



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 11, 2006

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

OR2006-03609

Dear Ms. Longoria:

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# 246129.

The University of Texas at Austin (the "university") received two requests from the same requestor for information related to sexual assaults from 1995-2005. You state that some responsive information will be released to the requestor. You also state that the university is withholding some of the information responsive to items 2, 4, and 5 pursuant to the Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of title 20 of the United States Code.¹ *See* Open Records Decision No. 634 (1995) (concluding that educational agency or institution may withhold information protected by FERPA and sections 552.026 and 552.114 of the Government Code without necessity of requesting an attorney general decision as to that exception); *see also* Open Records Decision No. 673 at 7-8 (2001) (listing elements of second type of previous determination under section 552.301(a) of the Government Code). You have submitted information to this office that you

¹FERPA 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); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information).

claim is excepted from disclosure under sections 552.101, 552.108, 552.130, 552.137, and 552.147 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

You state that the university previously received requests for some of the information responsive to the instant request and that you previously requested opinions from this office with respect to such information. In response, this office issued Open Records Letter Nos. 2005-0757 (2005) and 2003-8077 (2003). In regard to the information responsive to the current request that is identical to the information previously requested and ruled upon by this office and for which the circumstances on which the prior rulings were based have not changed, we conclude that you may continue to rely on Open Records Letter Nos. 2005-0757 and 2003-8077 as previous determinations and withhold or release the requested information in accordance with those rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

The submitted information contains a search warrant affidavit, the release of which is governed by article 18.01 of the Code of Criminal Procedure. Article 18.01 provides in part:

(b) No search warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance. A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested. The affidavit is public information if executed, and the magistrate's clerk shall make a copy of the affidavit available for public inspection in the clerk's office during normal business hours.

Crim. Proc. Code art. 18.01(b). This provision makes the search warrant affidavit expressly public. The exceptions found in the Act do not, as a general rule, apply to information that is made public by other statutes. *See* Open Records Decision No. 525 (1989) (statutory predecessor). Therefore, pursuant to article 18.01(b), the university must release the submitted search warrant affidavit.

²You raise no exception to disclosure of the records submitted in tab 10, but notified the City of Austin (the "city") that it may have an interest in this information and to give the city an opportunity to submit comments to this office. *See* Gov't Code § 552.304. This office received no comments from the city regarding this information.

The submitted information also contains an arrest warrant and supporting affidavit. Article 15.26 of the Code of Criminal Procedure states “[t]he arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information.” Crim. Proc. Code art. 15.26. As previously noted, the exceptions found in the Act do not, as a general rule, apply to information that is made public by other statutes. Therefore, the university must release the arrest warrant and supporting affidavit we have marked pursuant to article 15.26.

We next note that the submitted information includes a search warrant and other court-filed documents. Section 552.022 of the Government Code provides in part:

(a) 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:

...

(17) information that is also contained in the public court record[.]

Gov’t Code § 552.022(a)(17). Section 552.022(a)(17) makes an executed search warrant and other documents which have been filed with a court expressly public. Therefore, the department may withhold the executed search warrant and other court filed documents only to the extent they are made confidential under other law. Although the university raises section 552.108 for this information, this exception is discretionary and thus, does not make information confidential. *See* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the executed search warrant and other court filed documents may not be withheld under section 552.108 of the Government Code. As the university raises no further exceptions to the disclosure of this information, it must be released.

Now we turn to your arguments for the remaining information. Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses confidentiality provisions such as Family Code section 261.201(a), which provides in pertinent part as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). Because a portion of the submitted information consists of files, reports, records, communications, or working papers used or developed in an investigation under chapter 261, the information is within the scope of section 261.201 of the Family Code. You have not indicated that the university has adopted a rule that governs the release of this type of information. Therefore, we assume that no such regulation exists. Given that assumption, case number 0508510 is confidential pursuant to section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute). Accordingly, the university must withhold case number 0508510 from disclosure under section 552.101 of the Government Code as information made confidential by law.

Next, we address your claims under section 552.108 of the Government Code. Section 552.108(a)(1) excepts from disclosure “[i]nformation 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[.]” Gov’t Code § 552.108(a)(1). Section 552.108(a)(2) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]” *Id.* § 552.108(a)(2). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Generally, section 552.108(a)(1) is applicable if release of the information would interfere with a pending criminal investigation or prosecution. *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). Section 552.108(a)(2) is applicable only if the information in question relates to a concluded case that did not result in a conviction or a deferred adjudication.

You inform us that the information in tabs 7 and 8 relates to open and active criminal investigations. You assert that release of this information would interfere with the detection and investigation of crime. Based on your representations, we find that section 552.108(a)(1) is applicable to this information. You further state that the information in tab 9 relates to concluded criminal cases that did not result in conviction or deferred adjudication. Based on your representation, we find that section 552.108(a)(2) is applicable to the information in tab 9.

However, section 552.108 does not except from disclosure 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*. See 531 S.W.2d at 185; Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). Front page offense report information includes the identity and description of the complainant. See ORD 127 at 4. We note that while an arrestee's information is considered basic information, a suspect's information is not basic information. We further note that the university is not required to release Texas driver's license numbers or motor vehicle record information as part of the basic information. Thus, the university must generally release the types of information that are considered to be front page offense report information, including a detailed description of the offense, regardless of whether such information is actually located on the front page of an offense report. However, some of the basic information is subject to section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses the common-law right of privacy, which 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. *Indus. Found. v. Tex. 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. Further, information tending to identify a sexual assault victim is protected by common-law privacy and must be withheld pursuant to section 552.101 of the Government Code. See *id.* @ 683-85; Open Records Decision Nos. 393 (1983), 339 (1982). This office has additionally found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, see Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and identities of victims of sexual abuse, see Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). The university must withhold identifying information of sexual assault victims under section 552.101 on the basis of common-law privacy.³ We note that use of a pseudonym by the complainant sufficiently protects the complainant's privacy. We have marked additional information in the remaining records that must be withheld under section 552.101 on the basis of common-law privacy.

You also argue that some of the submitted information is excepted from disclosure under section 552.137 of the Government Code. This provision 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

³As our ruling is dispositive, we do not address your constitutional privacy argument for this information.

Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. In addition, section 552.137 does not apply to a business's general e-mail or website address.

You inform us that no member of the public whose e-mail address is at issue has consented to the release of their e-mail address, and you also represent that none of the e-mail addresses are a type specifically excluded by section 552.137(c). We note, however, that the e-mail addresses you have marked include work e-mail addresses of government employees. The university may not withhold these types of e-mail addresses, which we have marked, under section 552.137. However, the university must withhold the remaining e-mail addresses you have marked, unless the university receives consent for their release.

An arrestee's social security number is confidential pursuant to section 552.147 of the Government Code, which provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. Gov't Code § 552.147. Accordingly, the university must withhold the social security numbers of arrestees pursuant to section 552.147 of the Government Code.⁴

Finally, we address your claim that section 552.107 of the Government Code applies to portions of the information submitted under tab 11. When asserting the attorney-client privilege under section 552.107, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional

⁴We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

In this instance, you inform us that this information consists of confidential communications between and among university administrators, lawyers, and support staff made for the purpose of facilitating the rendition of professional legal services. You have also identified for this office the individuals involved in these communications. Having considered your arguments and reviewed the information at issue, we agree that this information reflects privileged attorney-client communications. As such, the university may withhold the information you have marked in tab 11 pursuant to section 552.107(1) of the Government Code.

In summary, (1) the university may continue to rely on Open Records Letter Nos. 2005-0757 and 2003-8077 as previous determinations and withhold or release the information previously ruled upon in accordance with those rulings; (2) pursuant to article 18.01(b) of the Code of Criminal Procedure, the university must release the search warrant affidavit; (3) the marked arrest warrant and supporting affidavit must be released pursuant to article 15.26 of the Code of Criminal Procedure; (4) the university must withhold case number 0508510 from disclosure under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code; (5) except for the basic information, the records in tabs 7 and 8 may be withheld under section 552.108(a)(1), and the records in tab 9 under section 552.108(a)(2); (6) we have marked the information that must be withheld under section 552.101 on the basis of common-law privacy; (7) except for the work e-mail addresses of government employees that we have marked for release, the university must withhold the e-mail addresses you have marked under section 552.137; (8) the university must withhold the social security numbers of arrestees pursuant to section 552.147; (9) the university may withhold the information you have marked in tab 11 pursuant to section 552.107(1) of the Government Code. 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, 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); *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 Office of the Attorney General 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/er

Ref: ID# 246129

Enc. Submitted documents

c: Ms. Ariel Lumbard
The Daily Texan
P.O. Box D
Austin, Texas 78713
(w/o enclosures)

Ms. Cary Grace
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828
(w/o enclosures)