



April 10, 2001

Ms. Priscilla Lozano
The University of Texas System
Office of the General Counsel
201 West Seventh Street
Austin, Texas 78701-2902

OR2001-1429

Dear Ms. Lozano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 145830.

The University of Texas at El Paso (the "university") received a request for documentation regarding approval of a new job title, two specified job descriptions, documents requesting a reduction in force and reorganization for the Office of Scholarships for the 00-01 fiscal year as well as any information concerning a theft of scholarship funds. You state that you have released documentation regarding approval of a new job title as well as the two job descriptions. You claim that the remaining requested information is excepted from disclosure under sections 552.026, 552.101, 552.103, 552.108, 552.111, 552.114, and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative samples of information.¹

Initially, we note that section 552.022(a) provides in pertinent part:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

¹In reaching our conclusion here, we assume that 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 that those records contain substantially different types of information than that submitted to this office.

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Tab 7 includes information in an account and voucher relating to the receipt or expenditure of public or other funds by the university. Sections 552.103, 552.111, and 552.116 are discretionary exceptions under the Public Information Act and are, therefore, not "other law" that makes the submitted information confidential. See Open Records Decision No. 473 at 2 (1987) (discretionary exceptions under the Act can be waived). Therefore, you must release the marked information in Tab 7 under section 552.022(a)(3) of the Government Code.

However, you must withhold the student-identifying information in the information marked for release in Tab 7 because it is made confidential by other law. The Family Educational Rights and Privacy Act of 1974 ("FERPA") provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. See 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990).

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception.

Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." See Open Records Decision Nos. 332 (1982), 206 (1978). We have marked the student-identifying information that must be withheld under FERPA. Accordingly, you must withhold the marked information under FERPA but release the remaining information in these documents pursuant to section 552.022(a)(3).

Further, some of the information that must be released contains social security numbers of former or current university employees. Section 552.117(1) excepts from disclosure information that relates to the home addresses, home telephone numbers, social security numbers, and family member information of current or former employees of a governmental body who request that this information remain confidential under section 552.024. Please note that whether a particular piece of information is protected by section 552.117(1) must be determined at the time the request for it is made. See Open Records Decision No. 530 at 5 (1989). Therefore, a proper election must be made *prior* to the request for information. If the employees did not elect prior to the request to keep their social security numbers confidential under section 552.024, this information may not be withheld from public disclosure based on section 552.117(1) of the Government Code. If the employees did make such an election, the social security numbers must be withheld under section 552.117(1) of the Government Code.

We also note that social security numbers are excepted from required public disclosure under section 552.101 of the Government Code in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if the social security numbers were obtained or are 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). It is not apparent to us that the social security numbers contained in the records at issue were obtained or are maintained by the university pursuant to any provision of law enacted on or after October 1, 1990. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the university to obtain or maintain social security numbers. Therefore, we have no basis for concluding that the social security numbers at issue were obtained or are maintained pursuant to such a statute and are, therefore, confidential under section 405(c)(2)(C)(viii)(I). We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing the social security numbers, the university should ensure that these numbers were not obtained or maintained by the university pursuant to any provision of law enacted on or after October 1, 1990.

We note that Tab 6 contains bank records that have been obtained pursuant to a grand jury subpoena. The Public Information Act (the "Act") does not apply to information within the actual or constructive possession of the grand jury. Open Records Decision No. 513 (1988). When an individual or entity acts at the direction of a grand jury as the grand jury's agent, information prepared or collected by the agent is within the grand jury's constructive

possession. *Id.* Information not held or maintained in this manner is not exempt from coverage of the Act and may be withheld only if one of the act's specific exceptions applies to the information. *Id.* Furthermore, information obtained pursuant to a grand jury subpoena issued in connection with the prosecution is within the grand jury's constructive possession and is not subject to the Act. *Id.*; see also Gov't Code § 552.003. If the bank records are within the constructive possession of the grand jury, the bank records are not subject to disclosure under the Act.

You claim that the information in Tab 6 is excepted under section 552.108 of the Government Code.² Section 552.108(a)(1) excepts from disclosure information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime if release of the information would interfere with the detection, investigation, or prosecution of crime. You explain that the documents in Tab 6 were created by the university police as part of an on-going criminal investigation. Further, you explain that the university police department is a law enforcement agency that employees commissioned peace officers. See Educ. Code § 51.203 (providing that institutions of higher education may employ peace officers). You also inform this office that the investigation has been referred to the El Paso District Attorney and that criminal charges are pending against numerous individuals. Accordingly, we find that release of the information in Tab 6 would interfere with the detection, investigation, or prosecution of crime. See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

However, section 552.108 is inapplicable to basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle*. 531 S.W.2d at 177. Please note that FERPA does not apply to records created by a law enforcement unit of an educational agency or institution. See Open Records Decision No. 612 at 2 (1992). Accordingly, you need not withhold student-identifying information from Tab 6. Thus, with the exception of the basic front page offense and arrest information, you may withhold the submitted information in Tab 6 based on section 552.108(a)(1).³

You assert that the submitted information in Tab 5 is excepted under section 552.103 of the Government Code. Section 552.103(a) provides as follows:

²We note that the information in Tab 6 appears to be a completed investigation which is public pursuant to section 552.022(a)(1) except as provided by section 552.108. Because you have claimed section 552.108 for this investigation, the investigation is not public pursuant to section 552.022(a)(1).

³Generally, basic information may not be withheld from public disclosure under section 552.103. Open Records Decision No. 362 (1983).

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). Further, litigation must be pending or reasonably anticipated on the date the requestor applies to the public information officer for access. Gov't Code § 552.103(c).

You have provided a copy of an original petition filed against the university in Cause Number 2001-088, *Jackie Austin v. The University of Texas at El Paso*. You explain that the plaintiff, the former Director of the University Scholarships Office, alleges that the university violated the Texas Whistleblower Act by retaliating against her for reporting the theft of scholarship funds. After reviewing your arguments and the submitted information, we conclude that you have demonstrated the existence of pending litigation and that the submitted information in Tab 5 relates to the pending litigation. Accordingly, you may withhold the information in Tab 5 under section 552.103 of the Government Code.

We note that if the opposing party in the litigation has seen or had access to any of the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). We note that the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982).

You also assert that information in Tab 7 is excepted under section 552.116 of the Government Code. Section 552.116 of the Government Code provides the following:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency or institution of higher education as defined by Section 61.003, Education Code, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [required public disclosure] by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You state that the information in Tab 7 is contained in audit files for which a final report has not been issued. Most of the submitted information appears to have been generated by the Office of Auditing and Consulting Services. Assuming that the audit is authorized by statute, we conclude that the submitted information in Tab 7 falls under the definition of audit working papers and, therefore, the submitted information in Tab 7 may be withheld under section 552.116 of the Government Code.⁴

In conclusion, you must release the marked information in Tab 7 pursuant to section 552.022(a)(3) of the Government Code. However, you must withhold the marked information in Tab 7 under FERPA as well as any social security numbers that are excepted under section 552.117(1) or federal law. Further, the bank records in Tab 6 are not subject to the Act if in the constructive possession of the grand jury. You may withhold the information in Tab 6 under section 552.108(a)(1), but you must release basic information. You may also withhold the information in Tab 5 under section 552.103 and the remaining information in Tab 7 pursuant to section 552.116 of the Government Code.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

⁴Having found the information in Tab 7 to be excepted under section 552.116, we need not address sections 552.103 and 552.111.

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

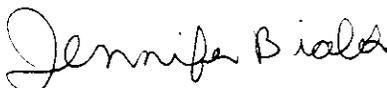
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jennifer H. Bialek
Assistant Attorney General
Open Records Division

JHB/er

Ref: ID# 145830

Encl: Submitted documents

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