



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 29, 2009

Ms. Neera Chatterjee
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2009-08952

Dear Ms. Chatterjee:

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# 347438.

The University of Texas Health Science Center at Houston (the "university") received a request for all e-mails sent by a specified university employee during a specified time frame. You state that some information has been redacted and released pursuant to an agreement with the requestor. You assert the information submitted in Tab 5A is not subject to the Act. You also raise sections 552.101 and 552.107 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.¹ We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address your contention that the e-mails submitted in Tab 5A are not public information subject to the Act. The Act is only applicable to "public information." *See*

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.

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." *Id.* § 552.002(a). Information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act 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 the emails submitted in Tab 5A "were not collected, assembled or maintained in connection with the transaction of any University business, nor were they collected, assembled, or maintained pursuant to any law or ordinance." Upon review, we agree that, with the exception of the e-mails we have marked, the e-mails in Tab 5A are purely personal and do not constitute "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the university. *See* Gov't Code § 552.021; *see also* 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). Thus, we conclude that these e-mails are not subject to the Act, and need not be released in response to this request. However, we find that the remaining e-mails within Tab 5A, which we marked, pertain to university business. We therefore conclude that these e-mails are subject to the Act and must be released, unless they fall within the scope of an exception to disclosure. *See* Gov't Code §§ 552.002(a), .021.

Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. You assert the remaining e-mails in Tab 5A are confidential under the doctrines of common-law and constitutional privacy, which are encompassed by section 552.101. Common-law privacy protects information if (1) the information contains highly intimate or 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. This office has frequently stated that information relating to public employees and public employment is generally a matter of legitimate public interest. *See e.g.*, Open Records Decision Nos. 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Additionally, this office has held the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 at 9-12 (1992) (identifying public and private portions of certain state personnel records), 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public

disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). The remaining information in Tab 5A generally relates to the work conduct of the employee at issue or to financial transactions between the employee and the university. Therefore, we conclude that there is a legitimate public interest in this information and it may not be withheld on the basis of common-law privacy.

The constitutional right to privacy protects two types of interests. See Open Records Decision No. 600 at 4 (1992) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985)). The first is the interest in independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court. *Id.* The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. See *id.* The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. See Open Records Decision No. 455 at 5-7 (1987) (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is narrower than that under the common-law right to privacy; the material must concern the "most intimate aspects of human affairs." See *id.* at 5 (citing *Ramie*, 765 F.2d at 492). Upon review, we find you have failed to demonstrate how any portion of the remaining information in Tab 5A falls within the zones of privacy or implicates any party's privacy interests for purposes of constitutional privacy. Furthermore, as established above, there is a legitimate public interest in disclosure of this information. Therefore, the university may not withhold any information under section 552.101 in conjunction with constitutional privacy.

Some of the information in Tab 5A may be subject to section 552.117(a)(1) of the Government Code. This section excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that such information be kept confidential under section 552.024.² Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. See Open Records Decision No. 530 at 5 (1989). The university may only withhold information under section 552.117(a)(1) on behalf of current officials or employees

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the employee whose information is at issue in Tab 5A timely elected to keep her family member information confidential pursuant to section 552.024, the university must withhold this information, which we marked, under section 552.117(a)(1). However, if the employee at issue did not timely elect under section 552.024, this information must be released.

You assert the information submitted in Tab 5B is excepted from disclosure under section 552.107 as 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 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). 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.*, 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 e-mails in Tab 5B are communications between university attorneys and their clients, and that these communications were made in furtherance of the rendition of

legal services and advice for the university. You identify, in Tab 6, the university attorneys and clients who are parties to these communications. You further state that all of these communications were made in confidence and have not been shared or distributed to others. Based on your representations and our review, we find that you have demonstrated the applicability of the attorney-client privilege to the e-mails in Tab 5B. These e-mails may generally be withheld under section 552.107(1). However, a few of the individual e-mails contained in the e-mail strings are communications with parties not listed in Tab 6. You do not identify these parties or otherwise describe their relationship with the university. Therefore, we conclude you have failed to establish how these e-mails, which we have marked, constitute communications between or among university representatives and attorneys for the purposes of section 552.107. Thus, to the extent that these non-privileged e-mails exist separate and apart from the submitted e-mail chains, they may not be withheld under section 552.107.

Finally, we note that some of the non-privileged e-mails in Tab 5B contain e-mail addresses that are subject to section 552.137 of the Government Code, which excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Accordingly, if the university maintains the non-privileged e-mails separate and apart from the submitted e-mail chains, the university must withhold the e-mail addresses we have marked under section 552.137, unless the owners of the addresses have affirmatively consented to their release. *See id.* § 552.137(b).

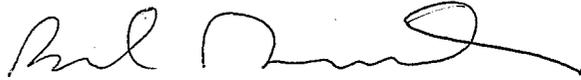
In summary, except for the information we have marked, the information in Tab 5A is not subject to the Act and need not be released in response to this request. If the employee whose information is at issue in Tab 5A timely elected to keep her personal information confidential pursuant to section 552.024, the university must withhold the information we marked under section 552.117(a)(1). The university may generally withhold the information in Tab 5B under section 552.107 of the Government Code; however, to the extent the marked e-mails exist separate and apart from the submitted e-mail chains, the non-privileged e-mails must be released. If the university maintains the non-privileged e-mails in Tab 5B separate and apart from the submitted e-mail strings, the university must withhold the e-mail addresses we marked under section 552.137, unless the owners of the addresses have affirmatively consented to their release. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php,

or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

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

Bob Davis
Assistant Attorney General
Open Records Division

RSD/cc

Ref: ID# 347438

Enc. Submitted documents

cc: Requestor
(w/o enclosures)