



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 9, 1998

Mr. Thomas G. Ricks
President
University of Texas Investment
Management Company
210 W. Sixth Street, 2nd Floor
Austin, Texas 78701

OR98-1636

Dear Mr. Ricks:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 116697.

The University of Texas Investment Management Company ("UTIMCO") received a request for information concerning Brian G. Borowski's personnel file and separation agreement. You state that UTIMCO is making available to the requestor copies of portions of the requested information. You assert that several documents are excepted from required public disclosure based on sections 552.101, 552.102, 552.103, 552.107(1), 552.111, 552.117 and 552.130 of the Government Code.

Section 552.101 excepts from required public disclosure information considered to be confidential by law, including information made confidential by judicial decision. This exception applies to information made confidential by the common-law right to privacy. *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).¹ Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate

¹UTIMCO also raises section 552.102 of the Government Code. Section 552.102(a) of the Government Code excepts from public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The test to be applied to information claimed to be protected under section 552.102 is the same test formulated by the Texas Supreme Court in *Industrial Foundation of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. *See Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Thus, our decision regarding the applicability of section 552.101 and the common-law right to privacy will resolve your section 552.102 claim.

or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. *See id.* The doctrine of common-law privacy may protect from disclosure certain financial information that does not involve a transaction with a governmental body. *See* Open Records Decision No. 545 (1990). We have marked the information protected from disclosure based on section 552.101 in conjunction with the common-law right to privacy.

Section 552.101 also excepts from disclosure information deemed confidential by statute. The tax return information is confidential under federal law and must not be released. 26 U.S.C. § 6103; *see* Open Records Decision No. 600 (1992).

You assert that portions of the information are attorney work product, protected from disclosure based on sections 552.103 and 552.111 of the Government Code. Section 552.103 may apply to attorney work product if the information relates to pending or reasonably anticipated litigation. A governmental body may withhold information as attorney work product under section 552.111 if the governmental body can show that (1) the information was created for trial or in anticipation of litigation under the test articulated in *National Tank Co. V. Brotherton*, 851 S.W.2d 193 (Tex. 1993), or after a lawsuit is filed, and (2) the work product consists of or tends to reveal an attorney's mental processes, conclusions, and legal theories. *See* Open Records Decision No. 647 (1996) at 5. As the information consists of correspondence from opposing counsel, we do not believe that either section 552.103 or 552.111 is applicable in this instance, as these exceptions are not intended to protect the work product of a third party.

You raised section 552.107(1), which protects information within the attorney-client privilege, for the first time in your letter dated May 6, 1998. You failed to raise this exception within the ten-day deadline for raising exception. *See* Gov't Code § 552.301. Thus, UTIMCO waived any section 552.107(1) protection. *See* Open Records Decision No. 630 (1994).

Section 552.111 also may apply to a governmental body's internal communications consisting of advice, recommendations, or opinions reflecting the policymaking process of the governmental body at issue. *See* Open Records Decision No. 615 (1993). An agency's policymaking processes do not encompass routine internal administrative and personnel matters. *See id.* We believe the submitted information concerns routine internal administrative and personnel matters. Thus, section 552.111 is inapplicable.

Some of the information may be excepted from public disclosure based on section 552.117 of the Government Code. This exception protects information that relates to the an employee's home address, home telephone number, or social security number, or that reveals whether the employee has family members. In order for this exception to apply, the employee must have complied with the procedures in section 552.024 of the Government Code at the time of the governmental body's receipt of the request. *See* Open Records Decision No. 530 (1989).

Finally, we turn to the Employment Eligibility Verification Form I-9. The public release of this form is governed by title 8, section 1324a of the United States Code, which provides that the form "may not be used for purposes other than for the enforcement of this chapter and for enforcement of other federal statutes governing crime and criminal investigations." 8 U.S.C. § 1324(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Release of the Form I-9 under the Open Records Act is not for "purposes of enforcement" of the statute.² You must withhold this document.

We are resolving this matter with this 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 may 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,



Kay Hastings
Assistant Attorney General
Open Records Division

KHH/mjc

Ref.: ID# 116697

Enclosures: Submitted documents

cc: Mr. Stephen N. Lisson
Publisher/Editor
Initiate!!
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(w/o enclosures)

²In light of our conclusion concerning the public release of the I-9 form, we need not address your section 552.130 claim.