



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

October 29, 1993

Ms. Nancy S. Footer  
Associate University Counsel  
University of Houston System  
1600 Smith, Suite 3400  
Houston, Texas 77002

OR93-149

Dear Ms. Footer:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code, formerly V.T.C.S. article 6252-17a. Your request was assigned ID# 19099.

You inform us that on February 11, 1993 the University of Houston System ["the university"] received an open records request from a faculty member for all information in its possession which concerns him. You requested a decision from this office on February 19, 1993, as to whether the university may withhold portions of the requested information based on sections 3(a)(1) and 3(a)(11) of V.T.C.S. article 6252-17a, now sections 552.101 and 552.111 of the Government Code. In a letter dated April 13, 1993, you sought to withhold the requested information based on section 3(a)(3) of V.T.C.S. article 6252-17a, now section 552.103 of the Government Code, the litigation exception. You enclosed a copy of a petition, in order to demonstrate that the requested information relates to pending litigation to which the university is a party.

We first consider the effect of raising the litigation exception nearly two months after the university received the request for information. Section 552.301(a) of the Open Records Act provides as follows:

A governmental body that receives a written request for information that it considers to be within one of the exceptions under Subchapter C must ask for a decision from the attorney

general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions. The governmental body must ask for the attorney general's decision within a reasonable time but not later than the 10th calendar day after the date of receiving the written request.

Section 552.302 of the Government Code states that

[i]f a governmental body does not request an attorney general decision as provided by Section 552.301(a), the information requested in writing is presumed to be public information.

Under these provisions, if a governmental body raises an exception after the 10-day time period has expired, the information is presumed to be public information. However, a governmental body may overcome this presumption by demonstrating a compelling reason why the information should not be made public. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); Open Records Decision Nos. 515 (1988); 452 (1986). This compelling reason standard applies when a governmental body raises additional exceptions past the 10-day time limit. Open Records Decision No. 515 (1988) at 6. You raised the litigation exception past the 10-day time limit; therefore, we must consider whether that exception is a compelling reason to withhold the requested information.

Generally, this office has recognized two compelling reasons which overcome the presumption of openness: the fact that information is deemed confidential by law; and the fact that the release of the information implicates third party interests. *See, e.g.*, Open Records Decision No. 150 (1977). *But see* Open Records Decision No. 586 (1991) (need of another governmental body to withhold requested information may provide a compelling reason for nondisclosure). We do not consider the fact that the requested information relates to pending litigation a compelling reason to overcome the presumption of openness. We therefore conclude that you may not withhold the requested information based on section 552.103 of the Open Records Act.

We turn to the exceptions you raised within the 10-day time period. You raise section 3(a)(1) of V.T.C.S. article 6252-17a, now section 552.101 of the Government Code, in conjunction with the attorney-client privilege in regard to documents you enclosed as Exhibit A. Although past decisions of this office relied on section 3(a)(1) to withhold information within the attorney-client privilege, the privilege is more specifically covered under section 552.107(1) of the Government Code, formerly section 3(a)(7) of V.T.C.S. article 6252-17a. Open Records Decision No. 574 (1990). The protection afforded attorney-client communications under section 552.107(1) extends to factual information or requests for legal advice communicated by the client to the

attorney, as well as to legal advice or opinion rendered by the attorney to the client or to an associated attorney in furtherance of the rendition of legal services to the client. *See id.* Except for two documents which we have marked, we agree that you may withhold the documents in Exhibit A under section 552.107 of the Open Records Act as within the attorney-client privilege.<sup>1</sup>

You raise section 3(a)(11) of V.T.C.S. article 6252-17a, now section 552.111 of the Government Code, as an exception to the required public disclosure of questionnaires completed by faculty colleagues to evaluate the administrative performance of the requestor. We have examined the questionnaires, which you submitted as "Exhibit B." We note that although an evaluator may choose to simply check an answer to the questions posed on the questionnaire (for example, "above average", "average" or "below average"), each question on the questionnaire has a "written comments" section. Thus, many of the questionnaires contain the evaluator's handwritten comments. Three of the questionnaires are signed. You say that the evaluators were assured that their handwritten comments would be held in confidence. However, you say that the handwritten comments were transcribed *verbatim* into a typewritten document which was or will be shared with the requestor. Your concern is that by releasing copies of the original questionnaires, which in some cases contain handwritten comments and in three cases the name of the evaluator, the anonymity of the evaluators will be lost.

#### Section 552.111 excepts from required public disclosure

[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

The Third Court of Appeals recently addressed the proper scope and interpretation of this exception. *See Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ). Consequently, this office reexamined its past rulings applying this section in light of *Gilbreath*. *See* Open Records Decision No. 615 (1993) (copy enclosed). In that decision, we concluded that *Gilbreath* requires this office to interpret this section in a more limited way. Reasoning that since the Texas Legislature patterned section 3(a)(11) after exemption 5 in the Freedom of Information Act ("FOIA"), the decision concluded that the exception must be applied in accordance with the construction of exemption 5 of FOIA. Thus, relying on federal cases interpreting exemption 5, we interpreted section 552.111 to apply to only those internal

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<sup>1</sup>The attorney representing the requestor urges that the requested information is available pursuant to section 3(a)(2) of V.T.C.S. article 6252-17a, now section 552.102(a) of the Government Code. Section 552.102(a) grants an employee of a governmental body a right of access to information in that employee's personnel file. However, this provision does not override other exceptions in the Open Records Act. *See* Open Records Decision No. 288 (1981). Moreover, it is not apparent that the information in Exhibit A is part of the requestor's personnel file.

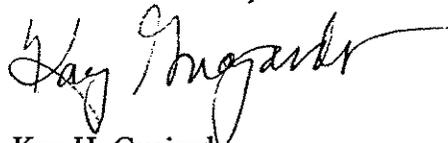
communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body at issue. Open Records Decision No. 615 (1993) at 5. Furthermore, an agency's policymaking functions do not encompass internal administrative and personnel matters. *Id.*

You argue that if the university cannot assure the anonymity of the faculty members, the free flow of information during the evaluation process will be inhibited. You say that disclosure of the questionnaires will have a chilling effect on the open and frank discussions in the evaluation process. The purpose of the exception is indeed to promote frank discussion within government agencies; however we reiterate that under Open Records Decision No. 615 the exception applies only to information that relates to the *policymaking* function of the university. We therefore must conclude that, since the questionnaires at issue relate solely to a personnel matter about a particular individual, a matter which does not implicate the policymaking functions of the university, you must release Exhibit B in its entirety.

We regret that the release of Exhibit B will result in the identification of faculty members who were promised anonymity. Information is not confidential under the Open Records Act simply because the party submitting information to a governmental body expects or requests that the information be kept confidential. See Open Records Decision Nos. 479 (1987) at 1; 180 (1977) at 2.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR93-149.

Yours very truly,



Kay H. Guajardo  
Assistant Attorney General  
Open Government Section

KHG/rho

Ref.: ID# 19099

Enclosures: Submitted documents  
Open Records Decision No. 615

cc: Dr. Russell Meyer  
University of Houston  
Professor of English  
1600 Smith, Suite 3400  
Houston, Texas 77002  
(w/o enclosures)