



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 21, 2007

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

OR2007-10814

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# 287142.

The Texas A&M University System (the "university") received a request for the personnel file of a specified individual, a specified survey, and documents, calendars, and communications pertaining to specified individuals during a certain time period. You state that the university is releasing some of the responsive correspondence. You claim that portions of Exhibits D and E are not public information subject to the Act. You also claim that some of the submitted information is excepted from disclosure under sections 552.107, 552.111, 552.116, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.<sup>1</sup>

Initially, we note that you have not submitted information responsive to the request for the personnel file. To the extent that any additional responsive information exists and was not

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<sup>1</sup>We assume that the "representative sample" of records submitted to this office in Exhibits D and E is truly representative of these 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.

submitted for our review, we assume it has been released. If not, you must do so at this time. *See* Gov't Code § 552.006, .301, .302; *see* Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, the university argues that some of the entries you have marked in the submitted calendars in Exhibits D and E are not public information subject to the Act. *See* Gov't Code § 552.021 (Act is only applicable to "public information"). Section 552.002 defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." Gov't Code § 552.022. The university contends that the marked entries were not collected, assembled, or maintained in connection with the transaction of any official business of the university, nor were they collected, assembled, or maintained pursuant to any law or ordinance. You assert that the marked entries are simply an incidental use of university resources by a university employee with regard to personal matters. Based on your arguments and our review of the information at issue, we agree that the entries you have marked in the submitted calendars do not constitute "public information" that is subject to the Act. Consequently, the university is not required to disclose these entries under the Act. *Cf.* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources).

Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."<sup>2</sup> Gov't Code § 552.101. This section encompasses the doctrine of common law privacy, which protects information that (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). This office has found that some kinds of medical information or information indicating disabilities or specific illnesses is protected by common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). The university must withhold the information we have marked in Exhibit D under section 552.101 in conjunction with common law privacy.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege under section 552.107, a governmental body has the burden of providing the necessary facts to demonstrate the

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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)-(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 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).

You assert that the information in Exhibit B is protected by the attorney-client privilege. You state that this information consists of communications between and among university attorneys and administrators that were made for the purpose of rendering legal services. You have identified the parties to these communications. You state that these communications were intended to be confidential, and that confidentiality has been maintained. Based on your representations and our review of the information at issue, we agree that this information is protected by the attorney-client privilege. We therefore conclude that the university may withhold Exhibit B pursuant to section 552.107 of the Government Code.

You claim that some of the remaining submitted information is excepted under section 552.116 of the Government Code. Section 552.116 of the Government Code provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 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, the charter or an ordinance of a municipality, an order of the commissioners court of a county, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) 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.<sup>3</sup> You state that Exhibit C consists of audit working papers prepared by the A&M System Internal Audit Department. We understand that this information relates to an audit authorized under the Texas Internal Auditing Act, as set forth in Chapter 2102 of the Texas Government Code. We therefore conclude that the university may withhold Exhibit C under section 552.116 of the Government Code.<sup>4</sup>

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information

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<sup>3</sup>Act of May 28, 2007, 80<sup>th</sup> Leg., R.S., S.B. 9, §§ 24, 25 (to be codified as an amendment to Gov't Code § 552.116).

<sup>4</sup>As our ruling is dispositive, we need not address your argument under section 552.111 for this 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 received. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the university may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was received. In this case you inform us that the employees whose information is at issue in Exhibits D and E timely elected confidentiality under section 552.024. Therefore, the university must withhold the information we have marked in Exhibits D and E under section 552.117(a)(1) of the Government Code.

In summary, the entries you have marked in the submitted calendars in Exhibits D and E are not public information subject to the Act. The university must withhold the information we have marked in Exhibit D under section 552.101 of the Government Code in conjunction with common law privacy. The university may withhold Exhibit B under section 552.107 of the Government Code and Exhibit C under section 552.116 of the Government Code. The university must withhold the information we have marked in Exhibits D and E under section 552.117 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).

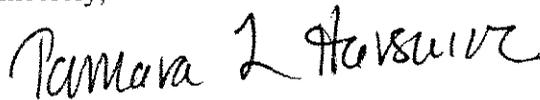
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,

A handwritten signature in black ink that reads "Tamara L. Harswick". The signature is written in a cursive, flowing style.

Tamara L. Harswick  
Assistant Attorney General  
Open Records Division

TLH/eeg

Ref: ID# 287142

Enc. Submitted documents