

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 OR2015-14088.

#### **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 OR2015-14088, 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 a public information request 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 OR2015-14088, 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 4). 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 4). In addition, ORD determined in error that some information must be produced under Section 552.101. (Ex. A at 7).

## **VI. Grounds for Challenge**

10. This suit by the System challenging OR2015-14088 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 OR2015-14088 agrees that some identifying information of non-enrolled applicants to a UT System institution must be withheld under this provision, the ruling finds the remaining identifying information cannot be withheld, including information ORD has previously found to be identifying of non-enrolled applicants. Additionally, 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.

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.

17. Section 552.022 of the Government Code requires disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body” unless that investigation is “made confidential under this chapter or other law.” The information withheld by UT System in this case constitutes information that is not subject to disclosure.

## **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, and 552.111 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 OR2015-14088.

Respectfully submitted,

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Attorney General of Texas

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*Counsel for Plaintiff The University of Texas System*



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

OFFICE OF GENERAL COUNSEL

REC'D JUL 14 2015

CASSEDY

July 13, 2015

Ms. Ana Vieira Ayala  
Senior Attorney & Public Information Coordinator  
Office of General Counsel  
The University of Texas System  
201 West Seventh Street  
Austin, Texas 78701

OR2015-14088

Dear Ms. Ayala:

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# 571803 (OGC# 160214).

The University of Texas System (the "system") received a request for "all emails, interview transcripts and other documents provided to or obtained by Kroll investigators as part of their audit of admissions" at the University of Texas at Austin (the "university").<sup>1</sup> You state you will redact information protected by section 552.117(a)(1) of the Government Code pursuant to section 552.024(c)(2) of the Government Code and e-mail addresses of members of the public pursuant to section 552.137 of the Government Code in accordance with Open Records Decision No. 684 (2009).<sup>2</sup> You also state you have redacted or withheld

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<sup>1</sup>We note the system sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You inform us the system received the required deposit on April 27, 2015. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

<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 is a previous determination to all governmental bodies authorizing them to withhold certain information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.<sup>3</sup> You claim some of the submitted information is not subject to the Act. You assert some of the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.106, 552.107, 552.111, 552.1235, and 552.139 of the Government Code. We have considered the submitted arguments and reviewed the submitted information.<sup>4</sup>

We note some of the requested information was the subject of previous requests for rulings, as a result of which this office issued Open Records Letter Nos. 2015-10528 (2015), 2015-12281 (2015), and 2015-13586 (2015). In Open Records Letter No. 2015-10528, we concluded the system may withhold the submitted information under Texas Rule of Evidence 503. In Open Records Letter No. 2015-12281, we concluded the system may rely on Open Records Letter No. 2015-10528 as a previous determination and withhold the identical information in accordance with that ruling, and may withhold the submitted information under Texas Rule of Evidence 503. In Open Records Letter No. 2015-13586, we concluded the system may withhold the marked information under Texas Rule of Evidence 503. We further determined the system must withhold (1) the marked information under section 552.101 of the Government Code in conjunction with common-law privacy, except for the information we marked for release, and (2) the identifying information of non-enrolled applicants to the university under section 552.101 of the Government Code on the basis of constitutional privacy. Finally, we concluded the system must release the remaining responsive information.

We have no indication the law, facts, or circumstances on which the prior rulings were based have changed. Thus, the system must continue to rely on Open Records Letter Nos. 2015-10528, 2015-12281, and 2015-13586 as previous determinations and withhold

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<sup>3</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>.

<sup>4</sup>We note that if the information responsive to a request for information under the Act is voluminous, section 552.301(e)(1)(D) allows a governmental body to submit in its request for a ruling representative samples of the information requested, rather than the specific information requested in its entirety. See Gov't Code § 552.301(e)(1)(D). We further note you have submitted, among other records, more than ten thousand pages of documents from which you have redacted information pursuant to FERPA and for which you claim no exception to disclosure under the Act. If a governmental body concludes no exceptions apply to the requested information, it must release the information as soon as possible. Open Records Decision No. 664 (2000).

or release the information at issue in accordance with those rulings.<sup>5</sup> 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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, we will consider your arguments for the submitted information not subject to the previous rulings.

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.

*Id.* § 552.002(a). 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 e-mail by system employees. You state the system's policy allows for incidental use of e-mail by employees and officials. You further state the use of system 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

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<sup>5</sup>As we make this determination, we need not address your arguments against disclosure of this information.

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 personal correspondence 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 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 [.]

Gov’t Code § 552.022(a)(1). The submitted 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 the information 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 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 any of the responsive information under section 552.103, section 552.106, section 552.107, or section 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 sections 552.101, 552.1235, and 552.139 of the Government Code can make information confidential under the Act, we will address your claims under these exceptions 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* ORD 676. 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 some of the submitted information is subject to the attorney-client privilege. You state the information you have marked consists of (1) communications between and among

system attorneys or their representatives, attorneys for the university or their representatives, system employees, university employees, and system consultants; and (2) interview notes taken by attorneys and their representatives from Kroll that were communicated with attorneys of the system. You state Kroll is working under the direction of the system's general counsel. You also explain the documents at issue were made for the purpose of providing legal services to the system or the university. You represent 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 at issue. Thus, the system may withhold the information you have marked under the attorney-client privilege pursuant to Texas Rule of Evidence 503.<sup>6</sup>

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. This section encompasses information protected by other statutes, such as section 81.046 of the Health and Safety Code, which provides, in pertinent part:

(b) Reports, records, and information relating to cases or suspected cases of diseases or health conditions are not public information under [the Act], and may not be released or made public on subpoena or otherwise except as provided by Subsections (c), (d), and (f).

Health & Safety Code § 81.046(b). Upon review, we find the information you have marked consists of records and information relating to suspected cases of Ebola. Accordingly, we conclude section 81.046(b) governs the release of this information. We have no indication any of the release provisions of section 81.046 are applicable to the information at issue. Therefore, upon review, we determine the system must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 81.046(b) of the Health and Safety Code.

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 or 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). This office has found that personal financial information

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<sup>6</sup>As we reach this conclusion, we do not address your remaining claims for this information.

not related to a financial transaction between an individual and a governmental body is intimate and embarrassing and of no legitimate public interest. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 523 (1989), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy).

Upon review, we find the information we marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the system must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the system has failed to demonstrate the remaining information you have marked is highly intimate or embarrassing and of no legitimate public interest. Thus, the system may not withhold the remaining information you have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

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. ORD 455 at 4. 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 claim the information you have marked is confidential under constitutional privacy. Upon review, we find some of the information you have marked, which consists of identifying information of applicants to the university who did not ultimately enroll at the university, falls within the zones of privacy. Accordingly, we have marked the type of information the system must withhold under section 552.101 of the Government Code on the basis of constitutional privacy. However, we find you have failed to demonstrate any of the remaining information you have marked falls within the constitutional zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Consequently, the system may not withhold any of the remaining information you have marked under section 552.101 of the Government Code in conjunction with constitutional privacy.

Section 552.1235 of the Government Code excepts from disclosure "[t]he name or other information that would tend to disclose the identity of a person, other than a governmental body, who makes a gift, grant, or donation of money or property to an institution of higher education[.]" Gov't Code § 552.1235(a). For purposes of this exception, "institution of higher education" is defined by section 61.003 of the Education Code. *Id.* § 552.1235(c).

Section 61.003 defines an “institution of higher education” as meaning “any public technical institute, public junior college, public senior college or university, medical or dental unit, public state college, or other agency of higher education as defined in this section.” Educ. Code § 61.003(8). Because section 552.1235 does not provide a definition of “person,” we look to the definition provided in the Code Construction Act. *See* Gov’t Code § 311.005. “Person” includes a corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity. *Id.* § 311.005(2).

You assert the information you have marked identifies donors to the university. Upon review, we agree some of the information at issue identifies donors. However, we find the remaining information at issue does not tend to disclose the identity of a donor to the university. Therefore, this information, which we have marked for release, may not be withheld under section 552.1235 of the Government Code. Thus, except for the information we marked for release, the system must withhold the information you have marked under section 552.1235.

Section 552.139 of the Government Code provides, in part:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; [and]

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body’s or contractor’s electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Gov’t Code § 552.139(a), (b)(1)-(2). Section 2059.055 of the Government Code provides, in part:

(b) Network security information is confidential under this section if the information is:

- (1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;
- (2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or
- (3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

*Id.* § 2059.055(b). The system asserts some of the remaining records include information about a particular university computer program. The system argues the information relates to computer network security, the release of which could make the network vulnerable to unauthorized access or harm. Based on these representations and our review, we find the information the system has marked relates to computer network security, and the design, operation, or defense of the system's computer network. Accordingly, the system must withhold the information you have marked under section 552.139(a) of the Government Code.

In summary, the information you have marked is not subject to the Act and need not be released in response to the present request for information. The system must continue to rely on Open Records Letter Nos. 2015-10528, 2015-12281, and 2015-13586 as previous determinations and withhold or release the information at issue in accordance with those rulings. The system may withhold the information you have marked as attorney-client privileged under Texas Rule of Evidence 503. The system must withhold (1) the information you have marked under section 552.101 of the Government Code in conjunction with section 81.046(b) of the Health and Safety Code; (2) the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy; and (3) the type of information we have marked under section 552.101 of the Government Code on the basis of constitutional privacy. Except for the information we marked for release, the system must withhold the information you have marked under section 552.1235 of the Government Code. The system must withhold the information you have marked under section 552.139(a) of the Government Code. The system 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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/dls

Ref: ID# 571803

Enc. Submitted documents

c: Requestor  
(w/o enclosures)