



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 14, 2015

Ms. Valerie Coleman-Ferguson
Associate General Counsel
Office of the General Counsel
University of Houston System
311 E Cullen Building
Houston, Texas 77204-2028

OR2015-07173

Dear Ms. Ferguson:

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# 559889.

The University of Houston (the "university") received a request for information pertaining to all complaints, grievances, and reports of misconduct made against the University of Houston Charter School (the "charter school"), named individuals, or other charter school administrators during a specified time period. You state some information has been provided to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, 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.¹ Consequently, state and local educational authorities that

¹A copy of this letter may be found on the Office of the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

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”). We further note the requestor is a parent of the student to whom some of the submitted information pertains. Because our office is prohibited from reviewing these education records to determine the applicability of FERPA, we will not address the applicability of FERPA to any of the submitted records, other than to note that parents have a right of access under FERPA to their own child’s education records and their right of access prevails over claims under section 552.101 of the Government Code. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3; *see also Equal Employment Opportunity Comm’n v. City of Orange Tex.*, 905 F. Supp. 381, 382 (E.D. Tex. 1995) (holding FERPA prevails over inconsistent provision of state law). Such determinations under FERPA must be made by the educational authority in possession of the education records. The DOE has also informed our office, however, a parent’s right of access under FERPA to information about the parent’s child does not prevail over an educational institution’s right to assert the attorney-client privilege. Therefore, we will address your assertion of the attorney-client privilege to the information at issue. We will also consider the exception you claim to the extent the student’s parent does not have a right of access to the submitted information under FERPA.

Next, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

Gov’t Code § 552.022(a)(1). The information at issue consists of a completed investigation subject to section 552.022(a)(1) that must be released unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* Although you raise section 552.107(1) of the Government Code for this information, we note section 552.107(1) is a discretionary exception and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under section 552.107(1) may be waived); 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the information at issue may not be withheld under section 552.107(1) of the Government Code. The Texas Supreme Court has held, however, the Texas Rules of Evidence are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address your assertion

of the attorney-client privilege under Texas Rule of Evidence 503 for the information subject to section 552.022(a)(1). Furthermore, because section 552.101 of the Government Code makes information confidential under the Act, we will address its applicability to the submitted information.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides:

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).

You assert the information you marked should be withheld under Rule 503. You state the information at issue consists of communications between attorneys from the University of Houston System Office of the General Counsel (the “system”) and university staff. 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 established the information at issue constitutes privileged attorney-client communications under Rule 503. Thus, the university may withhold the information you marked pursuant to Rule 503 of the Texas Rules of Evidence.²

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *See Gov’t Code* § 552.101. This section encompasses information protected by other statutes. Section 51.971 of the Education Code 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.

(2) “Institution of higher education” has the meaning assigned by Section 61.003.

...

(c) The following are confidential:

²As our ruling is dispositive, we need not address your remaining argument against disclosure of this information in Exhibits 5 and 6, which we note are duplicates of the information in Exhibit 7.

(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.

Educ. Code § 51.971(a), (c)-(d). We understand 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 information you marked pertains to allegations of discrimination reported to and investigated by system attorneys and university staff through Equal Opportunity Services, which you explain is a part of the university's compliance program. 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).

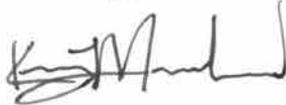
You argue the remaining information is confidential pursuant to section 51.971(c) of the Education Code. You state the investigation at issue was completed, and the university found the allegations to be unsubstantiated and without merit. Thus, you argue the information at issue would directly or indirectly reveal the identities of individuals who participated in the investigation and the identity of an individual who was the subject of the complaints. *See id.* § 51.971(c). Subsection (c) does not apply to information related to an individual who consents to disclosure of the information. *Id.* § 51.971(d). You state none of the individuals at issue have consented to release of their information. Upon review, we agree release of some of the information at issue, which we have marked, would directly or indirectly identify individuals as participants in or the subject of the compliance program investigation. Accordingly, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 51.971(c) of the Education Code. However, we find you have failed to demonstrate how the remaining information at issue would directly or indirectly identify individuals as complainants or as participants in the compliance program investigation, or as alleged participants in the activities subject to the complaint. Accordingly, the university may not withhold the remaining information at issue under section 552.101 in conjunction with section 51.971(c) of the Education Code.

In summary, the university may withhold the information you marked pursuant to Rule 503 of the Texas Rules of Evidence. To the extent the university determines the submitted information does not constitute student records to which the student's parent has a right of access under FERPA, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 51.971(c) of the Education 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,



Kenny Moreland
Assistant Attorney General
Open Records Division

KJM/som

Ref: ID# 559889

Enc. Submitted documents

c: Requestor
(w/o enclosures)