



November 19, 2002

Mr. Scott A. Kelly
Deputy General Counsel
The Texas A&M University System
301 Tarrow, 6th Floor
College Station, Texas 77840-7896

OR2002-6602

Dear Mr. Kelly:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 172384.

The Texas A&M University System (the "system") received a request for President Robert Gates' contract and for information relating to the presidential search process used by Texas A&M University and the use of a private search firm. You indicate that the system has released some of the requested information. You claim that other responsive information is excepted from disclosure under sections 552.123 and 552.137 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted. We assume that the system has released any other responsive information that existed when this request for information was received. If not, then the system must do so at this time. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000). We note that chapter 552 of the Government Code does not require the system to release information that did not exist when it received this request or to create responsive information. *See* Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

Section 552.123 of the Government Code excepts from required public disclosure the "name of an applicant for the position of chief executive officer of an institution of higher education . . . except that the governing body of the institution must give public notice of the name or names of the finalists being considered for the position at least 21 days before the date of the meeting at which final action or vote is to be taken on the employment of the person." You state that this request for information relates to the recent presidential search by Texas A&M University and the appointment of Dr. Robert Gates to the position of president of the university. The university is an institution of higher education. *See, e.g.,* Educ. Code § 61.003. We understand that the president is the "chief executive officer" and is appointed by the system's board of regents in accordance with section 85.17(b) of the Education Code.

You have highlighted the submitted information that you assert identifies the unsuccessful candidates for the university's presidency. You seek to withhold the highlighted information under section 552.123. Based on your representations and our review of this information, we conclude that the information that you have highlighted as identifying the unsuccessful candidates for the presidency is excepted from disclosure under section 552.123. *See also* Open Records Decision No. 540 (1990) (addressing statutory predecessor).¹

The system also raises section 552.137 of the Government Code. This exception provides as follows:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. We have marked the e-mail addresses in the submitted documents that are encompassed by section 552.137. The system must withhold the marked e-mail addresses under section 552.137 unless the person to whom a particular e-mail address belongs has affirmatively consented to its public disclosure.

In summary, the system may withhold the highlighted information that identifies the unsuccessful candidates for the presidency under section 552.123 of the Government Code. The system must withhold the marked e-mail addresses under section 552.137 unless the person to whom an e-mail address belongs has affirmatively consented to its public disclosure. The university must release the rest 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.

¹As indicated above, you have informed us that a finalist for the presidency was named and that a new president, Dr. Gates, was appointed. We understand that you publicly announced the name of the finalist within the time period prescribed by section 552.123.

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).

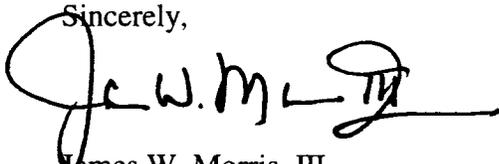
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 "J.W. Morris, III". The signature is written in a cursive style with a large initial "J" and a long horizontal stroke at the end.

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

JWM/sdk

Ref: ID# 172384

Enc: Marked documents

c: Mr. Jim Thompson
Chief Executive Officer
African-American Legal Defense Group
P.O. Box 91212
Houston, Texas 77291-1212
(w/o enclosures)