



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 27, 2007

Mr. Jerry M. Brown
Assistant General Counsel
Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845-3424

OR2007-09577

Dear Mr. Brown:

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# 284971.

Texas A&M University (the "university") received a request for all documents that a specified individual has regarding the requestor, as well as all e-mails and computer files a specified individual sent, received, or copied regarding the requestor. You state that you are providing some of the requested information to the requestor. You claim that a portion of the requested information is no longer maintained by the university. You claim that the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also received and considered the requestor's written comments. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

Initially, we address your comments regarding e-mails that have been deleted and are no longer maintained by the university. The Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.— San Antonio 1978, writ dismiss'd); *Open Records Decision No. 452 at 3(1986)*. You state that the requestor, a former employee of the university, made copies of and then deleted e-mail messages from

the university's server.¹ You represent that the requested e-mails were not saved to the hard drive of the computer used by the requestor. You also represent that since the e-mails are no longer on the server, they would have to be obtained from the exchange server's backup tape. However, you note that, before the instant request was received, the university had migrated its exchange server to different hardware and software versions. You explain that efforts to restore the e-mails off of the university's backup tape have not been successful, and you have advised the requestor that in order to restore the backup tape, the university would be required to purchase additional hardware.

In general, computer software programs keep track of the location of files by storing the location of data in the "file allocation table" (FAT) of a computer's hard disk. The software then displays the file as being in a specific storage location. Usually, but not always, when a file is "deleted," it is not actually deleted, but the display of the location is merely shown to be moved to a "trash bin" or "recycle bin." Later, when files are "deleted" or "emptied" from these "trash bins," the data is usually not deleted, but the location of the data is deleted from the FAT. Some software programs immediately delete the location information from the FAT when a file is deleted. Once the location reference is deleted from the FAT, the data may be overwritten and permanently removed.

As noted, you inform us that the requested e-mail messages were not saved to the hard drive of the computer used by the requestor and are no longer on the university's server. You further explain that to restore the backup tape, the university would be required to purchase additional hardware. Based on your representations that the e-mail messages have been deleted and are not maintained on the hard drive or servers at issue, we find that the e-mail messages were no longer being "maintained" by the university at the time of the request and are not public information subject to disclosure under the Act. *See Econ. Opportunities Dev. Corp*, 562 S.W.2d 266; *see also* Gov't Code §§ 552.002, 552.021 (public information consists of information collected, assembled, or maintained by or for governmental body in connection with transaction of official business). Accordingly, we conclude that the Act does not require the university to release the requested e-mail messages at issue in this instance.

Next, with regard to the submitted information, we address the requestor's contention that the university failed to follow its procedural obligations under section 552.301 of the Government Code. Section 552.301 prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(d) provides that a governmental body that requests an attorney general decision must provide to the requestor, not later than the tenth business day after the date of its receipt of the written request for information:

¹You state that, prior to allowing the requestor access to the computer in question, the university made a copy of the hard drive. The university has released files from this hard drive to the requestor.

- (1) a written statement that the governmental body wishes to withhold the requested information and has asked for an attorney general decision about whether the information is within an exception to public disclosure; and
- (2) a copy of the governmental body's written communication to the attorney general asking for the decision or, if the governmental body's written communication to the attorney general discloses the requested information, a redacted copy of that written communication.

Gov't Code § 552.301(d). In this instance, the university received the request for information on May 7, 2007. Thus, the university was required to mail a copy of its request for a ruling to the requestor no later than May 21, 2007. The requestor contends that the university failed to mail a copy of its request for a ruling to him until May 22, 2007, and he provides documentation showing that his copy of the request for a ruling bears a meter-mark of May 22, 2007. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). The university has provided no documentation to the contrary. Therefore, we conclude that the university failed to comply with the requirements of section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with 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). Normally, a compelling reason for non-disclosure exists where some other source of law makes the information confidential or where third-party interests are at stake. Open Records Decision No. 150 at 2 (1977).

Although you raise section 552.107 of the Government Code as an exception to disclosure, section 552.107 is a discretionary exception that protects a governmental body's interest and may be waived. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107 (1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Thus, section 552.107 does not provide a compelling reason for non-disclosure under section 552.302, and the university may not withhold any of the submitted information under

this exception. As you raise no other exceptions to disclosure in this instance, the university must release the submitted information to the requestor.²

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).

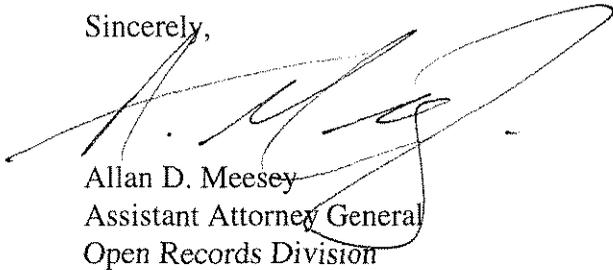
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

²We note that the requestor has a right of access pursuant to section 552.023 of the Government Code to information in the submitted documents that would otherwise be excepted from release under the Act. *See* Gov't Code § 552.023(a) (“a person or a person’s authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person’s privacy interests.”); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). But should the university receive another request for this particular information from a different requestor, then the university should again seek a decision from this office.

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,



Allan D. Meesey
Assistant Attorney General
Open Records Division

ADM/eeg

Ref: ID# 284971

Enc. Submitted documents

c: Dr. Radoslav Dimitric
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(w/o enclosures)