



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 6, 1995

Ms. Cheryl N. Elliott
University General Counsel
Texas Southern University
3100 Cleburne Avenue
Houston, Texas 77004

OR95-920

Dear Ms. Elliott:

You ask whether certain information held by Texas Southern University (the "university") is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 34706.

Although it is not clear to this office the exact date upon which the university received the open records request submitted by Dr. Daniel Adams, it is clear that the request was received sometime in June of 1995. However, as evidenced by the postmark on your letter to us requesting an open records decision, you did not request a decision from this office until July 11, 1995. We therefore conclude that you failed to request a decision within the ten days required by section 552.301(a) of the Government Code.

Section 552.301(a) requires a governmental body to release requested information or to request a decision from the attorney general within ten days of receiving a request for information the governmental body wishes to withhold. When a governmental body fails to request a decision within ten days of receiving a request for information, the information at issue is presumed public. Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this presumption. See *Hancock* at 381.

You have not shown compelling reasons why the information at issue should not be released. You contend that the requested personnel evaluations and other personnel records must be withheld from the public pursuant to section 552.102 of the Government Code. Section 552.102(a) is designed to protect public employees' personal privacy.

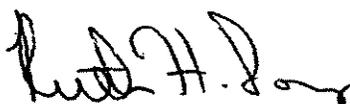
The scope of section 552.102(a) protection, however, is very narrow. *See* Open Records Decision No. 336 (1982). *See also* Attorney General Opinion JM-36 (1983). The test for section 552.102(a) protection is the same as that for information protected by common-law privacy under section 552.101: to be protected from required disclosure the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.).

The information at issue pertains solely to the job performance of public servants, and as such cannot be deemed either to pertain to the employees' private affairs or to be outside the realm of public interest. *See* Open Records Decision No. 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees). Section 552.102 was not intended to protect the type of information at issue here.

We have attached a list of common types of confidential information that may be contained in the records at issue.¹ To the extent that confidential information exists in these records, those portions must be withheld from the public. In the absence of a demonstration that the information is confidential by law or that other compelling reasons exist as to why the information should not be made public, you must release the requested information in its entirety without delay. *See also* Gov't Code § 552.352 (distribution of confidential information is criminal offense). If you have any questions regarding this matter, please contact our office.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/RWP/rho

¹Despite our request of July 24, 1995, that you submit to this office copies of the records at issue, you have failed to do so. Consequently, we are unable to determine the extent to which the records at issue contain incidental confidential information.

Ref: ID# 34706

Enclosure: Confidentiality list

cc: Dr. Daniel Adams
Texas Faculty Association
Texas Southern University Chapter
1415 Southmore
Houston, Texas 77004
(w/ enclosure)

INFORMATION COMMONLY PROTECTED BY
STATUTORY CONFIDENTIALITY

- Medical records -- "Records of the identity, diagnosis, evaluation, or treatment of a patient that are *created or maintained by a physician.*" V.T.C.S. art. 4495b, § 5.08(b).
- The federal Americans With Disabilities Act (the "ADA", 42 U.S.C. §§ 12101 - 12213, may apply to employee and applicant medical information obtained by a governmental body. The ADA provides that information regarding the medical condition or history of an applicant or employee must be treated as a confidential medical record. *Id.* § 12112(c)(3)(B), (4)(C).
- Mental health records -- "Records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained" by a mental health professional. Health & Safety Code § 611.002.
- EMS records -- "Records of the identity, evaluation, or treatment of a patient" created or maintained by EMS personnel. Health & Safety Code § 773.091.
- Polygraph examination results -- Any "information acquired from a polygraph exam." V.T.C.S. art. 4413(29cc), § 19A.
- Home addresses and telephone numbers of public employees and former employees who have elected, *prior to the current open records request*, to restrict access to this information in compliance with Gov't Code § 552.024(b).
- Home addresses and telephone numbers of peace officers. Gov't Code § 552.024.
- Criminal history information -- All TCIC and NCIC information; other compilations of an individual's criminal history *except for offense for which individual is currently under the supervision of criminal justice system.*
- Records of juvenile offenders -- Fam. Code § 51.14.
- Records relating to reports of child abuse -- Fam. Code § 34.08.
- Social security numbers -- confidential only if the social security number was obtained or is maintained by a governmental body pursuant to any provision of law that was enacted on or after October 1, 1990. 42 U.S.C. section 405(c)(2)(C)(viii)(I); *see* Open Records Decision No. 622 (1994).
- Student records -- confidential only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982), 206 (1978). Therefore, governmental bodies must withhold from education records only that information tending to identify a particular student. "Directory information," as defined at 20 U.S.C. § 1232g(a)(5)(A), must be released in its entirety.

PLEASE NOTE THAT THE RECORDS SUBMITTED TO THIS OFFICE FOR REVIEW MAY CONTAIN INFORMATION DEEMED CONFIDENTIAL BY LAWS NOT ADDRESSED IN THE ATTACHED LETTER RULING. YOU SHOULD THOROUGHLY EXAMINE THE RECORDS AT ISSUE TO DETERMINE WHETHER ANY OF THE PROVISIONS LISTED BELOW APPLY TO INFORMATION IN THESE RECORDS THAT MUST BE WITHHELD IN ACCORDANCE WITH STATE OR FEDERAL LAW.

WE CAUTION THAT THIS IS NOT AN EXCLUSIVE LIST OF CONFIDENTIALITY PROVISIONS AND TYPES OF INFORMATION PROTECTED FROM DISCLOSURE BY COMMON-LAW PRIVACY. THE LIST INCLUDES ONLY THOSE STATUTORY CONFIDENTIALITY PROVISIONS THAT FREQUENTLY AFFECT REQUESTS FOR RECORDS. IF YOU HAVE ANY QUESTIONS REGARDING THE APPLICABILITY OF THESE OR ANY OTHER CONFIDENTIALITY PROVISIONS, PLEASE CONSULT YOUR AGENCY ATTORNEY, WHO WILL BE MOST FAMILIAR WITH PROVISIONS THAT DIRECTLY AFFECT YOUR AGENCY.

**COMMON TYPES OF INFORMATION DEEMED
CONFIDENTIAL UNDER COMMON-LAW PRIVACY**
(NOTE: RIGHT OF PRIVACY LAPSES UPON DEATH)

- Information revealing details of sexual assault. Open Records Decision Nos. 440 (1986), 339 (1982).
- Prescribed drugs a person is taking. Open Records Decision No. 455 (1987).
- Information regarding drug overdoses, *acute* alcohol intoxication, obstetrical/gynecological illnesses, convulsions/seizures, or emotional/mental distress. Open Records Decision No. 343 (1982).
- Results of psychological and IQ tests. Open Records Decision No. 600 (1992).
- Personal financial information, *e.g.*, mortgage payments, assets, bills, credit history. Open Records Decision Nos. 545 (1990), 373 (1983). *Note: Present and past salaries of public employees and applicants for public employment are not confidential.*
- Information regarding an employee's participation in a deferred compensation plan, including whether or not an employee is participating, and certain information regarding insurance, such as choice of carrier and optional coverages. Open Records Decision Nos. 600 (1992), 545 (1990).
- Allegations of sexual harassment -- If there is a clear summary of the allegations, the summary must be released but the identities of victims and witnesses must be redacted from the summary and their detailed statements must be withheld from disclosure. *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied). If no summary exists, detailed statements regarding the allegations must be released but identities of the witnesses and victims must be redacted from those statements.