



May 16, 2002

Mr. J. Robert Giddings
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2002-2624

Dear Mr. Giddings:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 163023.

The University of Texas at Austin (the “university”) received two requests for communications between the university and the National Collegiate Athletic Association (“NCAA”). The first request is for correspondence between the university and the NCAA since November 12, 2001 concerning the men’s baseball program. The second request is for the NCAA letter of official inquiry regarding an investigation of the men’s baseball program and the university’s response to the NCAA’s letter. The university indicates that it has released some of the information that is responsive to these respective requests. The university claims that the remaining requested information is excepted from disclosure under sections 552.026, 552.101, 552.103, 552.107, 552.111, and 552.114 of the Government Code and the federal Family Educational Rights and Privacy Act of 1974 (“FERPA”), 20 U.S.C. § 1232g. We have considered the exceptions you raise and have reviewed the information you submitted.¹ We also received correspondence from the first requestor. *See Gov’t Code* § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

We first note that the university has submitted information that is not responsive to either of these requests for information. We have marked the information that is not responsive to these requests. This decision does not address the non-responsive information.

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the responsive information as a whole. This ruling neither reaches nor authorizes the university to withhold any responsive information that is substantially different from the submitted information. *See Gov’t Code* § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Next, we address the university's assertion that the first request for information has been partially withdrawn. The university so informed this office by letter dated April 5, 2002. That letter states that after requesting this decision, the university received a letter from the first requestor dated March 19, 2002. The university interprets the first requestor's letter as withdrawing his request with respect to information that would identify or discuss a particular student athlete. However, in a letter to this office dated April 17, 2002, the first requestor reiterated his desire "to see all documents involving the University of Texas baseball program and the NCAA from November 12, 2001 to [the date of his request]." The requestor also has informed this office that his March 19, 2002 letter to the university was not meant as a withdrawal of any portion of his request for information. Thus, we next address the information, submitted as Exhibit C, that is responsive to the first request.

The university claims that Exhibit C comes within the scope of FERPA. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information).

Section 552.026 of the Government Code incorporates FERPA into chapter 552 of the Government Code. *See* Open Records Decision No. 634 at 6-8 (1995). Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026. "Education records" under FERPA are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). In the event of a conflict between FERPA and chapter 552 of the Government Code, the federal law takes precedence. *See* Gov't Code § 552.026; Open Records Decision No. 431 at 3 (1985). Thus, the provisions of FERPA will prevail over a conflicting provision of chapter 552. *See also* Open Records Decision No. 634 (1995).

Section 552.114(a) of the Government Code excepts from disclosure "information in a student record at an educational institution funded wholly or partly by state revenue." This office generally has treated "student record" information under section 552.114(a) as the equivalent of "education record" information that is protected by FERPA. *See* Open Records Decision No. 634 at 5 (1995).

In Open Records Decision No. 634 (1995), this office concluded that: (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 of the Government Code without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 of the Government Code as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. *See* Open Records Decision No. 634 at 6-8 (1995).

In this instance, the university has submitted the information that it believes to be confidential under FERPA. Therefore, we will address the applicability of FERPA to that information. The university states that it previously issued a press release identifying the student. You state that because the identity of the student has been released, merely redacting the identifying information in the document would not protect the student's identity as required by FERPA. You therefore contend that Exhibit C is confidential in its entirety under FERPA.

We agree that the information submitted as Exhibit C is subject to FERPA. Generally, FERPA requires that information be withheld from the public only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 at 3 (1982), 206 at 2 (1978). In this particular instance, however, we agree that merely withholding the identifying information in Exhibit C would not sufficiently protect the identity of the student to whom this information pertains. *See* 34 C.F.R. § 99.3 ("personally identifiable information" includes, among other things, "[o]ther information that would make the student's identity easily traceable"), Open Records Decision No. 224 (1979) (release of document in student's handwriting would make student's identity easily traceable). Therefore, we conclude that Exhibit C is confidential in its entirety under FERPA. Accordingly, the university must not release the information in Exhibit C unless it is authorized under FERPA to do so.

Next, we address the correspondence between the university and the NCAA that is responsive to both of these requests. The university claims that this information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. As section 552.103 is the most inclusive exception that the university raises, we address it first. Section 552.103 provides in part:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body that raises section 552.103 bears the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. The governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date that the governmental body received the request for information and (2) that the information in question is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both parts of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

In this instance, the university has not demonstrated that its correspondence with the NCAA relates to any litigation that was pending when the university received either of these requests for information. Likewise, the university has not shown that this information relates to any litigation that the university reasonably anticipated when it received either of these requests. Therefore, none of the correspondence between the university and the NCAA is excepted from disclosure under section 552.103.

The university also raises section 552.107 of the Government Code. Section 552.107(1) excepts from public disclosure

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 Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct[.]

Gov't Code § 552.107(1). Section 552.107(1) protects information that comes within the attorney-client privilege. In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and the client's communications made in confidence to the attorney. *See* Open Records Decision No. 574 (1990). Accordingly, these two classes of information are the only information that may be withheld pursuant to the attorney-client privilege under section 552.107(1). Moreover, the governmental body may waive the attorney-client privilege under section 552.107(1). *See* Open Records Decision No. 630 at 4-7 (1994). We conclude that the university has not demonstrated that its correspondence with the NCAA is excepted from disclosure under section 552.107(1).

The university also raises section 552.111 of the Government Code with respect to the NCAA correspondence. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” The purpose of this exception is to protect advice, opinion, and recommendation used in the decisional process and encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.-San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ). We determined that section 552.111 protects only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App. -- Austin 2001, no pet.).

The university has not demonstrated that any of its correspondence with the NCAA consists of an interagency or intraagency communication that is protected by section 552.111. *See also* Open Records Decision No. 561 at 9 (1990) (section 552.111 not applicable to communication with entity with which governmental body has no privity of interest or common deliberative process). Therefore, the university may not withhold any of its correspondence with the NCAA under section 552.111.

Next, we address the information sought by the second requestor that relates to the university’s response to the NCAA. The university also claims that this information is excepted from disclosure under sections 552.103, 552.107, and 552.111. We first note that the information in question is subject to section 552.022 of the Government Code. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under 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 documents reflect that the information in question constitutes a completed investigation by the university. Therefore, the university must release the requested information that relates to its investigation under section 552.022(a)(1), unless those documents contain information that is excepted from disclosure under section 552.108 or expressly confidential under other law. Sections 552.103, 552.107, and 552.111 of the Government Code are discretionary exceptions to disclosure that protect the governmental body’s interests and may be waived. As such, these exceptions are not

other law that makes information confidential for the purposes of section 552.022.² Therefore, the university may not withhold its response to the NCAA under sections 552.103, 552.107, or 552.111.

We note, however, that the attorney-client privilege also is found in rule 503 of the Texas Rules of Evidence. The Texas Supreme Court has held that “[t]he Texas Rules of Civil Procedure and 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). As the university claims that its response to the NCAA is protected by the attorney-client privilege, we will consider whether the university may withhold this information under rule 503.

Texas Rule of Evidence 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer’s representative;
- (C) by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503. A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

²See *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 section 552.103); Open Records Decision Nos. 630 at 3-7 (1994) (governmental body may waive section 552.107), 542 at 4 (1990) (section 552.103 may be waived), 470 at 7 (1987) (section 552.111 may be waived).

Thus, 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. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ); *see also* TEX. R. EVID. 511; *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 554 (Tex. 1990); *Carmona v. State*, 947 S.W.2d 661, 663 (Tex. App.—Austin 1997, no writ).

The university asserts that its response to the NCAA is privileged and confidential. We conclude, however, that the university has not demonstrated that this information is protected from disclosure under Texas Rule of Evidence 503.

We note, however, that the response to the NCAA reveals the identities of students. This information comes within the scope of FERPA. We have marked the information in the NCAA response that identifies students. The university may release this information only if it is authorized under FERPA to do so. *See also* Gov't Code §§ 552.026, .114; Open Records Decision No. 634 (1995).

The response to the NCAA also contains medical records. These documents are subject to the Medical Practice Act (the "MPA"), Occ. Code § 151.001 *et. seq.* Section 159.002 of the Occupations Code provides in pertinent part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in section 159.004 who is 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.

Id. § 159.002(a)-(c). Other provisions of the MPA govern the disclosure of information that it encompasses. *See id.* §§ 159.003, .004, .005, .006. This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of chapter 552 of the Government Code. *See* Open Records Decision No. 598 (1991). We have marked the requested documents that are subject to the MPA. The university may release these documents only if the MPA permits the university to do so.

The response to the NCAA also contains driver's license and license plate numbers. Section 552.130 of the Government Code provides in part:

(a) Information is excepted from [required public disclosure] if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Gov't Code § 552.130(a)(1)-(2). We have marked a Texas license plate number. We also have marked what may be a Texas driver's license number. The university must withhold Texas driver's license and license plate numbers under section 552.130.

The response to the NCAA also contains account number information that is confidential under section 552.136 of the Government Code. This exception, which the Seventy-seventh Legislature added to chapter 552 of the Government Code, provides as follows:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. We have marked the account number information that the university must withhold under section 552.136.

In summary, some of the submitted information is not responsive to either of these requests for information. This decision does not address the non-responsive information. The first request for information has not been partially withdrawn. Some of the information that is responsive to these respective requests is confidential under FERPA. The university may release that information only if the university is authorized under FERPA to do so. The requested information also includes medical records that the university may release only if the MPA permits the university to do so. Texas driver's license and license plate numbers must be withheld under section 552.130 of the Government Code. Account number information must be withheld under section 552.136. The university must release the rest of the information that is responsive to these respective requests.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is stylized with a large, circular flourish at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

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