



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

October 23, 2008

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

OR2008-14509

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# 325676.

Texas A&M University-Corpus Christi (the "university") received a request for records relating to any investigation by the university or the National Collegiate Athletic Association which pertain to a specified individual or to that individual's contract with the university. 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.¹ You also state that it is your intent to withhold any social security numbers belonging to living persons under section 552.147 of the Government Code.² You state that you will release some of the information to the requestor, including copies of completed reports and their accompanying exhibits. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.111, 552.116,

¹The 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.

²We 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.

552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

Initially, we note that a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that:

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:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108.

Gov't Code § 552.022(a)(1). In this instance, some of the submitted information is part of completed investigations made by or for the university. The university must release the completed investigations under section 552.022(a)(1) of the Government Code unless they are excepted from disclosure under section 552.108 of the Government Code or are expressly confidential under other law. Although you assert this information is excepted under sections 552.103 and 552.107 of the Government Code, these sections are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App-Dallas 1999, no pet.); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107 may be waived), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). As such, sections 552.103 and 552.107 are not other law that makes information confidential for purposes of section 552.022. Therefore, the investigations subject to section 552.022 may not be withheld under these sections. However, the attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence. The Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *see also* Open Records Decision No. 676 (2002). Accordingly, we will consider your assertion of this privilege under Rule 503. You also raise sections 552.136 and 552.137 for portions of the information at issue. Because sections 552.136 and 552.137 are other laws for section 552.022 purposes, we will address the applicability of these exceptions to the information at issue.

Texas Rule of Evidence 503(b)(1) provides as follows:

³We 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.

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503. A communication is "confidential" if 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). Thus, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under Rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You explain that the portion of the submitted information labeled Exhibit B-2 consists of communications between university employees and the university's legal counsel. You explain that these communications were made for the purpose of facilitating the rendition of professional legal services to the university. You also state that the communications were intended to be and have remained confidential. Based on your representations and our review, we agree that Exhibit B-2 consists of privileged, attorney-client communications. Therefore, the university may withhold Exhibit B-2 under Rule 503.

A portion of the remaining information subject to section 552.022 consists of account numbers. Section 552.136 of the Government Code states in part that "[n]otwithstanding any

other provision of [the Act], 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.” Gov’t Code § 552.136(b). However, some of the information you have marked under this section pertains to the requestor’s client. Section 552.136 protects privacy interests; thus, the requestor has a right of access to his client’s section 552.136 information under section 552.023 of the Government Code. *Id.* § 552.023. The university must withhold the remaining account number information, which we have marked, pursuant to section 552.136 of the Government Code.

Section 552.137 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). *Id.* § 552.137(a)-(c). We note that 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. The e-mail addresses you have marked are not types specifically excluded by section 552.137(c) of the Government Code. Therefore, the university must withhold the e-mail addresses you have marked in the information subject to section 552.022, in addition to those we have marked, in accordance with section 552.137 unless the university receives consent for their release. The remaining information that we have marked under section 552.022 must be released.

You assert that a portion of the remaining submitted information not subject to 552.022 is excepted from disclosure under section 552.116 of the Government Code, which 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. You claim that the portion of the submitted information labeled Exhibit B-3 consists of audit working papers of audits conducted by the university's Internal Audit Department into the athletic department. You explain that the audit was authorized under the Texas Internal Auditing Act, pursuant to chapter 2102 of the Government Code. *See id.* § 2102.007 (relating to the duties of an internal auditor); .005 (requiring state agencies to conduct internal audit programs); .003 (defining types of audits). Based on your representations and our review, we agree that the university may withhold Exhibit B-3 under section 552.116 of the Government Code.

You assert that the remaining submitted information not subject to 552.022 is excepted from disclosure under section 552.103 of the Government Code, which provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The university has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The university must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us, and the submitted information indicates, that prior to the receipt of the present request, the university was named as a defendant in an ongoing lawsuit. Based on your representations and our review of the submitted information, we agree that litigation was pending when the university received the request for information. In addition, we find that the remaining submitted information is related to the pending litigation for purposes of section 552.103(a). Therefore, the university may withhold the remaining information pursuant to section 552.103 of the Government Code.⁴

In summary, the submitted information subject to section 552.022, which we have marked, must generally be released.⁵ However, within the information subject to 552.022, the university (1) may withhold Exhibit B-2 pursuant to Texas Rule of Evidence 503, (2) must withhold the account numbers we have marked pursuant to section 552.136, and (3) must withhold the e-mail addresses you have marked, in addition to those we have marked, under section 552.137 of the Government Code. The university may withhold Exhibit B-3 under section 552.116 of the Government Code, and may withhold the remaining information pursuant to section 552.103 of the Government Code.

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

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure for this information.

⁵We note that the information being released contains confidential information to which the requestor, as representative for the individual at issue, has a right of access. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body to provide him with information concerning himself). Therefore, if the university receives another request for this same information from a different requestor, then the university should again seek a decision from this office.

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,



Matt Entsminger
Assistant Attorney General
Open Records Division

MRE/jb

Ref: ID# 325676

Enc. Submitted documents

c: Mr. Robert C. Hilliard
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(w/o enclosures)