



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

October 24, 2003

Ms. Carol Longoria  
Office of the General Counsel  
University of Texas System  
201 West Seventh Street  
Austin, Texas 78701-2902

OR2003-7629

Dear Ms. Longoria:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 189898.

The University of Texas System (the "system") received two requests from the same individual for telephone records and information related to tuition flexibility or deregulation pertaining to fourteen specified university officials and regents from May 23, 2003 to June 2, 2003. The requestor subsequently amended the request to exclude two of the named regents. You state that some responsive information will be provided to the requestor, but assert that the system does not have information that is responsive to portions of the requests. It is implicit in several provisions of the Public Information Act (the "Act") that the Act applies only to information in existence at the time a request for information is received. *See* Gov't Code §§ 552.002, .021, .227, .351. A governmental body need not release information that did not exist when it received a request or create new information in response to a request. *See Economic Opportunities Dev. Corp. of San Antonio v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd). You claim that other responsive information is excepted from disclosure under sections 552.101, 552.106, 552.108, 552.111,

552.117, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, you state that a portion of the requested information was previously addressed by this office in Open Records Letter No. 2003-7394 (2003). To the extent that the currently requested information is precisely the same information that was addressed in that ruling, the system may rely on that letter ruling as a previous determination regarding that information. See Open Records Decision No. 673 (2001) (previous determination exists where requested information is precisely same information addressed in prior attorney general ruling; ruling is addressed to same governmental body; ruling concludes that information is or is not excepted from disclosure; and law, facts, and circumstances on which ruling was based have not changed).

We begin by addressing your assertion that the system need not release telephone numbers because “the subject telephone numbers are ‘mechanical adjustments’ that must be made to gain direct access to the listed individuals.” In Open Records Decision No. 401 (1983), this office considered a request for a computer program and stated:

Programs that give access to computer-stored information are analogous . . . to the combinations of safes. Safe combinations are merely notations of mechanical adjustments that must be made to gain access to the contents of the safe. The security of the information can be very important, even vital, depending on the contents. The same is true of information allowing access to government computers. Just as there is a difference between (a) making public particular documents kept in a safe and (b) releasing the safe’s combination, there is a difference between (a) making available information stored in a computer and (b) making available information about how to get into the computer. The Open Records Act does not require governmental bodies to disclose information that would breach the security of government computers or computer files any more than it requires them to disclose the combinations of safes that might be on their premises.

ORD 401 at 5. In Open Records Decision No. 581 (1990), we again considered a request for a computer program. Revisiting our previous decision, we revised our standard and concluded that “[w]here information has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property,” it is not public information subject to disclosure under the Act. ORD 581 at 7 (construing predecessor statute).

---

<sup>1</sup>We have also considered comments submitted by the requestor. See Gov’t Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

We have considered your arguments and conclude that these telephone numbers do not exist solely as tools used to maintain, manipulate, or protect information. We find that the rationale in Open Records Decision Nos. 401 and 581 is not applicable in this instance.

We next note that the submitted documents contain information that falls within the purview of section 552.022(a)(3). Section 552.022(a)(3) provides that information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body is not excepted from required disclosure unless they are made expressly confidential by law. The submitted information includes telephone billing records (Tabs 8 and 10). These records are accounts as contemplated by section 552.022(a)(3), and are therefore public information not excepted from public disclosure, unless the information is expressly made confidential under other law.

You claim that portions of these documents are excepted from disclosure under section 552.108 of the Government Code. However, this section constitutes a discretionary exception, which is intended to protect the interests of a governmental body, as distinct from exceptions that are intended to protect information deemed confidential by law or the interests of third parties. *See* Open Records Decision Nos. 586 (1991) (governmental body may waive law enforcement exception), 522 at 4 (1989) (discretionary exceptions in general), 177 (1977) (governmental body may waive statutory predecessor to section 552.108). Therefore this exception does not constitute other law that makes information confidential for purposes of section 552.022(a)(3). Therefore, the system may not withhold the information subject to the purview of section 552.022(a)(3) under section 552.108. However, you also raise sections 552.101, 552.117, and 552.136 as potential exceptions to disclosure. Because these sections constitute other law for purposes of section 552.022, we will address your arguments regarding them for the information that is subject to section 552.022, along with the remaining submitted information.

Section 552.101 excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information protected by other statutes. Section 418.176 of the Government Code provides in relevant part:

**Sec. 418.176. CONFIDENTIALITY OF CERTAIN INFORMATION RELATING TO EMERGENCY RESPONSE PROVIDERS.**

(a). Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

(1) relates to staffing requirements of an emergency response provider, including law enforcement agency, a fire-fighting agency, or an emergency services agency;

(2) relates to a tactical plan of the provider; or

(3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

Act of June 2, 2003, 78th Leg., R.S., ch. 1312, § 3, 2003 Tex. Sess. Law Serv. 4814 (to be codified at Gov't Code § 418.176). In this instance, you state that several of the telephone numbers that you seek to withhold belong to members of the Core Crisis Management Team who serve as points of contact for the *Emergency Response Plan*. However, you have failed to demonstrate that these telephone numbers are "collected, assembled, or maintained . . . for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity." We are therefore unable to conclude that the telephone numbers you seek to withhold are confidential under section 418.176, and they may not be withheld under section 552.101 on that basis. *See generally* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express and cannot be implied from overall statutory structure), 478 at 2 (1987) (language of confidentiality statute controls scope of protection), 465 at 4-5 (1987) (statute explicitly required confidentiality).

You also assert that the cellular telephone and "back line" numbers are protected under common law and constitutional privacy, which are both encompassed by section 552.101 of the Government Code. Common law privacy protects information if it (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. *Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court 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.

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. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" that include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* 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.* The scope of information protected is narrower than that under the common law doctrine of privacy and includes only information that concerns the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village*, Texas, 765 F.2d 490 (5th Cir. 1985)).

You contend that "releasing the private cell phone numbers and any private back line numbers, including those numbers called or received, divulges highly intimate information protected by the common law and constitutional right to privacy with regard to matters [that]

do not relate to University business.” We note, however, that the “back line numbers” at issue are telephone numbers of university offices and that what you refer to as “private cell phone numbers” are instead the telephone numbers of cellular telephones that are issued to university employees and paid for with university funds. We thus conclude that these telephone numbers are not protected by either common law or constitutional privacy, and they may not be withheld under section 552.101 on that basis. *See* Open Records Decisions Nos. 478 (1987), 455 (1987) (in absence of special circumstances, names, addresses, and telephone numbers are not “intimate” information); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow).

You also contend that the employees’ cellular telephone numbers are confidential under section 552.136 of the Government Code. This section provides:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value;  
or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov’t Code § 552.136. You assert that the cellular telephone numbers constitute access device numbers that are “used to obtain services or another thing of value[,] immediate access to University officials and administrators.” Having considered your arguments, we find that these cellular telephone numbers do not constitute access device numbers for purposes of section 552.136. We find, however, that certain account numbers, a sample of which we have marked, do constitute access device numbers that must be withheld under section 552.136.

We turn now to your arguments under section 552.117 of the Government Code for other telephone numbers contained in the requested information. Section 552.117(a)(1) of the Government Code excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of governmental body who timely request that such information be kept confidential under section 552.024. Whether a particular piece of

information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, pursuant to section 552.117(a)(1), the system must withhold the telephone numbers in the requested records to the extent that they reveal information that these employees elected, prior to the system's receipt of this request, to keep confidential under section 552.024. *See* Open Records Decision No. 670 (2001) (applying predecessor of section 552.117 to personal cellular telephone numbers and personal pager numbers paid for by employee). The system may not withhold such information under section 552.117 to the extent a timely election was not made.

You also assert that the individuals' "direct contact [telephone] numbers" contained in the information not subject to the purview of section 552.022 may be withheld pursuant to section 552.108 of the Government Code. Section 552.108(b)(1) excepts from disclosure "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if: (1) release of the internal record or notation would interfere with law enforcement or prosecution." Section 552.108 only applies to records of a law enforcement agency or prosecutor. *See* Open Records Decision Nos. 439 (1988) (concluding that predecessor of section 552.108 only applies to records created by agency, or portion of agency, whose primary function is to investigate crimes and enforce criminal laws), 287 (1981). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a law enforcement agency must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement; the determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. Open Records Decision No. 409 at 2 (1984). This office has previously determined that the cellular telephone numbers assigned to county officials and employees with specific law enforcement responsibilities are excepted from required public disclosure pursuant to section 552.108. *See* Open Records Decision No. 506 (1988) (applying predecessor statute).

In this instance, you have not established that the system itself is a law enforcement agency for purposes of section 552.108. Furthermore, you have failed to demonstrate that the individuals at issue are law enforcement officials with specific law enforcement responsibilities. Thus, we conclude that you have failed to demonstrate that the telephone numbers at issue constitute an "internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution" for purposes of section 552.108(b)(1), and the telephone numbers may not be withheld on this basis.

We next address your argument under section 552.111 for the information submitted at Tab 7. Section 552.111 excepts from public disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This exception encompasses the deliberative process privilege. 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 only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5. Furthermore, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Id.*

You state that the information at Tab 7 consists of internal communications that contain advice, recommendations, and opinion pertaining to proposed legislation that will ultimately affect the system's policies. Based upon our review of the information at issue and your arguments, we conclude that you have demonstrated that section 552.111 is applicable to some of the information that the system seeks to withhold under this exception. We have marked the information that is excepted from disclosure under section 552.111. However, the remaining information at Tab 7 is purely factual in nature and is therefore not excepted from disclosure under section 552.111.

Section 552.106 of the Government Code excepts from required public disclosure “[a] draft or working paper involved in the preparation of proposed legislation[.]” Gov’t Code § 552.106(a). Section 552.106 resembles section 552.111 in that both of these exceptions protect advice, opinion, and recommendation on policy matters, in order to encourage frank discussion during the policymaking process. *See* Open Records Decision No. 460 at 3 (1987). However, section 552.106 applies specifically to the legislative process and thus is narrower than section 552.111. *Id.* The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body. *Id.* at 2. Therefore, section 552.106 is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *Id.* at 1; *see also* Open Records Decision Nos. 429 at 5 (1985) (statutory predecessor to Gov’t Code § 552.106 not applicable to information relating to governmental entity’s efforts to persuade other governmental entities to enact particular ordinances), 367 at 2 (1983) (statutory predecessor applicable to recommendations of executive committee of State Board of Public Accountancy for possible amendments to Public Accountancy Act). Furthermore, section 552.106 does not protect purely factual information from public disclosure. *See* Open Records Decision No. 460 at 2; *see also* Open Records Decision No. 344 at 3-4 (1982) (for purposes of statutory predecessor, factual information prepared by State Property Tax Board did not reflect policy judgments, recommendations, or proposals concerning drafting of legislation). However, a comparison or analysis of factual information prepared to support proposed legislation is within the scope of section 552.106. *See* Open Records Decision No. 460 at 2.

The remaining information submitted at Tab 7 consists of severable factual information. The protection of section 552.106 does not extend to purely factual information. Therefore, we conclude that none of the remaining information is excepted from disclosure under section 552.106.

In summary, telephone numbers contained in the requested billing information must be withheld under section 552.117 to the extent that they reveal information that the employees timely elected to keep confidential. We have also marked the types of account numbers that the university must withhold under section 552.136. We have marked the information that the system may withhold under section 552.111. The remaining submitted information must be released to the requestor.

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. *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 Dep't of Pub. 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/jh

Ref: ID# 189898

Enc. Submitted documents

c: Ms. Sharon Jayson  
Education Reporter  
Austin American Statesman  
P.O. Box 670  
Austin, Texas 78767  
(w/o enclosures)