



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 23, 2008

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

OR2008-05391

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# 308104.

The University of Texas at Austin (the "university") received a request for information pertaining to a specified collection at the university's Center for American History (the "CAH"), including access to the collection, a list of those who have researched the collection, and communications pertaining to the collection. You indicate that the university will withhold social security numbers pursuant to section 552.147 of the Government Code. *See* Gov't Code § 552.147(b) (governmental body may redact living person's social security number from public release without necessity of requesting decision from this office under the Act). You claim that the collection is not subject to the Act. You also claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.117, 552.120, 552.121, 552.1235, 552.124, and 552.130 of the Government Code.<sup>1</sup> We have considered your arguments and reviewed the submitted representative sample of

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<sup>1</sup>Although you raise section 552.101 in conjunction with the attorney-client privilege, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

information.<sup>2</sup> We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have also considered comments by the donor that the university submitted to us. *See id.*

The Act is applicable to "public information." Gov't Code § 552.021. Section 552.002 of the Act provides that "public information" means "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." *Id.* § 552.002(a). Thus, virtually all information that is in a governmental body's physical possession constitutes public information that is subject to the Act. *Id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988).

You inform us that the collection is a compilation of the donor's personal papers, unpublished letters, and audio and video tapes that were donated to the CAH pursuant to a deed of gift. You also inform us that the collection is maintained by the division of the CAH located at the university's main campus and that "[t]he campus division is CAH's main facility and repository for archival collections of manuscripts, rare books, video and audio documentation, and personal correspondences of historical significance." Based on this representation, we conclude that the university's CAH acquired and maintains the collection in connection with the transaction of its official business; therefore, the collection consists of public information for purposes of the Act. *See* Attorney General Opinions JM-37 (1983) (oral history interviews acquired by institution of higher education in connection with its official activities are generally available to the public under the Act.).

You assert that the collection is not subject to the Act because "the Act is not applicable to library holdings." Section 552.027 of the Government Code does exclude commercially available research information, such as library books, from the definition of public information. *See* Gov't Code § 552.027 (commercially available research material excluded from the definition of "public information"); Interim Report to the 74th Legislature of the House State Affairs Comm., 74th Leg., R.S., Subcommittee on Open Records Revisions 9 (1994) (public information under section 552.027 should exclude "tools [available] elsewhere to any member of the public. Thus, although *public* library books are available for public use, the library staff will not be required to do research or make copies of books for members of the public."). However, the collection does not consist of commercially available research material, but rather a compilation of research material donated exclusively

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<sup>2</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the 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.

to the university. The university also does not cite to any other law that provides that "library holdings" are not subject to the Act. Accordingly, we conclude that the collection is public information that is responsive to the request for information, rather than commercially available information, and, thus, the collection must be made available to the requestor, unless the university demonstrates that it falls within an exception to public disclosure under the Act. *See* Gov't Code §§ 552.006, 552.021, 552.301, 552.302.

You also inform us that the securing, preserving and cataloguing of the collection is a "monumental task" and that "after attempts to release portions of such a massive amount of information proved to be overwhelming for the CAH and, more importantly, raised many questions of privacy, the library decided to close the Collection pending completion of its inventory and indexing process." However, the administrative inconvenience of providing public records is not grounds for refusing to comply with the mandates of the Act. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976). Therefore, the university may not close access to the collection during its inventory and indexing process on the grounds that it is administratively inconvenient to comply with the Act.

You next assert that the collection is not subject to disclosure because it is in "active use." Section 552.221 of the Government Code provides in relevant part the following:

(a) An officer for public information of a governmental body shall promptly produce public information for inspection, duplication, or both on application by any person to the officer. In this subsection, "promptly" means as soon as possible under the circumstances, that is, within a reasonable time, without delay.

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(c) If the requested information is unavailable at the time of the request to examine because it is in active use or in storage, the officer for public information shall certify this fact in writing to the requestor and set a date and hour within a reasonable time when the information will be available for inspection or duplication.

Gov't Code § 552.221(a), (c). This office has interpreted section 552.221 to require prompt disclosure of information unless it is in "immediate active use." *See* Open Records Decision No. 225 at 3 (1979) (under former section 552.221, shorthand notes are in active use while typist is in the process of typing them out, but are not in active use "if there is no prospect that they will be immediately typed or further processed"), 57 at 4 (1974) (student directory information not in active use under former section 552.221 if copies of same information are provided to various college departments). Section 552.221 is a narrow exception to the rule of prompt production of information under the Act—it permits an agency to avoid only unreasonable disruption of its immediate business. Open Records Decision No. 121 at 3

(1976). Section 552.221, however, cannot be used to deny a requestor access to records. JM-757 at 4 (1987).

You assert that “[t]he CAH fully intends to provide public access to these materials; however, until all documents are indexed, the Collection is incomplete and in active use.” You also state that “[j]ust as the University would not release a library book one chapter at a time because to do so would dilute the value of the work as a whole, the Collection was given to the University as a single holding intended as an historical record of American history; it too should remain intact.” However, we disagree with the university’s position that each portion of the collection is in “active use” for purposes of section 552.221(c) on the grounds that the university has not catalogued the collection in its entirety. *See, e.g.*, Open Records Decision Nos. 148 at 1 (1976) (recommendations and employment evaluations not in active use under former section 552.221 during entire time when faculty member’s promotion is under consideration), 121 at 3 (university’s financial records in custody of district attorney during criminal investigation not in active use under former section 552.221). The university also has not adequately explained how release of the documents within the collection would disrupt the university’s immediate business. Therefore, we find you have not established that the collection is in active use for purposes of section 552.221, and the university may not withhold any information in the collection on that basis.

The university claims that the collection is excepted under section 552.101 of the Government Code, which excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. Section 51.910(b) of the Education Code provides that “[r]are books, original manuscripts, personal papers, unpublished letters, and audio and video tapes held by an institution of higher education for the purposes of historical research are confidential, and the institution may restrict access by the public to those materials to protect the actual or potential value of the materials and the privacy of the donors.” We agree that the collection is subject to section 51.910(b); therefore, we conclude that the university has the discretion to withhold the collection in accordance with this provision of the Education Code.<sup>3</sup> *Id.*

Section 552.101 also 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). 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

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<sup>3</sup>As our ruling is dispositive, we do not address your other arguments to withhold the collection.

disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. We have marked the information that is confidential under common-law privacy and that the department must withhold under section 552.101.

You assert that Tab 7 is excepted under section 552.107 of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, 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. ORD 676 at 6-7. 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 Texas 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 a 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). 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.*, 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 state Tab 7 contains confidential communications between university attorneys and the director of the CAH that were made in furtherance of the rendition of professional legal services. You also assert the communications were intended to be confidential and that their confidentiality has been maintained. After reviewing your arguments and the submitted information, we agree that the university may withhold Tab 7 under section 552.107.

You assert that some of the remaining information in Tab 6 is excepted under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the current and former 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 be kept confidential under section 552.024 of the Government Code. Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Pursuant to section 552.117(a)(1), the university must withhold this personal information that pertains to a current or former employee of the university who elected, prior to the university's receipt of the request for information, to keep such information confidential. Such information may not be withheld for individuals who did not make a timely election. We agree that the university must withhold the remaining information you have marked under section 552.117 if that section applies.

You assert that some of the information in Tab 6 is excepted under section 552.124 of the Government Code. Section 552.124 of the Government Code makes confidential, with certain exceptions that are not applicable here, "[a] record of a library or library system, supported in whole or in part by public funds, that identifies or serves to identify a person who requested, obtained, or used a library material or service." Gov't Code § 552.124(a)-(b); *see also* Open Records Decision No. 100 at 3 (1975) (identifying information of library patrons in connection with object of their attentions is confidential by constitutional law). Only the names, addresses, and other information specifically identifying library patrons may be withheld under section 552.124. *See* Open Records Decision No. 649 at 3 (1996) (confidentiality provisions strictly construed). Some of the information at issue does not identify or serve to identify a person who requested, obtained, or used the collection; therefore, the university may not withhold this information, which we have marked for release, under section 552.124. However, we agree that the university must withhold the remaining information you have marked under section 552.124.<sup>4</sup>

You assert that the identifying information of the collection's donor is excepted under section 552.1235 of the Government Code. Section 552.1235(a) provides that "[t]he name or other information that would tend to disclose the identity of a person, other than a governmental body, who makes a gift, grant, or donation of money or property to an institution of higher education or to another person with the intent that the money or property be transferred to an institution of higher education is excepted from the requirements of Section 552.021." We note, however, that the university itself named the collection after the donor and released the donor's name to the public when it previously allowed access to the catalogued portion of the collection. The university also has disclosed the name of the donor in its communications with this requestor. Those communications include a copy of the deed of gift, which was faxed to the requestor in 2007, and a copy of the university's

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<sup>4</sup>As our ruling is dispositive, we do not address your other arguments to withhold this information.

correspondence to this office on February 19, 2008, which was provided to the requestor pursuant to section 552.301 of the Government Code. *See* Gov't Code § 552.301(a), (b), (d)(2). Therefore, we conclude that the university may not withhold any of the submitted information under section 552.1235 of the Government Code.

To conclude, the university may restrict access by the public to the collection pursuant to section 51.910 of the Government Code. The university must also withhold the following: (1) the information we have marked under section 552.101 in conjunction with common-law privacy; (2) the remaining information you have marked under section 552.117 of the Government Code if the employee at issue timely elected to withhold that information; and (3) the information you have marked under section 552.124 of the Government Code, with the exception of the information that we have marked for release. The university may withhold Tab 7 under section 552.107 of the Government Code. The university must release the remaining information.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

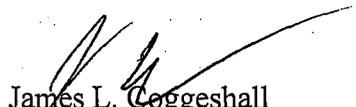
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental

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,



James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/jh

Ref: ID# 308104

Enc. Submitted documents

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