



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 21, 1995

Mr. J. Robert Giddings
Attorney
The University of Texas System
Office of General Counsel
201 West Seventh Street
Austin, Texas 78701-2981

OR95-1587

Dear Mr. Giddings:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 36745.

The University of Texas at Arlington (the "university") received a request for three categories of information:

1. All reports, audits or other documents in possession of the University of Texas at Arlington concerning asbestos contamination and/or abatement on campus in the last two years. This would include any documents related to an investigation and/or audit conducted this summer to ascertain the extent of asbestos contamination in any and all buildings on campus, and documents containing recommendations from a consulting firm that evaluated asbestos contamination on campus. This would also include any transcripts of interviews with UT-Arlington employees in the course of the above-mentioned investigation and/or audit, and any documents that reveal the results of air-monitoring tests conducted on campus to measure asbestos contamination.
2. All reports, audits or documentation of any kind concerning an investigation and/or audit conducted this summer into alleged criminal activities on the part of employees of the Physical Plant of the University of Texas at Arlington or any other employees of the University of Texas at Arlington who work for any other department. This includes any transcripts of interviews with

University of Texas at Arlington employees that were taken during the course of this investigation and/or audit. This also includes any information about the status of the investigation and/or audit, and the identities of all University of Texas at Arlington employees, University of Texas at Austin employees and University of Texas System employees involved in the investigation and/or audit as investigators, witnesses and suspects of wrongdoing.

3. All reports, audits or documentation of any kind concerning an investigation and/or audit conducted this summer into alleged mismanagement on the part of employees of the Physical Plant of the University of Texas at Arlington or any other employees of the University of Texas at Arlington who work for any other department. This includes any transcripts of interviews with University of Texas at Arlington employees taken during the course of this investigation and/or audit. This also includes any information about the status of the investigation and/or audit, and the identities of all University of Texas at Arlington employees, University of Texas at Austin employees and University of Texas System employees involved in the investigation and/or audit as investigators, witnesses and suspects of wrongdoing.

You claim that the requested information is excepted from disclosure under sections 552.111, 552.124,¹ and 552.101 of the Government Code and the informer's privilege incorporated by section 552.101 of the Government Code, and that a portion of the requested information is excepted under the attorney-client privilege.² We have considered the exceptions you claimed and have reviewed the documents at issue.

In the recent legislative session, the legislature enacted the Texas Environmental, Health, and Safety Audit Privilege Act (the "Act"). Act of May 9, 1995, 74th Leg., R.S., ch. 219, 1995 Tex. Sess. Law Serv. 1963 (Vernon). The purpose of the act is to "encourage voluntary compliance with environmental and occupational health and safety laws."³ An "audit report" is defined as "a report that includes each document and communication, other than those set forth in Section 8 of the Act, produced from an

¹Section 552.124 was added to the Government Code in the most recent legislative session. Act of May 9, 1995, 74th Leg., R.S., ch. 219, § 14, 1995 Tex. Sess. Law Serv. 1963, 1969 (Vernon) (to be codified as Gov't Code § 552.124).

²We note that although you claimed the attorney-client privilege under sections 552.101 and 552.111 of the Government Code, the privilege is properly claimed under section 552.107(1) of the Government Code.

³Act of May 9, 1995, 74th Leg., R.S., ch. 219, § 2, 1995 Tex. Sess. Law Serv. 1963 (Vernon).

environmental or health and safety audit.”⁴ An “environmental or health and safety audit” means:

a systematic voluntary evaluation, review, or assessment of compliance with environmental or health and safety laws or any permit issued under those laws conducted by an owner or operator, an employee of the owner or operator, or an independent contractor of:

- (A) a regulated facility or operation; or
- (B) an activity at a regulated facility or operation.⁵

The university claims that the documents responsive to the first request are excepted from disclosure under section 552.124 of the Government Code. We agree that most of the information contained in Exhibit “A,” which is responsive to the first request, is excepted from disclosure under section 552.124 of the Government Code.⁶ Likewise, some of the information in Exhibit “B” was part of the environmental or health and safety audit and must be withheld under section 552.124. We have marked the documents or portions thereof that must be withheld under section 552.124.

However, several of the documents in Exhibit “A” either do not fall within definition of an “audit report” or are expressly excepted under the Act. To be an exhibit or appendix to an audit report, the information must be “supporting information that is collected or developed for the primary purpose of and in the course of an environmental or health and safety audit.”⁷ We have marked the documents that do not appear to have been collected or developed for the *primary purpose of and in the course of* an audit. These documents appear to have been collected by a university employee prior to the audit or are invoices, which are not “supporting information.” Therefore, the university may not withhold these documents under section 552.124. Some of this same information is expressly made nonprivileged under the Act. The Act provides that

⁴*Id.* § 4, 1995 Tex. Sess. Law Serv. at 1964. The types of exhibits and appendices that may be contained in an audit report include: (1) interviews with current or former employees; (2) field notes and records of observations; (3) findings, opinions, suggestions, conclusions, guidance, notes, drafts, and memoranda; (4) legal analyses; (5) drawings; (6) photographs; (7) laboratory analyses and other analytical data; (8) computer-generated or electronically recorded information; (9) maps, charts, graphs, and surveys; and (10) other communications associated with an environmental or health and safety audit. *Id.*

⁵*Id.* § 3, 1995 Tex. Sess. Law Serv. at 1963.

⁶This includes the audit report prepared by the outside consultant. As we have concluded that the university may withhold this report under section 552.101 of the Government Code and your argument under section 552.111 of the Government Code for the information in Exhibit “A” appears to apply only to this report, we need not address your argument under section 552.111 of the Government Code as to the information in Exhibit “A.”

⁷*Id.* § 4, 1995 Tex. Sess. Law Serv. at 1964.

“information obtained from a source not involved in the preparation of the environmental or health and safety audit report” is not privileged under the Act.⁸ Consequently, the university may not withhold these documents under section 552.124. We have marked the documents that are not excepted under section 552.124.⁹

You claim that a portion of the information that is responsive to request numbers 1 and 2 is excepted by the informer’s privilege as applied through section 552.101 of the Government Code. The Texas courts have recognized the informer’s privilege. See *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer’s identity. Open Records Decision Nos. 515 (1988) at 3, 208 (1978) at 1-2. The informer’s privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to “administrative officials having a duty of inspection or of law enforcement within their particular spheres.” Open Records Decision No. 279 (1981) at 2 (citing Wigmore, *Evidence*, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. See Open Records Decision Nos. 582 (1990) at 2, 515 (1988) at 4-5. We conclude that two of the witnesses made reports of possible criminal violations to law enforcement officials. Therefore, the university may withhold information that would tend to reveal the identities of these informers. We have marked a sample of the information in Exhibits “A” and “B” to indicate the type of information that is protected by the informer’s privilege. We are assuming that the subject(s) of the information do not know the identities of these informers.

Section 552.101 of the Government Code protects “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” including information protected by the common-law right to privacy. *Industrial Found. v. Texas*

⁸*Id.* § 8, 1995 Tex. Sess. Law Serv. at 1966.

⁹We note that one of the documents in Exhibit “A” contains the home address, home telephone number, and social security number of a university employee. If the employee has made the election under section 552.024 of the Government Code to keep that information confidential, the university must withhold that information. Act of May 29, 1995, 74th Leg., R.S., ch. 1035, § 9, 1995 Tex. Sess. Law Serv. 5127, 5132 (Vernon) (to be codified as Gov’t Code § 552.117). Section 552.024 of the Government Code was amended in the last legislative session to include social security numbers and information that relates to whether the government employee has family members. *Id.* § 5, 1995 Tex. Sess. Law Serv. at 5130 (to be codified as Gov’t Code § 552.024). Even if the employee has not elected to keep this information confidential, federal law may prohibit disclosure of the employee’s social security number. A social security number is excepted from required public disclosure under section 552.101 of the act in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. See Open Records Decision No. 622 (1994). Based on the information you have provided, we are unable to determine whether the social security numbers are confidential under this federal statute. We note, however, that section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information.

Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is (1) highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person, *and* (2) of no legitimate concern to the public. *Id.* at 683-85. You claim that, based on the court's ruling in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the university may withhold the names of the witnesses and their detailed statements made in connection with request numbers 2 and 3. However, none of the interviewed witnesses testified to having witnessed sexual harassment which was the only issue addressed by the court in *Ellen*. Thus, the records at issue here contain no "highly intimate or embarrassing" information, and releasing these records does not implicate the privacy interests of the witnesses. With the exception of information that would tend to identify an informer, the university must release the names and statements of the witnesses.¹⁰

You claim that the information in Exhibit "B" is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. The information in Exhibit "B" does not relate to the university's policymaking processes but to internal administrative and personnel matters. Therefore, the university may not withhold the documents in Exhibit "B" from disclosure under section 552.111 of the Government Code.

We note that some of the information contained in Exhibit "B" reveals the home addresses of government employees and whether these employees have family members.¹¹ If these employees have made the election under section 552.024 that this information be kept confidential, the university must withhold that information under section 552.117 of the Government Code.

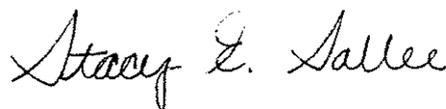
¹⁰You state that certain information relating to allegations of employee misconduct and mismanagement should be withheld because no disciplinary action was taken regarding these allegations. However, we note that one of the documents indicates whether the allegations were sustained or not. Therefore, no invasion of privacy will result.

¹¹See *supra* note 9.

You next claim that the documents in Exhibit "C" are excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 (1990) at 5. Section 552.107(1) does not except purely factual information from disclosure, Open Records Decision Nos. 574 (1990), 559 (1990), nor does it protect information gathered by an attorney as a fact-finder, Open Records Decision No. 462 (1987). We conclude that portions of the memoranda in Exhibit "C" consist of legal advice or opinions. However, some of the memoranda is purely factual information that was gathered by an attorney in his role as a fact-finder and may not be withheld under section 552.107(1). Further, some of the information in the memoranda must be withheld under section 552.124 because it is part of the environmental or health and safety audit. Finally, a portion of the information may tend to reveal the identities of informers. We have marked the memoranda in Exhibit "C" to indicate the information that must be withheld under section 552.124 and may be withheld under section 552.107(1) and the informer's privilege.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/rho

Ref.: ID# 36745

Enclosures: Marked documents

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(w/o enclosures)