in the law, facts, or circumstances on which Open Records Letter Nos. 2018-13722 and 2018-28748 were based. Accordingly, to the extent the requested information is identical to the information previously withheld in Open Records Letter Nos. 2018-13722 and 2018-28748, the university may continue to rely on Open Records Letter Nos. 2018-13722 and 2018-28748 as previous determinations and withhold any identical information in accordance with those rulings. *See id.*

However, we note you now seek to withhold information under section 552.107 of the Government Code that may have been previously ordered released in Open Records Letter Nos. 2018-13722 and 2018-28748. 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 under law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the university may not withhold previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although you raise section 552.107 of the Government Code for this information, this section is a discretionary exception to disclosure and does not prohibit the release of information or make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, to the extent the university has previously released the information at issue, the university may not now withhold the information that was previously released in Open Records Letter Nos. 2018-13722 and 2018-28748 under section 552.107 of the Government Code. To the extent the information at issue has not been previously ruled upon, we will address your arguments against disclosure.

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, 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 submitted information consists of communications between university attorneys, university officials, and university employees. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the university. You further state these communications were intended to be confidential 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. Thus, to the extent the information at issue has not been previously ruled upon, the university may withhold the submitted information under section 552.107(1) of the Government Code.

In summary, the university may continue to rely on Open Records Letter No. 2018-26981 as a previous determination and withhold any identical information in accordance with that ruling. To the extent the requested information is identical to the information previously withheld in Open Records Letter Nos. 2018-13722 and 2018-28748, the university may continue to rely on Open Records Letter Nos. 2018-13722 and 2018-28748 as previous determinations and withhold any identical information in accordance with those rulings. To the extent the university has previously released the information at issue, the university may not now withhold the information that was previously released in Open Records Letter Nos. 2018-13722 and 2018-28748 under section 552.107 of the Government Code and must release any identical information. To the extent the information at issue has not been

previously ruled upon, the university may withhold the submitted information under section 552.107(1) of the Government Code.

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,

Tim Neal  
Assistant Attorney General  
Open Records Division

TN/rm

Ref: ID# 853127

Enc. Submitted documents

c: Requestor  
(w/o enclosures)