



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 4, 2011

Ms. Tammye Curtis-Jones
Associate General Counsel
Texas Southern University
3100 Cleburne Avenue
Houston, Texas 77004

OR2011-00170

Dear Ms. Curtis-Jones:

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# 404798.

Texas Southern University (the "university") received a request for twelve categories of information pertaining to the requestor and the university's School of Pharmacy comprehensive exam.¹ You state you will release some of the responsive information to the requestor with redactions made pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107 and 552.122 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

¹You note that the university received a clarification of the information requested. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²Although you raise section 552.026 of the Government Code as an exception to disclosure, we note that section 552.026 is not an exception to disclosure. Rather, section 552.026 provides that the Act does not require the release of information contained in education records except in conformity with the Family Educational Rights and Privacy Act of 1974 ("FERPA"). Gov't Code § 552.026.

Initially, we note a portion of the submitted information was created after the request was received. This information, which we have marked, is not responsive to the instant request for information. This ruling does not address the public availability of non-responsive information, and the university is not required to release non-responsive information in response to this request.

We next note the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.³ Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). The submitted information includes unredacted education records. Because our office is prohibited from reviewing these records to determine whether appropriate redactions under FERPA should be made, we will not address the applicability of FERPA to any of the submitted records. Such determinations under FERPA must be made by the educational authority in possession of such records. We will, however, address the applicability of the claimed exceptions to the submitted information.

Section 552.122 of the Government Code exempts from required public disclosure "a test item developed by a . . . governmental body[.]" Gov't Code § 552.122(b). In Open Records Decision No. 626 (1994), this office determined the term "test item" in section 552.122 includes "any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated," but does not encompass evaluations of an employee's overall job performance or suitability. ORD 626 at 6. The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); ORD 626 at 8.

You seek to withhold a portion of the submitted information under section 552.122. You state the release of the requested comprehensive examination, including the test questions and corresponding answers, would compromise the use of questions in future examinations. Upon review, we agree most of the information in Tab B qualifies as test items under section 552.122(b) of the Government Code. Thus, this information is generally protected under section 552.122. However, we find the remaining information you seek to withhold,

³A copy of the letter from the DOE to this office may be found on the Office of the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

which includes examination cover pages and a space for comments, does not contain examination questions, nor does it provide any indication of the nature or content of the examination questions. Therefore, we find this information, which we have marked for release, is not protected under section 552.122 and may not be withheld on that basis. Accordingly, except for the information we have marked for release, the university may withhold the information in Tab B under section 552.122(b).

You raise section 552.107 of the Government Code for the information in Tab C. Section 552.107(1) of the Government Code protects information that comes 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. 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 "for the purpose of facilitating 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 Texas 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1)(A)-(E). 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.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of 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, no pet.). 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 that the information in Tab C constitutes communications between university attorneys and university faculty that were made for the purpose of providing legal advice to the university. You indicate that these communications 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 in Tab C under section 552.107 of the Government Code.

In summary, the university may withhold the information in Tab B under section 552.122 of the Government Code, except as we have marked for release. The university may withhold the information in Tab C under section 552.107 of the Government Code.⁴

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 http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 404798

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure.