



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 29, 2010

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

OR2010-04387

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# 374072.

The University of Texas Health Science Center at Houston (the "university") received a request for information pertaining to a named individual and for e-mails to or from that individual during a specified time period. You state that you are releasing some information to the requestor. You claim a portion of the requested information is not subject to the Act. You also claim that the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, a portion of which contains a representative sample.¹

Initially, we note 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

¹ We 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.

and the governmental body owns the information or has a right of access to it.” *Id.* § 552.002(a). You inform us that portions of the submitted information consist of personal e-mails that have no connection with university business and represent incidental use of university e-mail by university employees. After reviewing the information at issue, we agree that most of the information you have marked does 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 id.* § 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). Therefore, this information, which we have marked, is not subject to the Act, and the university need not release it in response to this request. However, upon review, we find one of the e-mails you have marked as not subject to the Act was collected or assembled or is maintained in connection with the transaction of official university business; thus, this e-mail constitutes “public information” as defined by section 552.002(a). Accordingly, this e-mail is subject to the Act and must be released unless it falls within the scope of an exception to disclosure.

Next, you claim a portion of the remaining information is subject to section 552.111 of the Government Code. 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 exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, and opinions that reflect the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995). Moreover, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual

information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You state a portion of the remaining information relates to the university's policy formation involving a proposed partnership between the university's Children's Learning Institute (the "CLI") and the Texas School Ready! Certification System, and how to carry out the CLI's response to intervention research. You also inform us this information contains the advice and recommendations of university employees and Texas Education System employees regarding the broad policies at issue. Upon review of your arguments and the information at issue, we find the university may withhold the information we have marked under section 552.111 of the Government Code. However, the remaining information you have marked under section 552.111 is purely factual in nature. Thus, you have failed to demonstrate, and the remaining information does not reflect on its face, that it reveals advice, opinions, or recommendations that pertain to policymaking. Accordingly, we find none of the remaining information you have marked under section 552.111 is excepted from disclosure under that section, and it may not be withheld on that basis.

Next, we note that some of the remaining information may be subject to section 552.117 of the Government Code.² Section 552.117(a)(1) excepts from disclosure the home addresses and 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.³ *See* Gov't Code §§ 552.117(a)(1), .024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it was made. *See* Open Records Decision No. 530 at 5 (1989). Accordingly, if the employees at issue timely elected to keep their personal information confidential, the university must withhold the information we have marked under section 552.117. However, the university may not withhold this information under section 552.117 if the employees at issue did not make a timely election to keep their information confidential.

You claim portions of the remaining information are confidential under the doctrine of common-law privacy. 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. This section encompasses the doctrine of common-law privacy, which excepts from public disclosure private information about an

² The Office of the Attorney General will raise a mandatory exception like section 552.117 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

³ We note that section 552.024(c)(2) of the Government Code now allows a governmental body to redact certain personal information pertaining to employees who properly elected to keep their information confidential without the necessity of requesting a ruling from this office. *See* Gov't Code § 552.024(c)(2).

individual if the information (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). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. The types of information the court considered intimate and embarrassing 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; *see also Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 551 (Tex. App.—Austin 1983, *writ ref'd n.r.e.*). In addition, this office has found the following types of information are excepted from required public disclosure under common-law privacy: personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, protected under common-law privacy), 545 (1990); and some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (information pertaining to illness from severe emotional and job-related stress protected by common-law privacy), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). We note that the fact that a public employee is sick is public information, but specific information about illnesses is excepted from disclosure. *See* ORD 470 at 4.

Upon review, we agree that some of the submitted information is protected under common-law privacy; therefore, the university generally must withhold the information we have marked on that basis under section 552.101 of the Government Code. However, we note that a portion of this information, which we have identified, may only be withheld under common-law privacy if section 552.117 does not apply. Additionally, we find none of the remaining information you have marked under common-law privacy is intimate or embarrassing and of no legitimate public interest; thus, none of it may be withheld under section 552.101 in conjunction with common-law privacy.

You also raise section 552.101 in conjunction with constitutional privacy for the remaining information. Constitutional privacy consists of two interrelated types of privacy: (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. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* at 7. The scope of information protected is narrower than that under the common-law

doctrine of privacy; constitutional privacy under section 552.101 is reserved for “the most intimate aspects of human affairs.” *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find none of the remaining information implicates an individual’s privacy interests for purposes of constitutional privacy, and the university may not withhold any of it under section 552.101 on that basis.

We note the remaining information includes 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). The personal e-mail addresses in the remaining information are not specifically excluded by section 552.137(c). As such, these e-mail addresses, which we have marked, must be withheld under section 552.137 unless the owners of the addresses have affirmatively consented to their release. *See id.* § 552.137(b).⁴

In summary, the university need not release the information we have marked as not subject to the Act. The university may withhold the information we have marked under section 552.111 of the Government Code. The university must withhold the information we have marked under section 552.117 of the Government Code for university employees who made timely elections under section 552.024 of the Government Code, but may not withhold such information for any employees who did not make a timely election. The university generally must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; however, a portion of the information, which we have identified, may only be withheld under common-law privacy if section 552.117 does not apply. The university must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless their owners have consented to their release. The remaining information must be released to the requestor.

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

⁴ We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "James McGuire", with a stylized flourish at the end.

James McGuire
Assistant Attorney General
Open Records Division

JM/cc

Ref: ID# 374072

Enc. Submitted documents

c: Requestor
(w/o enclosures)