



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 27, 2009

Mr. Scott A. Kelly
Office of the General Counsel
The Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845-3424

OR2009-10361

Dear Mr. Kelly:

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# 350198 (TAMIU ID# 09-056).

Texas A&M International University (the "university") received a request for e-mails of three named employees during a specified time period.¹ You state you will redact social security numbers pursuant to section 552.147 of the Government Code. You also state that the university is withholding some information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.² You claim that the requested information is excepted from disclosure under sections 552.101, 552.107, 552.117, 552.1235, 552.136, and

¹The university sought and received clarification of the request. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed).

²The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.³ We have also received and considered the requestor's written comments. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

Initially, we address the requestor's contention that the university failed to follow its procedural obligations under section 552.301 of the Government Code. Section 552.301 prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(d) provides that a governmental body that requests an attorney general decision must provide to the requestor, not later than the tenth business day after the date of its receipt of the written request for information:

- (1) a written statement that the governmental body wishes to withhold the requested information and has asked for an attorney general decision about whether the information is within an exception to public disclosure; and
- (2) a copy of the governmental body's written communication to the attorney general asking for the decision or, if the governmental body's written communication to the attorney general discloses the requested information, a redacted copy of that written communication.

Gov't Code § 552.301(d). In this instance, the university received the request for information on May 11, 2009. Thus, the university was required to mail a copy of its request for a ruling to the requestor no later than May 26, 2009. The requestor contends that the university did not mail a copy of its request for a ruling to him until May 28, 2009, and he provides documentation showing that his copy of the request for a ruling bears a meter-mark of May 28, 2009. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). The university has provided no documentation to the contrary. Further, we note that the university failed to comply with section 552.301(b). Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving a written request for information. Gov't Code § 552.301(b). The university did not raise sections 552.1235 and 552.136 until June 1, 2009. Therefore, we conclude that the university failed to comply with the requirements of section 552.301 of the Government Code.

³We assume 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 those records contain substantially different types of information than that submitted to this office.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption the information is public and must be released, unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where an exception designed to protect the interest of a third party is applicable. *See* Open Records Decision No. 150 at 2 (1977). You assert the submitted information is excepted under sections 552.103 and 552.107. These sections, however, are discretionary in nature. They serve only to protect a governmental body's interests, and may be waived; as such, it does not constitute a compelling reason to withhold information for purposes of section 552.302. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions). Thus, no portion of the submitted information may be withheld under sections 552.103 and 552.107 of the Government Code. You claim, however, that portions of the submitted information are excepted under sections 552.101, 552.117, 552.1235, 552.136, and 552.137 of the Government Code. Because these sections can provide compelling reasons to overcome the presumption of openness, we will consider whether these sections apply to the submitted information is excepted under the Act.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. You assert that some of the submitted information should be withheld under the doctrine of common-law privacy, which is encompassed by section 552.101 of the Government Code. Common-law privacy protects information if it (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 types of information considered intimate or 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. In addition, this office has found that medical information or information indicating disabilities or specific illnesses is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Furthermore, this office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law

privacy. *See* Open Records Decision Nos. 600 (1992) (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Upon review, we find that portions of the submitted information, which we have marked, are highly intimate or embarrassing and not of legitimate public interest. Thus, this information is protected by common-law privacy and must be withheld under section 552.101.

Next, we address your argument under section 552.117 of the Government Code for portions of the remaining information. Section 552.117(a)(1) excepts from disclosure the current and former home addresses, telephone numbers, social security numbers, 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. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected under 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 state the employees at issue elected to keep their information confidential. Thus, the university must withhold the information we have marked pursuant to section 552.117(a)(1) of the Government Code.

You assert that a portion of the remaining information is excepted from disclosure under section 552.1235 of the Government Code, which excepts "the name or other information that would tend to disclose the identity of a person, other than a governmental body, who makes a gift, grant, or donation of money or property to an institution of higher education[.]" Gov't Code § 552.1235(a). However, this section does not except from disclosure the amount or value of an individual gift, grant, or donation. *See id.* § 552.1235(b). "Institution of higher education" is defined by section 61.003 of the Education Code. *Id.* § 552.1235(c). Section 61.003 of the Education Code defines an "institution of higher education" as any public technical institute, public junior college, public senior college or university, medical or dental unit, public state college, or other agency of higher education as defined in this section. We agree that the university qualifies as an "institution of higher education" under section 61.003 of the Education Code. Further, because section 552.1235 of the Government Code does not provide a definition of "person," we look to the definition provided in the Code Construction Act. *See id.* § 311.005. "Person" includes corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity. *Id.* § 311.005(2).

The university asserts that the remaining information contains the identifying information of university donors that is confidential pursuant to section 552.1235. However, we note that the names you have marked under this section are readily available on the university's website. Therefore, we conclude the university failed to demonstrate that section 552.1235

is applicable to the names at issue. Consequently, the names may not be withheld under section 552.1235 of the Government Code.

Section 552.136 states that “[n]otwithstanding 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.” *Id.* § 552.136. The university must withhold the account numbers we have marked under section 552.136.

Next, you assert that the remaining information contains e-mail addresses that are excepted from disclosure under section 552.137 of the Government Code, which requires a governmental body to withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked the personal e-mail addresses that must be withheld under section 552.137, unless the owner of an e-mail address has consented to its disclosure.

Finally, we note that some of the remaining information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the university must withhold the information we have marked under 1) section 552.101 of the Government Code in conjunction with common-law privacy; 2) section 552.117 of the Government Code; 3) section 552.136 of the Government Code; and, 4) section 552.137 of the Government Code. The remaining information must be released in accordance with copyright law.

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 cursive script, appearing to read "Tamara Wilcox".

Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/cc

Ref: ID# 350198

Enc. Submitted documents

c: Requestor
(w/o enclosures)