



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 14, 2006

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

OR2006-01461

Dear Ms. Longoria:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 241268.

The University of Texas at Austin (the "university") received a request for all available documents related to a named lecturer at the university law school and information related to the Children's Rights Clinic.<sup>1</sup> You state that the university will withhold student identifying information pursuant to the Federal Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232(g) of title 20 of the United States Code. *See* Open Records Decision No. 634 (1995) (educational institution may withhold student identifying information that is protected by FERPA without the necessity of requesting an attorney general decision). You also state that some of the requested information will be released, but claim that some of the submitted information is not subject to the Act. You further argue that some of the remaining information is excepted from disclosure under sections 552.101, 552.107, 552.111, 552.114, 552.117, 552.136, and 552.137 of the

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<sup>1</sup>We note that pursuant to section 552.303 of the Government Code, this office sent a notice to the university requesting that you provide additional information necessary for this office to render a decision. The clinical professor for the Children's Rights Clinic has informed our office that the clinic is not an arm of the judiciary that performs a judicial function. Thus, we will rule on the information you have submitted.

Government Code.<sup>2</sup> We have considered your arguments and reviewed the submitted representative sample of information.<sup>3</sup>

Initially, we address your contention that the first request for information was not a proper request under the Act. The Act's disclosure requirements are generally triggered by a governmental body's receipt of a written request for information. *See* Gov't Code § 552.301(a). However, in instances where a written request is submitted to a governmental body by facsimile transmission or through e-mail, the Act, as you note, specifically provides that the request be "sent to the officer for public information, or the person designated by that officer[.]" *Id.* § 552.301(c). Thus, for written requests that are submitted to a governmental body via facsimile or e-mail, the Act's disclosure requirements are triggered only if the request is sent to the governmental body's "officer for public information," or by a person designated by that officer to receive such requests.

In this case, you state that the first request was addressed and emailed to the Dean of the university's law school. You further state that the Dean is neither the university's "officer for public information," nor the "person designated by that officer." *See* Gov't Code § 552.201 (officer for public information is defined as chief administrative officer of governmental body). We thus conclude that the first e-mailed request at issue here was not a proper request under the Act, and the university need not respond to this request as it failed to comply with the Act.

We now turn to your arguments for the information requested in the present request, which did comply with the Act. First, we address your assertion that the request is overbroad. Section 552.222 of the Government Code permits a governmental body to ask the requestor to clarify or narrow the scope of the request. Section 552.222(b) provides:

If what information is requested is unclear to the governmental body, the governmental body may ask the requestor to clarify the request. If a large amount of information has been requested, the governmental body may discuss with the requestor how the scope of a request might be narrowed, but the governmental body may not inquire into the purpose for which information will be used.

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<sup>2</sup>Although you raise the attorney work product exception under section 552.101 of the Government Code, the proper exception to raise for attorney work product not subject to section 552.022 is section 552.111. *See* Open Records Decision No. 677 (2002). Thus, we will consider your arguments under this exception.

<sup>3</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.

However, a request for records made pursuant to the Act may not be disregarded simply because a citizen does not specify the exact documents the citizen desires. Open Records Decision No. 87 (1975). Numerous opinions of this office have addressed situations in which a governmental body has received an "overbroad" written request for information. For example, Open Records Decision No. 561 at 8-9 (1990) states:

We have stated that a governmental body must make a good faith effort to relate a request to information held by it. Open Records Decision No. 87 (1975). It is nevertheless proper for a governmental body to require a requestor to identify the records sought. Open Records Decision Nos. 304 (1982); 23 (1974). For example, where governmental bodies have been presented with broad requests for information rather than specific records we have stated that the governmental body may advise the requestor of the types of information available so that he may properly narrow his request. Open Records Decision No. 31 (1974).

In this instance, you must make a good-faith effort to relate the request to information in the university's possession. We note that if a request for information is unclear, a governmental body may ask the requestor to clarify the request. Gov't Code § 552.222(b); *see also* Open Records Decision No. 561 at 8 (1990). In assisting the requestor in clarifying his request, you should advise him of the types of information available. Since you have been able to identify certain types of records that you believe fall within the scope of the request, we will address your arguments for these records.

Next, we note that names of individuals have been redacted from some of the documents you have submitted for review. We advise that section 552.301 of the Government Code requires a governmental body to submit responsive information in a manner that permits this office to review the information. *See* Gov't Code § 552.301(e)(1)(D). Therefore, the university risks non-compliance with section 552.301 if it fails to submit responsive information in non-redacted form. Such non-compliance can result in a conclusion from this office that the information at issue must be released. *See* Gov't Code §§ 552.006, .301, .302. As we are able in this instance to ascertain the nature of the information that you have redacted, we will determine whether it is excepted from public disclosure. In the future, however, the university should refrain from redacting any information that it submits to this office in seeking an open records ruling. *See id.* § 552.3035 (attorney general may not disclose to requestor or public any information submitted to attorney general under section 552.301(e)(1)(D)).

Next, we address your assertion that the information in Tab 11 is not subject to the Act. Chapter 552 of the Government Code is only applicable to "public information." *See* Gov't Code § 552.021. Section 552.002(a) defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." Gov't Code § 552.002(a). Information that is collected, assembled, or maintained by a third party may

be subject to disclosure under chapter 552 of the Government Code if it is maintained for a governmental body, the governmental body owns or has a right of access to the information, and the information pertains to the transaction of official business. *See* Open Records Decision No. 462 (1987).

You assert that the e-mails in Tab 11 were not collected, assembled, or maintained in connection with the transaction of any official business of the university, nor were they collected, assembled, or maintained pursuant to any law or ordinance. Based on your comments and our review of the e-mails at issue, we agree that these communications do not relate to the transaction of official university business, and therefore do not constitute "public information" of the university. Consequently, the university is not required to release Tab 11 pursuant to the Act. *See* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information made confidential by other statutes. You argue that the information in Tabs 6 through 9 is subject to section 261.201 of the Family Code. Section 261.201(a) provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). Because some of this information consists of files, reports, records, communications, or working papers used or developed in an investigation under chapter 261 or in providing services as a result of an investigation, that information is within the scope of section 261.201 of the Family Code. You have not indicated that the university has adopted a rule that governs the release of this type of information. Therefore, we assume that no such regulation exists. Given that assumption, the information we have marked in Tab 6 is confidential pursuant to section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute). Accordingly, the university must withhold this information from disclosure under section 552.101 of the Government Code as information made confidential by law. However, you have failed to demonstrate that the remaining

information in Tabs 6 through 9 was used or developed in an investigation made under chapter 261 of the Family Code.

The university also raises the attorney-client privilege for the remaining information submitted in Tabs 6 through 9. Section 552.107 of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “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).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

After reviewing your claims and the submitted information, we conclude that you have not demonstrated that any of the remaining information in Tabs 6 through 9 falls within the scope of the attorney-client privilege. Therefore, none of the information at issue may be withheld under section 552.107 of the Government Code.

The university also argues the work product privilege for the remaining information in Tabs 6 through 9. 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.” Gov’t Code § 552.111. This section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002) Rule 192.5 defines work product as

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. TEX. R. CIV. P. 192.5; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat’l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204; ORD 677 at 7.

Upon review of the university’s arguments and the information at issue, we find that the university has not demonstrated that any of this particular information was prepared for trial or in anticipation of litigation. Therefore, the university may not withhold any of the remaining submitted information under section 552.111 as attorney work product.

Section 552.114 exempts from disclosure student records at an educational institution funded completely or in part by state revenue. Gov’t Code § 552.114. This office generally applies the same analysis under section 552.114 and the Family Educational Rights and Privacy Act of 1974 (“FERPA”), section 1232g of title 20 of the United States Code. *See* Open Records Decision No. 539 (1990). 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). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). Section 552.026 of the Government Code provides that "information contained in education records of an educational agency or institution" may only be released under the Act in accordance with FERPA.

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 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 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, you have submitted a portion of this information for our review. Accordingly, we will address your claim.

Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). Such information includes both information that directly identifies a student, as well as information that, if released, would allow the student's identity to be easily traced. *See* Open Records Decision No. 224 (1979) (finding student's handwritten comments protected under FERPA because they make identity of student easily traceable through handwriting, style of expression, or particular incidents related). We have marked student identifying information that must be withheld pursuant to section 552.114 and FERPA.

We note that a portion of the remaining information is subject to section 552.101 of the Government Code in conjunction with common law privacy. Section 552.101 also encompasses the doctrine of common law privacy. Common law privacy protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: an individual's criminal history when compiled by a governmental body; personal financial information not relating to a financial transaction between an individual and a governmental body; some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records

Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and identities of victims of sexual abuse. We have marked the information that is protected by common law privacy and must be withheld under section 552.101 on that basis.

We next address the information in Tab 10. You indicate that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, social security number, 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 of the Government Code. *See Gov't Code § 552.117(a)(1)*. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. You inform us that the employee at issue made a timely election to keep such information confidential; therefore, that employee's personal information must be withheld under section 552.117(a)(1). Based on our review of the remaining submitted information, we agree that you must withhold the information you have highlighted under section 552.117(a)(1) of the Government Code.

Next, you assert that the employee's electronic identification number is excepted under section 552.136 of the Government Code. This section 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. You state that the electronic identification number is an access device number "used for transacting employee specific business." However, we find that you have failed to establish that the electronic identification number constitutes an access device number for purposes of section 552.136. Therefore, it may not be withheld on that basis.

You also argue that some of the submitted information in Tab 10 is excepted from disclosure under section 552.137 of the Government Code. Section 552.137 of the Government Code provides:

(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. You do not inform us that the individual at issue affirmatively consented to the release of the e-mail address contained in Tab 10. The university must, therefore, withhold the e-mail address we have marked under section 552.137 of the Government Code.

In summary, Tab 11 does not constitute public information under the Act and the university is not required to release this information. The university must withhold the information we have marked in Tab 6 under section 552.101 of the Government Code as information made confidential by law pursuant to section 261.201 of the Family Code. The university must withhold the information we have marked in Tabs 6 through 9 under section 552.101 in conjunction with common law privacy and section 552.114 and FERPA. The university must withhold the marked information pursuant to sections 552.117 and 552.137. The university must release the remaining 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 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 Office of the Attorney General 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. 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,



Brian J. Rogers  
Assistant Attorney General  
Open Records Division

BJR/krl

Ref: ID# 241268

Enc. Submitted documents

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