



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 2, 2005

Mr. Scott Kelly
Deputy General Counsel
The Texas A&M University System
Office of the General Counsel
A&M Building, Ste. 2079
200 Technology Way
College Station, Texas 77845-3424

OR2005-04804

Dear Mr. Kelly:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 225304.

The Texas A&M University System (the "system") received two requests for several categories of information regarding the requestor, including "[a]ll material related to the undersigned kept in the offices of general counsel" and "all correspondence between the General Attorney's (sic) office and the [system] attorney's." You state that you will release most of the requested information. You claim that all or portions of the submitted records are excepted from disclosure under sections 552.101, 552.107, and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that any person may submit comments stating why information should or should not be released).

Initially, we note, that the system has not submitted copies or samples to this office of "all correspondence between the General Attorney's (sic) office and the [system] attorney's." Thus, we assume that any information maintained by the system that is responsive to this portion of the request has been released to the requestor, to the extent it exists. If not, the system must release such information immediately. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under the circumstances).

Next, we note that the system failed to comply with section 552.301 of the Government Code. Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(a), (b). Additionally, under section 552.301(e), a governmental body receiving an open records request for information that it wishes to withhold pursuant to one of the exceptions to public disclosure is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents.

You state that the system received the first request on March 7, 2005. You explain that March 18, 2005 was an official holiday for the system. Accordingly, you were required to request a decision from this office by March 22, 2005. However, you did not request a ruling from this office until March 29, 2005. Consequently, the system failed to comply with the procedural requirements of section 552.301 for the first request. In addition, you state that the system received the second request on April 1, 2005. Accordingly, you were required to request a decision from this office by April 15, 2005. However, you did not request a ruling from this office until April 18, 2005. Consequently, the system failed to comply with the procedural requirements of section 552.301 for the second request.¹

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Generally speaking, a compelling reason exists when third party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). The system claims that the responsive information is excepted under sections 552.101, 552.107, and 552.114 of the Government Code. However, section 552.107 is a discretionary exception and, as such, does not provide a compelling reason to withhold information. *See* Open Records Decision No. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the system may not withhold the

¹We note that you identify the information responsive to the second request as supplemental to the first request. However, even if we considered this information supplemental to the first request, you were required to submit this information by March 29, 2005, the original fifteen day deadline. Thus, you would have still failed to comply with section 552.301(e) of the Government Code. *See* Gov't Code § 552.301(e) (requiring a governmental body to submit requested information within fifteen days of receiving request for information).

submitted information under section 552.107 of the Government Code. However, because sections 552.101 and 552.114 can provide compelling reasons to withhold information, we will address your arguments concerning these exceptions.

You claim that you have redacted some information within one of the submitted documents pursuant to the Family Educational Rights and Privacy Act of 1974 ("FERPA"). Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. 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. Gov't Code § 552.114. 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 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). After reviewing the information at issue, we agree that the student identifying information you have redacted must be withheld pursuant to FERPA.

We note that the submitted information contains a personal e-mail address. Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). We have

marked the e-mail address that is not of the type specifically excluded by section 552.137(c). Therefore, unless the individual whose e-mail address is at issue consented to its release, the e-mail address must be withheld in accordance with section 552.137.

In summary, the system must withhold the student identifying information you have marked under section 552.114 and FERPA. Additionally, the system must withhold the e-mail address we have marked under section 552.137. The remaining information must be released.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,

A handwritten signature in black ink, appearing to read 'Jaclyn N. Thompson', with a long, sweeping flourish extending to the right.

Jaclyn N. Thompson
Assistant Attorney General
Open Records Division

JNT/krl

Ref: ID# 225304

Enc. Submitted documents

c: Dr. Radoslav Dimitric
1400 Bayou Shore Drive #26
Galveston, Texas 77551
(w/o enclosures)