



May 25, 1999

Mr. Richard Rafes, J.D., Ph.D.  
Vice Chancellor and General Counsel  
University of North Texas  
P.O. Box 310907  
Denton, Texas 76203-0907

OR99-1455

Dear Mr. Rafes:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 123613.

The University of North Texas ("UNT") received a request, dated January 25, 1999, requesting access to the following information:

- A list of "full professors" by gender, salaries, ethnicity or race, age, years of experience, showing departments.
- A list of "Regents professors" by gender, salaries, ethnicity or race, age, years of experience, showing departments.
- A list of UNT administrators by gender, salaries, ethnicity or race, age, years of experience, showing departments.
- A list of professors and administrators (vice-presidents and above) who have left the University in the last five years. Please specify gender, ethnicity or race of each.
- A list of all active lawsuits and legal cases that the University of North Texas legal department is engaged in. Please list status of each case and which court has jurisdiction over case. Also, a list of lawsuits settled by university in the last five years. Please list case disposition.

Copies of the "UNT Faculty Salary Comparison by rank, time-in-rank, and gender for academic years, 1998-99; 1997-98; 1996-97- 1995-96; 1994-95.

On January 29, 1999, this request was clarified as "a request to view all active lawsuits and legal cases that UNTs [sic] legal department has been involved in in the last five yars [sic]." You interpreted this as a request for access to all litigation files of lawsuits in which UNT is now or has been a party in the last five years.

You indicate that you will furnish the requestor with most of the responsive information. However, you seek to withhold information from the requested litigation files. You assert that this information is excepted from public disclosure by sections 552.103, 552.107 and 552.111 of the Government Code. You have supplied a representative sample of the subject information.<sup>1</sup> We have considered the exceptions you argue and have reviewed the subject information.

We note that the subject information includes medical records. Section 5.08 the Medical Practice Act (the "MPA"), V.T.C.S. article 4495b, governs the release of medical records; it provides in relevant part:

(a) Communications between one licensed to practice medicine, relative to or in connection with any professional services as a physician to a patient, is confidential and privileged and may not be disclosed except as provided in this section.

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

---

<sup>1</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.

V.T.C.S. art. 4495b, § 5.08. Section 5.08(j)(3) also requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Thus, access to medical records is not governed by chapter 552 of the Government Code, but rather the MPA. Open Records Decision No. 598 (1991). Information that is subject to the MPA includes both medical records and information obtained from those medical records. See V.T.C.S. art. 4495b § 5.08(a), (b), (c), (j); Open Records Decision Nos. 598 (1991), 546 (1990). The department may only release this information in accordance with the MPA.

You assert that certain responsive information constitutes education records protected from disclosure to the public by the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g. A governmental body may withhold from disclosure information that is protected by FERPA without the necessity of requesting a decision from this office. Open Records Decision No. 634 (1995). Section 552.026 of the Government Code excepts from disclosure educational records unless released in conformity with FERPA.

FERPA provides that federal funding shall not be made available to “any educational agency or institution which has a policy or practice of permitting the release of educational records” of students without the written consent of the parents of a minor student. 20 U.S.C. § 1232g(b)(1). Education records are those records that “contain information directly related to a student and are maintained by an educational agency or institution.” *Id.* § 1232g(a)(4)(A). Generally, only information which would serve to identify the student is excepted from disclosure under FERPA. Open Records Decision No 332 at 3 (1982). UNT must withhold the information that it determines identifies a particular student and is maintained by an educational agency or institution.

You identify specific cases in which you contend information is excepted from disclosure by common-law privacy. Section 552.101 excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. This section encompasses the common-law right to privacy. Common-law privacy excepts information from public disclosure when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668,685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision No. 611 at 1 (1992). Our review of the submitted documents did not reveal any information that is protected under common-law privacy.

The responsive information consists of litigation files which have concluded and those that are currently active (including those that are subject to appeal). Section 552.103(a) of the Government Code, the “litigation exception,” excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. A governmental body has the burden of establishing that section 552.103 applies by showing

that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). In this case, we conclude that the information in files of active cases generally meets both prongs of the applicable test. However, absent special circumstances, once information has been obtained by the opposing party in the litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Further, documents previously filed with a court are usually public and must be released. *See Star Telegram Inc. v. Walker*, 834 S.W.2d. 54, 57-58 (Tex. 1992). Note that the section 552.103(a) exception to disclosure ends with the conclusion of the subject litigation; therefore this exception does not apply to information from closed files.

You assert that a portion of the responsive information is protected as attorney-client privileged communication. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. In this case, our review of the submitted materials from closed files reveals no information that is protected as an attorney-client privileged communication.

You also assert that a portion of the responsive information is excepted as attorney work product. Section 552.111 is the proper exception under which to claim protection for attorney work product once the litigation for which the work product was prepared has concluded. Open Records Decision No. 647 at 2-3 (1996) (citing *Owens-Corning Fiberglass v. Caldwell*, 818 S.W.2d 749 (Tex. 1991)). This section excepts from required public disclosure:

An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

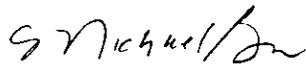
This office has stated that if a governmental body wishes to withhold attorney work product under section 552.111, it must show that the material 1) was created for trial or in anticipation of litigation under the test articulated in *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993), and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. *See id.* In this case, all responsive information is from files of cases that are now or have been actively litigated. The first prong of the work product test is therefore met for all such materials.

As regards the second prong of the work product test, some of the information submitted tends to reveal attorney mental impressions, conclusions and strategy. However, the work

product privilege does not generally extend to “facts an attorney may acquire.” *See* Open Records Decision No. 647 at 4 (1996) (citing *Owens-Corning*, 818 S.W.2d at 750 n.2). Moreover, the privilege does not protect memoranda prepared by an attorney that contain only a “neutral recital” of facts. *See Leede Oil & Gas, Inc. v. McCorkle*, 789 S.W.2d 686 (Tex. App.--Houston [1<sup>st</sup> Dist.] 1990, no writ). Where the subject information includes summaries and other “neutral recitals” of case facts, that information is not excepted. In this case, our review of the submitted materials reveals no information from closed files that is excepted as attorney work product.

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 regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Michael Jay Burns  
Assistant Attorney General  
Open Records Division

MJB/ch

Ref: ID# 123613

encl. Marked documents

cc: Mr. Carl Lewis  
Star-Telegram Staff Writer  
3201 Airport Freeway, Suite 108  
Bedford, Texas 76021  
(w/o enclosures)