



February 12, 2015

Ms. Audra Gonzalez Welter
Attorney & Public Information Coordinator
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2015-02799

Dear Ms. Welter:

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# 554789 (OGC# 159408, 159409, and 159411).

The University of Texas Medical Branch (the "university") received three requests from the requestor and his attorney for information pertaining to the investigation of the requestor. The university states it is redacting some information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ The university informs us it will release some of the requested information, but claims some of the submitted information is excepted from disclosure under sections 552.101, 552.107,

¹The 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. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

and 552.117 of the Government Code. We have considered the claimed exceptions and reviewed the submitted representative sample of information.²

Initially, the university acknowledges, and we agree, it failed to comply with the procedural requirements of section 552.301 of the Government Code regarding the first request, which the university received on October 31, 2014. Generally, a governmental body's failure to comply with section 552.301 results in the waiver of the claimed exceptions. *See generally* Gov't Code § 552.302. However, sections 552.101 and 552.117 of the Government Code are mandatory exceptions that cannot be waived by the university's failures under section 552.301 for the information.³ Therefore, we will consider the university's arguments under these exceptions for the information responsive to the first request, as well as the university's other arguments for the remaining information.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. *See id.* § 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. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate 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. *See* 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. *See 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 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). 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. Finally, the attorney-client privilege applies only to a confidential communication, meaning it was "not intended to be disclosed to third persons other than

²We 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.

³We note the university does not assert any of the information responsive to the first request is exempted from disclosure under section 552.107 of the Government Code.

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. *See 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 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. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You assert the information you have marked under section 552.107 consists of or documents confidential communications between attorneys for and employees of the university that were made for the purpose of rendering professional legal advice. You also assert the communications were intended to be confidential and their confidentiality has been maintained. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to this information. Therefore, the university may withhold the information you have marked under section 552.107(1) of the Government Code.⁴

The university asserts some of the remaining information is excepted from disclosure under section 552.101 of the Government Code, which 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 section 51.971 of the Education Code, which provides, in relevant part, the following:

(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.

⁴As our ruling is dispositive, we do not address your other arguments to withhold this information.

(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.

(e) Information is excepted from disclosure under [the Act] if it is collected or produced:

(1) in a compliance program investigation and releasing the information would interfere with an ongoing compliance investigation[.]

Educ. Code § 51.971(a), (c)-(e)(1). You explain the university is an institution of higher education for purposes of section 61.003 of the Education Code. *See id.* § 51.971(a)(2). You state the submitted information pertains to a concluded compliance investigation by the university's Office of Title IX Compliance and Human Resources Department. You also state the investigation was conducted in response to allegations concerning a university employee and was initiated 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 an investigation conducted under the university's compliance program. *See id.* § 51.971(a)(1).

You inform us the remaining information is part of a completed compliance investigation that concluded in a determination that the complaints were substantiated. You assert the remaining information you have marked under section 51.971 would directly or indirectly

reveal the identities of those individuals who made the complaint, sought guidance from the compliance program office, or participated in the investigation. *See id.* § 51.971(c)(1). You inform us these individuals have not consented to release of their information. Upon review, we find some of the information you have marked under section 51.971 neither directly nor indirectly reveals the identities of the individuals at issue nor pertains to individuals who made the complaint, sought guidance from the compliance program office, or participated in the investigation, or individuals who were alleged to have or may have planned, initiated, or participated in activities that are the subject of a complaint that was determined to be unsubstantiated or without merit. Consequently, we find you have failed to show how this information, which we have marked for release, is confidential under section 51.971, and the university may not withhold it under section 552.101 on that basis. However, we agree the university must withhold the remaining information you have marked under section 552.101 of the Government Code in conjunction with section 51.971(c) of the Education Code.⁵

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has found the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information, *see* Open Records Decision No. 455 (1987); and the identity of an alleged victim of sexual harassment. *See Morales v. Ellen*, 840 S.W.2d 519, 525 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). Upon review, we find you have not established some of the remaining information you have marked under common-law privacy satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the university may not withhold this information, which we have marked for release, under section 552.101 of the Government Code in conjunction with common-law privacy. However, we agree the university must withhold the remaining information you have marked, as well as the information we have marked, under section 552.101 on that ground.

Section 552.117(a)(1) of the Government Code may be applicable to some of the submitted information. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government

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

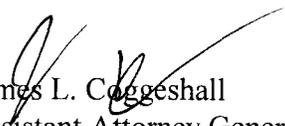
Code. Gov't Code § 552.117(a)(1). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the university may only withhold information under section 552.117(a)(1) on behalf of current or former employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Such information may not be withheld for individuals who did not make a timely election. Thus, the university must withhold the information you have marked, as well as the information we have marked, under section 552.117(a)(1) of the Government Code if the employees at issue made timely requests for confidentiality under section 552.024 of the Government Code.

To conclude, the university may withhold the information you have marked under section 552.107(1) of the Government Code. With the exception of the information we have marked for release, the university must withhold the following: (1) the remaining information you have marked under section 552.101 of the Government Code in conjunction with section 51.971 of the Education Code; (2) the remaining information marked under section 552.101 of the Government Code in conjunction with common-law privacy; and (3) the information marked under section 552.117(a)(1) of the Government Code if the employees at issue made timely requests for confidentiality under section 552.024 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 http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,


James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/cbz

Ref: ID# 554789

Enc. Submitted documents

c: Requestor
(w/o enclosures)