



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 12, 2006

Mr. Renaldo L. Stowers
Associate General Counsel
University of North Texas System
P.O. Box 310907
Denton, Texas 76203-0907

OR2006-10584

Dear Mr. Stowers:

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# 259822.

The University of North Texas (the "university") received two requests from the same requestor for a named university dean's calendar during a specified time period, communications between that dean and the University of Texas at Arlington and the University of Nebraska at Omaha during the same time period, information pertaining to the tenure of the requestor, and information pertaining to the Center for Virtual Strategic Technology. You state that the university will release some of the requested information. You claim that portions of the requested calendar are not subject to release under the Act. You claim that the remainder of the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Initially, we address your argument that the dean's personal calendar entries are not subject to the Act. Section 552.021 of the Government Code provides for public access to "public information." See Gov't Code § 552.021. Section 552.002(a) defines "public information" as:

¹We 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.

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.

Id. § 552.002(a). Under this provision, information is generally “public information” within the scope of the Act when it relates to the official business of a governmental body or is maintained by a public official or employee in the performance of official duties, even though it may be in the possession of one person. *See* Open Records Decision No. 635 at 4 (1995). In addition, section 552.001 states it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. *See* Gov’t Code § 552.001(a). In this instance, however, the information at issue was created and maintained by an employee for her personal use, and was not collected, assembled, or maintained in connection with the transaction of official business by or for the university. Accordingly, we conclude that the dean’s personal calendar entries are not subject to disclosure under the Act and need not be released to the requestor. *See id.* § 552.002(a), Open Records Decision No. 635 at 3-8 (appointment calendar purchased by state employee, who also maintained calendar herself and apparently had sole access to it, not subject to Act). As our ruling is dispositive for this information, we need not address your arguments under section 552.101 of the Government Code.

Next, we note that you did not raise section 552.102 of the Government Code within the ten-business-day deadline mandated by section 552.301(b) of the Government Code. However, because the applicability of this section can provide a compelling reason to withhold information, we will consider your argument under this section. *See* Gov’t Code § 552.302, *see also* Open Records Decision No. 150 at 2 (1977).

Section 552.102(a) of the Government Code excepts from required public disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” This exception applies when the release of information would result in a violation of the common law right to privacy. *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.). The doctrine of common law privacy protects information that is (1) highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person and (2) is of no legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). You assert that the employee identification numbers found in the submitted information are protected under section 552.102 because they are used to access sensitive employee information. After our review, however, we find that you have not demonstrated that the identification numbers at issue are protected under the doctrine of common law privacy, and they may not be withheld under section 552.102 of the Government Code.

You also assert that the employee identification numbers are protected under section 552.136 of the Government Code, which 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. As previously noted, you state that the employee identification numbers found in the submitted information are used to access sensitive employee information. We note, however, that you have not demonstrated that these identification numbers may be used to obtain money, goods, services, or another thing of value, or initiate a transfer of funds. Therefore, you have not demonstrated the applicability of section 552.136 in this instance, and the employee identification numbers at issue may not be withheld on that basis. As you raise no other exception to disclosure for this information, the employee identification numbers must be released to the requestor.

Next, we address your arguments under section 552.107 of the Government Code, which 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 Tex. 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 a 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).

You state that the submitted information includes correspondence between university attorneys and employees. You also state that these communications were made for the purpose of facilitating the rendition of professional legal services and indicate that the communications have remained confidential. Therefore, based on your representations and our review, we find that the communications we have marked are protected under the attorney-client privilege and may be withheld under section 552.107 of the Government Code.

In summary, the dean’s personal calendar entries are not subject to disclosure under the Act and need not be released to the requestor. The communications we have marked may be withheld under section 552.107 of the Government Code. The remaining information must be released.

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,



James A. Person III
Assistant Attorney General
Open Records Division

JAP/dh

Ref: ID# 259822

Enc. Submitted documents

c: Dr. Daniel Peak
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Denton, Texas 76205
(w/o enclosures)