



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 15, 2008

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

OR2008-11191

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# 319407.

Texas A&M University-Corpus Christi (the "university") received a request for the following information: e-mails during August 2006 dealing with the volleyball program and e-mails from September 15, 2007 through May 8, 2008 to or from seven named individuals pertaining to the NCAA investigation, the A&M System audit, the men's basketball budget, and the athletic department. You state that the university has redacted or withheld some of the responsive information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.<sup>1</sup> You also state that it is your intent to withhold any social security numbers belonging to living persons under

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<sup>1</sup>The United States Department of Education Family Compliance Office has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purposes of review in the open records ruling process under the Act. Because our office is prohibited from reviewing education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted information. Such determinations under FERPA must be made by the educational authority in possession of the education record.

section 552.147 of the Government Code.<sup>2</sup> You state that you will provide the requestor with some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, 552.1235, 552.116, 552.117, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>3</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).

Initially, we will address the university's claim that the request for information should be considered received by the university on June 5, 2008. You state, and provide documentation showing, that the university received the initial request for information on May 8, 2008. The request was subsequently amended on May 8, 2008 and May 16, 2008. On May 22, 2008, you sent the requestor an itemized cost estimate and requested a deposit from the requestor prior to processing the request. On May 23 and 24, 2008, the requestor further modified the request in response to the itemized statement. On May 28, 2008, the university requested confirmation of the status of the requests and reaffirmation of the prior cost estimate. On June 3, 2008, the requestor modified the request. On June 4, 2008, the university sent to the requestor a revised itemized cost estimate and request for deposit. You explain that, because the university's estimated cost to process the request was over \$100, the university required the requestor to make a deposit for payment of the anticipated costs in accordance with section 552.263 of the Government Code. Section 552.263(a) provides in relevant part that a governmental body "may require a deposit or bond for payment of anticipated costs . . . if [the governmental body] has provided the requestor with the required *written itemized statement* detailing the estimated charge for providing the copy and if the charge" is estimated to exceed \$100, if the governmental body has more than 15 full-time employees or \$50, if the governmental body has fewer than 16 full-time employees. Gov't Code § 552.263(a) (emphasis added). Further, section 552.263(e) provides that a request for a copy of public information is considered to have been received by a governmental body on the date the governmental body receives the deposit or bond for payment of anticipated costs. *See id.* § 552.263(e). You inform us, and provide documentation showing, that on June 5, 2008, the university received the requestor's deposit. Thus, pursuant to section 552.263(e), June 5, 2008 is the date the university received the request for purposes of section 552.301. Accordingly, the university's ten-business-day deadline was

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<sup>2</sup>We 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.

<sup>3</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.

June 19, 2008 and the university's fifteen-business-day deadline was June 26, 2008. The university's request for a ruling was faxed and received on June 13, 2008 and the university's arguments stating why the stated exceptions apply and the specific information responsive to the request was postmarked June 26, 2008. *See id.* § 552.308. Therefore, we find that the university's request for a ruling was timely. *See id.* § 552.301(b), (e).

We turn now to the exceptions to disclosure you raise. Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex.1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. The type 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. In addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); 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 and sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have marked the information in Exhibit C-1 that must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

You assert that portions of the submitted information in Exhibits C-2 and C-3 are subject to section 552.107 of the Government Code. Section 552.107(1) protects information that comes 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. *See* 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. *See* 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. *See 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. See 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. See *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 indicate that the information in Exhibits C-2 and C-3 consists of confidential attorney-client communications that were made for the purpose of facilitating the rendition of professional legal services to the university. You also indicate that the communications in question remain confidential. Based on your representations and our review of the information at issue, we conclude that the university may withhold the information submitted in Exhibits C-2 and C-3 under section 552.107(1) of the Government Code.<sup>4</sup>

Next, you assert that portions of the information submitted in Exhibit C-4 are excepted from disclosure under section 552.1235 of the Government Code. Section 552.1235 excepts from disclosure “the 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[.]” Gov’t Code § 552.1235(a). We note that this section does not except from disclosure the amount or value of an individual gift, grant, or donation. See *id.* § 552.1235(b). “Institution of higher education” is defined by section 61.003 of the Education Code. *Id.* § 552.1235(c). Section 61.003 defines an “institution of higher education” as any public technical institute, public junior college, public senior college or university, medical or dental unit, public state college, or other agency of higher education as defined in this section. See Educ. Code § 61.003.

You have marked the information in Exhibit C-4 that the university seeks to withhold under section 552.1235. You contend that the marked information identifies persons who have

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<sup>4</sup>As our ruling is dispositive for the information at issue, we need not address your remaining argument for the information in Exhibit C-2.

donated to an institution of higher education. Based upon your representations and our review, we agree that some of the information you have marked in Exhibit C-4 identifies persons as actual donors to the university. Accordingly, we conclude that the university must withhold the information we have marked under section 552.1235. However, you have failed to establish that the remaining marked information identifies or tends to identify donors to the university. Therefore, you may not withhold any of the remaining information on that basis.

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 [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] 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. You inform us that the submitted documents in Exhibit C-5 consist of audit working papers of audits that were conducted by the system's Internal Audit Department and "include an investigation of allegations involving non-compliance with NCAA rules and [u]niversity procedures made by an employee of the Athletic Department." You also explain that this audit was authorized by the Internal Auditing Act, chapter 2102 of the Texas Government Code. *See id.* § 2102.005 (requiring state agencies to conduct

internal audit programs); *see also id.* § 2102.003 (defining types of audits). Based on your representations and our review of the information submitted in Exhibit C-5, we agree that this information consists of audit working papers that the university may withhold under section 552.116 of the Government Code.<sup>5</sup> *See id.* § 552.116(b)(2).

Next, you assert that a portion of the information submitted in Exhibit C is subject to section 552.117 of the Government Code, which excepts from public disclosure the present 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. Whether a particular piece of 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). We note that section 552.117 also encompasses a personal cellular telephone number, provided that the cellular phone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular mobile phone numbers paid for by governmental body and intended for official use). Thus, to the extent that any of the submitted phone numbers and family member information that you have marked in Exhibit C belong to university employees who have made timely elections under section 552.024, this information must be withheld under section 552.117. To the extent the submitted numbers and family member information that you have marked in Exhibit C do not belong to university employees who made timely elections, this information may not be withheld under section 552.117 and must be released to the requestor.

Finally, you assert that a portion of the submitted information is subject to section 552.136 of the Government Code, which provides:

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

*Id.* § 552.136(b). With the exception of the information we have marked for release, the university must withhold the account numbers and insurance policy numbers you have marked in Exhibit C-6 under section 552.136 of the Government Code. Upon review, we find that you have not explained how the group number you have marked in Exhibit C-1 may be used to obtain goods, money, services, or anything of value, or to initiate transfer of funds. Therefore, we find that you have failed to explain how this number is subject to section 552.136 and it must be released.

In summary: (1) the university must withhold the information we have marked in Exhibit C-1 under section 552.101 of the Government Code in conjunction with common-law

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<sup>5</sup>As our ruling is dispositive for the information in Exhibit C-5, we need not address your remaining arguments for this information.

privacy; (2) the university may withhold the submitted information in Exhibit C-2 and Exhibit C-3 under section 552.107(1) of the Government Code; (3) the university must withhold the information we have marked in Exhibit C-4 under section 552.1235 of the Government Code; (4) the university may withhold the information in Exhibit C-5 under section 552.116 of the Government Code; (5) to the extent that any of the submitted phone numbers and family member information that you have marked in Exhibit C belong to university employees who have made timely elections under section 552.024, the university must withhold this information under section 552.117 of the government Code; and (6) with the exception of the information we have marked for release, the university must withhold the account numbers and insurance policy numbers you have marked in Exhibit C-6 under section 552.136 of the Government Code. The remaining submitted 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 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). If the governmental body does not file suit over 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,



Kay Hastings  
Assistant Attorney General  
Open Records Division

KHH/jh

Ref: ID# 319407

Enc. Submitted documents

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(w/o enclosures)