



August 20, 2002

Ms. Carol Longoria
Public Information Coordinator
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2002-4626

Dear Ms. Longoria:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 167386.

The University of Texas at Austin (the “university”) received two requests for information covering sixteen total categories of information. You indicate that the university will release most of the requested information. However, you contend that certain information responsive to the following categories of the requests are excepted from disclosure:

- (1) documents relating to an ongoing investigation of the university’s Zone 2 shop;
- (2) the document from which anyone employed with the university concluded that a named individual was convicted of DUI;
- (3) correspondence between university employees discussing the decision to terminate a named individual;
- (4) documents regarding acts of misconduct found to have been committed by a second named individual;
- (5) documents evidencing the result of any investigation of the second individual;

(6) the name, age, position, and reason for termination of any person terminated from the department in which the second named individual worked for the last six months; and

(7) documents in which the decision to terminate the second named individual was discussed or referenced.

Specifically, you contend that certain information responsive to these categories of information is exempted under sections 552.101, 552.102, 552.107, 552.116, 552.117, 552.130, and 552.136 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

We begin by addressing your argument that some of the submitted information is exempted from disclosure under section 552.116 of the Government Code. Section 552.116 provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency or institution of higher education as defined by Section 61.003, Education Code, is exempted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not exempted from [required public disclosure] by this section.

(b) In this section:

(1) 'Audit' means an audit authorized or required by a statute of this state or the United States and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

¹We note that you did not raise sections 552.130 and 552.136 of the Government Code within ten business days of the receipt of your request for information. A governmental body can waive its arguments under certain exceptions by failing to raise the exceptions within the ten-business-day deadline. *See* Gov't Code §§ 552.301, .302. However, a governmental body cannot waive exceptions by raising them outside of the ten-business-day deadline if, as here, the exceptions are designed to protect the interests of a third party. *See* Open Records Decision No. 150 (1977).

A governmental body that invokes section 552.116 must demonstrate that the audit working papers are from an audit authorized or required by statute by identifying the applicable statute. You state that the information at issue was prepared by a university auditor during the course of an internal investigation. However, you have not identified the applicable statute, if any, that authorized or required an audit. Thus, you have not demonstrated that the requested information was prepared or maintained by the state auditor or the auditor of a state agency in conducting an audit authorized or required by a statute of this state or the United States. *See* Gov't Code §§ 552.116(a), (b)(1), (b)(2). Therefore, none of the submitted information may be withheld under section 552.116 of the Government Code.

Next, we turn to your argument that portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code in conjunction with common-law privacy. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Information may be withheld under section 552.101 in conjunction with common-law privacy upon a showing of certain "special circumstances." *See* Open Records Decision No. 169 (1977). This office considers "special circumstances" to refer to a very narrow set of situations in which the release of information would likely cause someone to face "an imminent threat of physical danger." *Id.* at 6. Such "special circumstances" do not include "a generalized and speculative fear of harassment or retribution." *Id.* In this case, we find that you have demonstrated that release of some of the submitted information would likely cause certain individuals to face an imminent threat of physical danger. We have marked the information that the university must withhold under section 552.101 and common-law privacy.²

You also contend that portions of the submitted information are confidential under section 411.094 of the Government Code. Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083.

Sections 411.087 and 411.094 authorize an institution of higher education to obtain from DPS or any other criminal justice agency CHRI that relates to a person who is an applicant for a security-sensitive position. *Id.* §§ 411.087(a)(2), .094. Any CHRI obtained from DPS

²Based on this finding, we need not reach your argument that the same information is confidential under the informer's privilege.

or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. *See id.* § 411.094(d). You indicate that a portion of the submitted information consists of notes and a memorandum reflecting the results of criminal background checks conducted pursuant to section 411.094 of the Government Code. However, we note that the criminal history information pertains to employees of the university, not applicants. Therefore, the university may not withhold the criminal history information under section 411.094 of the Government Code.

Nevertheless, we note that where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). Thus, the university must withhold most of the criminal history information it obtained on its employees pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. *See id.* However, that the requestors have a special right of access to their respective client's criminal history information. *See Gov't Code* § 552.023.

Next, you contend that some of the submitted information is excepted from disclosure under section 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Gov't Code* § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Public Information Act. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). You contend that the social security numbers, home addresses, and home telephone numbers of former university employees are confidential under common-law privacy. However, we find that this information is not highly intimate and embarrassing for the purpose of common-law privacy, and, therefore, may not be withheld under section 552.102 of the Government Code. *See Open Records Decision Nos. 488* (1988) ("Absent a showing of special circumstances, common-law and constitutional privacy do not protect home addresses and telephone numbers."), 169 (1977) (social security numbers not protected under common-law privacy).

Nevertheless, you also contend that the personal information of former university employees is excepted from disclosure under section 552.117 of the Government Code. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section

552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the university may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the university must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. The university may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential. Furthermore, the requestors have a special right of access to their clients' personal information. *See* Gov't Code § 552.023. We have marked the information that may be excepted from disclosure under section 552.117.

Social security numbers contained in the submitted information may also be excepted from disclosure under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the university pursuant to any provision of law enacted on or after October 1, 1990. Again, however, we note that the requestors have a special right of access to their clients' social security numbers. *See* Gov't Code § 552.023.

Next, you contend that some of the submitted information is excepted from disclosure under section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 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[.]

Therefore, you must withhold the Texas driver's license number and temporary permit number contained in the submitted information under section 552.130.

Finally, we address your argument that one of the submitted documents is excepted from disclosure under section 552.107 of the Government Code. 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. Open Records Decision No. 574 at 5 (1990). You state that one of the submitted documents consists of an e-mail correspondence between the university administration and a university attorney that contains the attorney's mental impressions. Based on your argument and our review of the submitted document, we agree that the e-mail is excepted from disclosure under section 552.107 of the Government Code.

In summary, the university must withhold some of the submitted information, which we have marked, under section 552.101 and common-law privacy. The university must also withhold the criminal history information that we have marked under section 552.101 and common-law privacy. The university must withhold the home addresses, home telephone numbers, social security numbers, and family member information of current and former university employees under section 552.117 of the Government Code to the extent the employees timely elected to keep this information confidential. In addition, the university must withhold the social security numbers contained in the submitted information under section 552.101 of the Government Code in conjunction with the federal Social Security Act if the numbers were obtained or maintained by the university pursuant to a provision of law enacted on or after October 1, 1990. The university must withhold the Texas driver's license number and temporary permit number contained in the submitted information under section 552.130. Finally, the university may withhold the submitted e-mail correspondence between the university administration and the university attorney under section 552.107 of the Government Code. The university must release the remainder of the submitted information.

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).

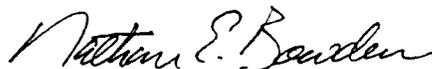
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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); *Tex. Dep't of Pub. 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,



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Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 167386

Enc: Submitted documents

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