



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

June 24, 2003

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

OR2003-4347

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# 183227.

The University of Texas Health Science Center at Houston (the "university") received a written request for information pertaining to an alleged conversation between the requestor and another university employee, as well as the financial disclosure statements filed by the university President, Vice-Presidents, Associate Vice-Presidents, and Assistant Vice-Presidents.¹ You state that some responsive information has been released to the requestor. You contend, however, that the remaining requested information, a representative sample of which you submitted to this office, is excepted from required disclosure pursuant to sections 552.101, 552.102, 552.103, 552.107(1), and 552.117 of the Government Code.²

¹You have informed the requestor and this office that the university does not possess records responsive to two other categories of requested information. The Public Information Act does not require a governmental body to obtain information not in its possession or to prepare new information in response to a requestor. Open Records Decision No. 445 (1986).

²In reaching our conclusion here, 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 No. 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.

You first contend that the requested financial disclosure statements are excepted from required public disclosure pursuant to sections 552.101, 552.102, and 552.117 of the Government Code. Section 552.101 protects “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” including information coming within the common-law and constitutional right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. The test for constitutional privacy, unlike the test for common-law privacy, involves a *balancing* of the individual’s privacy interests against the public’s need to know information of public interest; constitutional privacy concerns only the “most intimate aspects of human affairs.” *See* Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985)).

In this instance, however, we believe the more appropriate exception to address here is section 552.102 of the Government Code, which is specifically 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 privacy under section 552.101. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.). However, a public employee’s privacy under section 552.102(a) is less broad than privacy under section 552.101 because of the greater public interest in disclosure of information regarding public employees. Open Records Decision Nos. 269 (1981), 169 (1977).

In Open Records Decision No. 373 (1983), this office addressed the availability of personal financial information submitted to a city by an applicant for a housing rehabilitation grant. In that decision, this office concluded:

all financial information relating to an individual -- including sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits, retirement and state assistance benefits, and credit history -- ordinarily satisfies the first requirement of common law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities.

Open Records Decision No. 373 at 3 (1983). The submitted “Financial Disclosure and Conflict of Interest Reports” consist of information that could be deemed highly intimate for purposes of common-law or constitutional privacy. We note, however, that the members of the “governing board” of the university are required to file similar financial statements with the Texas Ethics Commission, and that those financial statements are public information. *See* Gov’t Code §§ 572.002(12), .003(c)(17), .021, .032(a). Although the

financial disclosure statements at issue here may not consist of the same statements made public under chapter 572, the above cited statutes evince the legislature's determination that such information is of legitimate public interest. *See also* Attorney General Opinion H-15 (1973) ("the public does have a legitimate interest in the current financial condition and recent financial history of those of its servants who are in positions of authority where the temptation to improperly exercise public discretion for private gain may coincide with the opportunity to do so") (emphasis in original); *cf.* H-1070 (1977) (high-ranking city officials' financial disclosure statements not *per se* protected by common-law privacy). Accordingly, we conclude that the submitted financial disclosure statements are not protected by either common-law or constitutional privacy and therefore may not be withheld from the public pursuant to section 552.102 of the Government Code.

We note, however, that the financial statements contain information that the university must withhold pursuant to section 552.117 of the Government Code, which makes confidential an employee's home address, home telephone number, social security number, and information that reveals whether the employee has family members, but only if the employee elected to keep this information confidential in accordance with section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117(1) must be determined at the time the request for the information is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, in order to withhold section 552.117(1) information from the public, a proper election must be made prior to the receipt of the request for information. We have marked the types of information the university must withhold pursuant to section 552.117(1) regarding university employees who have made timely section 552.024 elections. However, the remaining portions of the submitted financial statements must be released.

You next contend that the requested information pertaining to an alleged conversation between the requestor and another university employee is excepted from required public disclosure pursuant to section 552.103 of the Government Code. Section 552.103 is often referred to as the "litigation" exception. To show that section 552.103(a) is applicable, the university must demonstrate that (1) litigation was pending or reasonably anticipated on the date the university received the records request and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990).

Based on your representations and our review of the information at issue and other materials you previously submitted to this office, we conclude that you have established that the information you submitted under Tab 7 and the responsive information you have marked under Tab 8 relate to pending litigation to which the university is a party and that the litigation was pending on the date the university received the current records request. The

university therefore may withhold this information pursuant to section 552.103 of the Government Code.³

In summary, the university must withhold the information we have marked in the documents submitted under Tab 6 in accordance with section 552.117(1), but only if the respective employees have made timely elections under section 552.024 to make that information confidential; the remaining portions of Tab 6 must be released to the requestor. The university may withhold the information you submitted under Tab 7 and the responsive yellow highlighted information you submitted under Tab 8 pursuant to section 552.103 of the Government Code.

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).

³Because we resolve this aspect of your request under section 552.103, we need not address your arguments regarding the applicability of sections 552.101 and 552.107(1) of the Government Code. We additionally note that because the remaining information you submitted to this office under Tab 8 is not responsive to the records request, we do not address at this time the extent to which that information is subject to required public disclosure.

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 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,



Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/RWP/sdk

Ref: ID# 183227

Enc: Submitted documents

c: Mr. Laurent E. Colon
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(w/o enclosures)