



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 18, 2008

Ms. R. Yvette Clark  
General Counsel  
Stephen F. Austin State University  
P.O. Box 13065, S.F.A. Station  
Nacogdoches, Texas 75962-3065

OR2008-00915

Dear Ms. Clark:

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# 299886.

Stephen F. Austin State University (the "university") received two requests from the same requestor for a memorandum and severance agreement relating to the former Vice President for Alumni Affairs. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered the comments from the Alumni Association (the "association"). *See* Gov't Code § 552.304 (interested party may submit written comments concerning availability of requested information).

Initially, we address the association's arguments that the requested information is not subject to the Act. The Act is applicable to "public information." *See* Gov't Code § 552.021. Section 552.002 of the Act provides that "public information" consists of "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). Thus, virtually all information that is in a governmental body's physical possession constitutes public information that is subject to the Act. *Id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The association argues that the requested information is not public within the meaning of the statute because the association is not a governmental body. However, the university has submitted the requested

memorandum and a draft version of a severance agreement between the former vice president and the association, both of which are in the possession of the university, which is a governmental body as defined by section 552.003. Further, we find that the submitted information was collected, assembled, or maintained in connection with the transaction of the university's official business. Therefore, we conclude that the memorandum and draft severance agreement are both subject to the Act and must be released, unless the university or association demonstrates that the information falls within an exception to public disclosure under the Act. *See* Gov't Code §§ 552.006, .021, .301, .302. The university informs us, however, that it was not provided a copy of the executed severance agreement between the former vice president and the association. The association states that the executed severance agreement is held and maintained by the association. Accordingly, we agree that the executed version of the severance agreement is not public information subject to the Act, and is not required to be released to the requestor.

You claim that the entire memorandum is protected from disclosure by section 552.101 of the Government Code. This section excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information made confidential by other sources of law. You raise section 552.101 in conjunction with *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074 (1976). In *Bishop*, the United States Supreme Court held that allegations against an employee cannot form the basis of a deprivation of liberty claim if the allegations are privately communicated to the employee and not made public. *Bishop* at 348. You contend that the "[r]elease of this requested memorandum to the public could detrimentally impact [the former employee's] reputation and potentially implicate his liberty interests." Upon review, however, we find that the *Bishop* decision did not address the confidentiality of any communication. *Id.* at 348. Therefore, because *Bishop* does not make information confidential for purposes of the Act, the memorandum may not be withheld on that basis.

We understand both the university and the association to argue that releasing the submitted information would violate the former employee's privacy interest. Section 552.102 of the Government Code 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*, the court ruled that the test to be applied to information protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Act. *See Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546, 550 (Tex.App.-Austin 1983, writ ref'd n.r.e.) (citing *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976)). Accordingly, we will consider your privacy claim under both section 552.101 and 552.102.

Common-law privacy protects information if (1) the information contains highly intimate and embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *See 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. *Id.* at 683.

Constitutional privacy under section 552.101 protects two kinds of interests: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See Fadjo v. Coon*, 633 F.2d 1172 (5<sup>th</sup> Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5<sup>th</sup> Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. *See* ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: 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), 545 (1990); information concerning the intimate relations between individuals and their family members, *see* ORD 470; and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

Upon review, we find that none of the submitted information constitutes highly intimate or embarrassing information in which there is no legitimate public interest. Additionally, we find that the submitted information does not implicate an individual's privacy interests for purposes of constitutional privacy. *See* Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee's qualifications, work performance, and circumstances of employee's resignation or termination), 405 at 2-3 (1983) (public has interest in manner in which public employee performs job). Accordingly, the university may not withhold any portion of the submitted information under section 552.101 or section 552.102 in conjunction with either constitutional or common-law privacy.

You next raise section 552.107 of the Government Code in regard to the marked portion of the memorandum and the draft severance agreement. This section 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 Inc. 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)-(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. Finally, the attorney-client privilege applies only to a confidential communication, 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 inform us that the memorandum and draft severance agreement constitute communications between the university’s counsel and the association. Based on your representations, we conclude that the submitted information does not constitute a communication between an attorney and a client governmental body. TEX. R. EVID. 503(b)(1). Therefore, no portion of the submitted information may be withheld under section 552.107. As you raise no further exceptions against the disclosure of the submitted information, it 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 file suit in

Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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,

A handwritten signature in black ink, appearing to read "Chris Schulz", with a long horizontal flourish extending to the right.

Chris Schulz  
Assistant Attorney General  
Open Records Division

CS/jb

Ref: ID# 299886

Enc. Submitted documents

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