

CAUSE NO. \_\_\_\_\_

THE UNIVERSITY OF TEXAS	§	IN THE DISTRICT COURT OF
SYSTEM,	§	
<i>Plaintiff,</i>	§	
	§	
V.	§	TRAVIS COUNTY, T E X A S
	§	
KEN PAXTON, ATTORNEY	§	
GENERAL OF TEXAS,	§	
<i>Defendant.</i>	§	_____ JUDICIAL DISTRICT

**PLAINTIFF’S ORIGINAL PETITION**

Plaintiff The University of Texas System, through the Attorney General of Texas, files this original petition pursuant to section 552.324 of the Texas Government Code, seeking to challenge Letter Ruling OR2015-13586.

**I. Discovery Control Plan**

1. Plaintiff intends to conduct discovery, if necessary, under Level 2 of Texas Rules of Civil Procedure 190.

**II. Parties**

2. Plaintiff The University of Texas System (“the System” or “UT System”) is the state entity responsible for governing, operating, supporting, and maintaining the component institutions of The University of Texas System. Texas Education Code, Title 3, Subtitle C. The System is located in Austin, Travis County, Texas.

3. Defendant Ken Paxton is the Attorney General of Texas. The Open Records Division of the Office of Attorney General (“ORD”) issued Open Records Ruling OR2015-13586, the ruling at issue (attached hereto as **Exhibit A** and incorporated by reference).

### **III. Service**

5. Attorney General Ken Paxton may be served in the Price Daniel, Sr. Building, 8th Floor, 209 West 14th Street, Austin, TX, 78701.

### **IV. Venue and Jurisdiction**

6. Venue and jurisdiction are proper in this court under the authority of the Texas Government Code as this is a suit pursuant to section 552.324 of the Government Code.

7. In accordance with section 552.325(b) of the Government Code, the attorney for UT System will notify the requestor by certified mail, return receipt requested, of the following:

- a. the existence of the suit, including the subject matter and cause number of the suit and the court in which the suit is filed;
- b. the requestor's right to intervene in the suit or to choose not to participate in the suit;
- c. the fact that the suit is against the Attorney General in Travis County district court; and
- d. the address and phone number of the Office of the Attorney General.

### **V. Factual Background**

8. UT System received two nearly identical public information requests for certain information related to the Kroll Report, which is the final report of an investigation conducted by Kroll Associates, Inc. into university admissions practices at the request of UT System's Vice Chancellor and General Counsel.

9. The System timely requested an opinion from the Attorney General as to whether the information at issue was excepted from disclosure. In OR2015-13586, ORD ordered that some of the requested information must be disclosed because the information is part of a completed investigation under Government Code Section 552.022(a)(1) (Ex. A at 3). Consequently, and in error, ORD did not determine whether the information was subject to the litigation exception under Government Code Section 552.103, the legislative drafts exception under Government Code

Section 552.106, the attorney-client privilege under Government Code Section 552.107 or the deliberative process privilege under Government Code Section 552.111. (Ex. A at 3).

## **VI. Grounds for Challenge**

10. This suit by the System challenging OR2015-13586 is brought pursuant to section 552.324 of the Texas Government Code. It has been filed timely within the statutory 30 days of receiving the ruling from the Attorney General.

12. Section 552.101 of the Government Code excepts information from disclosure under the Public Information Act “if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” The information withheld by UT System in this case constitutes information that is confidential by law under the constitutional right to privacy. While OR2015-13586 agrees that the information must be withheld under this provision, UT System has received multiple open records requests for documents related to the Kroll Report and there is a chance that different open records rulings could expose the System to different open records obligations. UT System includes this ground for challenge to prevent conflicting obligations.

13. Section 552.103 of the Government Code excepts information from disclosure under the Public Information Act if the request is for “information relating to litigation of a civil or criminal nature” and, on the date of the request, the government body is a party to pending litigation or such litigation is reasonably anticipated. The information withheld by UT System in this case constitutes information that is subject to this litigation exception.

14. Section 552.106 of the Government Code excepts information from disclosure under the Public Information Act if the information constitutes a “draft of working paper involved in the

preparation of proposed legislation.” The information withheld by UT System in this case constitutes information that is subject to this legislative document exception.

15. Section 552.107 of the Government Code excepts information from disclosure under the Public Information Act if, for instance, “it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct.” The information withheld by UT System in this case constitutes information that is subject to this attorney-client privilege exception.

16. Section 552.111 of the Government Code excepts information from disclosure under the Public Information Act “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” The information withheld by UT System in this case constitutes information that is subject to this deliberative process exception.

## **VII. Request for Relief**

Plaintiff The University of Texas System requests that this Court find that the withheld information is protected by sections 552.101, 552.103, 552.106, 552.107, 552.111, and 552.022 of the Texas Government Code, as well as the constitutional right to privacy, and therefore is excepted from disclosure under the Public Information Act such that Plaintiff is not required to comply with the challenged aspects of OR2015-13586.

Respectfully submitted,

KEN PAXTON  
Attorney General of Texas

CHARLES E. ROY  
First Assistant Attorney General

JAMES E. DAVIS  
Deputy Attorney General for Civil Litigation

ROBERT O'KEEFE  
Division Chief  
Financial Litigation, Tax, and Charitable Trusts Division

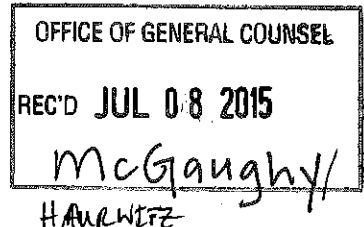
*/s/ Jennifer S. Jackson*

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*Counsel for Plaintiff the University of Texas System*



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS



July 7, 2015

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

OR2015-13586

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# 570767 (OGC Nos. 161200, 161211).

The University of Texas System (the "system") received two requests from different requestors for seven specified categories of e-mails referenced in the Kroll Report during a specified time period. You state you have redacted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g(a).<sup>1</sup> You also state you will redact information under section 552.117(a)(1) of the Government Code pursuant to section 552.024(c)(2) of the Government Code and personal e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684

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<sup>1</sup>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 or an adult student's 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 educational records. We have posted a copy of the letter from the DOE on the Attorney General's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.



(2009).<sup>2</sup> You state you are releasing some information to the requestors. You claim some of the submitted information is not subject to the Act. You also claim some of the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.106, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>3</sup>

Initially, we understand you to assert the information you have marked is not responsive to the present request. This ruling does not address the public availability of the non-responsive information, and the system need not release such information in response to this request.

Next, you contend the information you have marked is not subject to the Act. The Act is applicable only to “public information.” *See* Gov’t Code §§ 552.002, .021. Section 552.002(a) defines “public information” as information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body;
- (2) for a governmental body and the governmental body:
  - (A) owns the information;
  - (B) has a right of access to the information; or
  - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
- (3) by an individual officer or employee of a governmental body in the officer’s or employee’s official capacity and the information pertains to official business of the governmental body.

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<sup>2</sup>Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov’t Code § 552.024(c)(2). Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

<sup>3</sup>We assume that 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 that those records contain substantially different types of information than that submitted to this office.

*Id.* § 552.002. Thus, virtually all the information in a governmental body's physical possession constitutes public information and is subject to the Act. *Id.*; see Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). You inform us the information you have marked consists of personal e-mails that have no connection with the system's business and constitute incidental use of the system's resources. You state the system allows for incidental use of such resources by employees and officials. You further state the use of the system's resources to create and maintain the marked information was *de minimis*. See Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Based on your representations and our review of the information at issue, we agree the information you have marked does not constitute "information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the system. See Gov't Code § 552.002. Therefore, we conclude the information you have marked is not subject to the Act and need not be released in response to the present request for information.

Next, we note the submitted responsive 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 [.]

*Id.* § 552.022(a)(1). The submitted responsive information is part of a completed investigation subject to section 552.022(a)(1). The system must release the completed investigation pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. Although you raise sections 552.103, 552.106, 552.107, and 552.111 of the Government Code, these sections are discretionary exceptions to disclosure 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 Gov't Code § 552.103); Open Records Decision Nos. 676 at 10-11 (2002) (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), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). Thus, the system may not withhold the submitted information under section 552.103, 552.106, 552.107, or 552.111 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336



(Tex. 2001). Thus, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503. Further, because section 552.101 can make information confidential under the Act, we will address this exception for the information at issue.

Texas Rule of Evidence 503(b)(1) provides the following:

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 state the information you have marked relates to communications between system attorneys or their representatives, attorneys for the University of Texas at Austin (the “university”) or their representatives, system employees, and university employees. You state the communications at issue were made to provide or seek legal advice on behalf of the system or university. You also state the communications were intended to be confidential and have remained confidential. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to the information you have marked. Thus, the system may withhold the information you have marked under Texas Rule of Evidence 503.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy, which consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently, and (2) an individual’s interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual’s autonomy within “zones of privacy” which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual’s privacy interests and the public’s need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the “most intimate aspects of human affairs.” *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). You state the information you have marked is confidential under constitutional privacy. Upon review, we find the information at issue falls within the zones of privacy. Accordingly, the system must withhold the identifying information of non-enrolled applicants to the university, which you have marked, under section 552.101 of the Government Code on the basis of constitutional privacy.

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. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. See Open Records Decision No. 455 (1987). Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the system

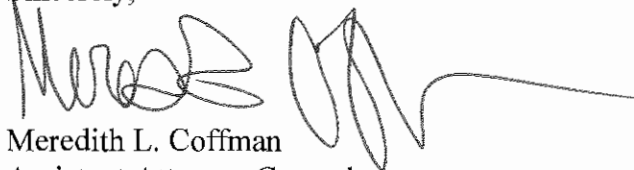
must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, the remaining information at issue either pertains to an individual who has been de-identified and whose privacy interests are, thus, protected, or is not highly intimate or embarrassing and of no legitimate public concern. Thus, none of the remaining information at issue may be withheld under section 552.101 on the basis of common-law privacy.

In summary, the system may withhold the information you have marked under Texas Rule of Evidence 503. The system must withhold the identifying information of non-enrolled applicants to the university, which you have marked, under section 552.101 of the Government Code on the basis of constitutional privacy. The system must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The system must release the remaining responsive 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](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,

A handwritten signature in black ink, appearing to read 'Meredith L. Coffman', with a long horizontal flourish extending to the right.

Meredith L. Coffman  
Assistant Attorney General  
Open Records Division

MLC/dls

Ref: ID# 570767

Enc. Submitted documents

c: 2 Requestors  
(w/o enclosures)