



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 25, 2008

Ms. Valerie Coleman-Ferguson
Associate General Counsel
University of Houston System
311 E. Cullen Building
Houston, Texas 77204-2028

OR2008-16245

Dear Ms. Coleman-Ferguson:

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# 328830.

The University of Houston (the "university") received two requests from the same requestor for e-mails sent by multiple named university officials during two specified time periods. You state you will provide some of the requested information to the requestor. You also state you are withholding 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 personal information of peace officers under section 552.117(a)(2) of the Government Code;² and social security numbers under section 552.147 of the Government

¹ We note the United States Department of Education Family Policy Compliance Office (the "DOE") informed this office FERPA, 20 U.S.C. § 1232g(a), does not permit state and local educational authorities to disclose to this office, without parental or student consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

² The previous determination issued in Open Records Decision No. 670 (2001) authorizes the university to withhold the home addresses and telephone numbers, personal cellular telephone and pager numbers, social security numbers, and family member information of its peace officers under

Code.³ You claim some of the requested information is not subject to the Act. You also claim the requested information is excepted from disclosure under sections 552.101, 552.105, 552.111, 552.116, 552.117, 552.123, 552.1235, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.⁴

Initially, we note some of the submitted e-mails were sent after the request for information was received. Thus, this information, which we have marked, is not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

Next, you claim the usernames and passwords in Exhibit 76 are not public information under the Act. We note the Act is applicable only to "public information." *See* Gov't Code § 552.021. Section 552.002 of the Act 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.

Id. § 552.002. In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property, is not the kind of information that is made public under section 552.021 of the Act. *See* Open Records Decision No. 581 at 6 (1990) (construing predecessor statute). Based on the reasoning in that decision and our review of the information at issue, we find the usernames and passwords we have marked in Exhibit 76 are used solely as tools to maintain, manipulate, or protect public property and have no other significance. *Id.* As such, the marked usernames and passwords are not public information,

section 552.117(a)(2) without the necessity of requesting an attorney general decision. We note section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure.

³ Section 552.147(b) 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.

⁴ We assume 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 those records contain substantially different types of information than that submitted to this office.

as defined by section 552.002, and, thus, are not subject to the Act. Therefore, the university need not release the marked usernames and passwords in Exhibit 76 under the Act.

Next, you inform us the portion of the responsive information pertaining to unsuccessful applicants for the position of University of Houston System Chancellor was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2008-01068 (2008). In that ruling, we concluded the university may withhold the unsuccessful applicants' identifying information under section 552.123 of the Government Code. As we have no indication the law, facts, and circumstances on which the prior ruling was based have changed, the university may continue to rely on that ruling as a previous determination and withhold the unsuccessful applicants' identifying information in accordance with Open Records Letter No. 2008-01068. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information other statutes make confidential, such as section 560.003 of the Government Code. Section 560.003 provides "[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act]." *Id.* § 560.003; *see id.* § 560.001(1) ("biometric identifier" means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). You seek to withhold the marked fingerprints in Exhibit 77 under section 560.003. There is no indication the requestor has a right of access to the fingerprints under section 560.002. *See id.* § 560.002(1)(A) (governmental body may not sell, lease, or otherwise disclose individual's biometric identifier to another person unless the individual consents to disclosure). Therefore, the university must withhold the marked fingerprints in Exhibit 77 under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

You claim the e-mail in Exhibit 79 is confidential under section 418.177 of the Texas Homeland Security Act (the "HSA"), chapter 418 of the Government Code. Section 552.101 also encompasses section 418.177, which provides:

Information is confidential if the information:

- (1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and

(2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

Id. § 418.177. The fact information may relate to a governmental body's security concerns does not make the information per se confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provisions controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A).

You inform us the e-mail in Exhibit 79 was sent by the university's chief of police to the university's director of environmental health and risk management in response to "a request from an FBI agent for the [u]niversity to identify large quantities of chemicals on or near the [u]niversity's campus that could be used to blow up a building or cause catastrophic damage." You also state the e-mail "relates to information collected by the [u]niversity for the purpose of preventing and assessing the risk of an act of terrorism." After reviewing your arguments and the information at issue, we find the e-mail in Exhibit 79 relates to an assessment of the risk or vulnerability of persons or property to an act of terrorism or related criminal activity. *See id.* § 418.177. Therefore, the university must withhold Exhibit 79 under section 552.101 of the Government Code in conjunction with section 418.177 of the Government Code.

Section 552.101 also encompasses information protected by the common-law informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law enforcement authority, provided the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5.

You contend the information you have highlighted in Exhibit 78 reveals the identity of a complainant who reported to the university's police department his credit cards had been stolen, which carries a criminal penalty. You do not indicate, nor does it appear, the alleged

offender knows the identity of the complainant. Based on your representation and our review, we conclude the university may withhold the complainant's identifying information, which we have marked, in Exhibit 78 under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. You have failed to demonstrate, however, how the remaining highlighted information identifies the complainant. Thus, the remaining highlighted information in Exhibit 78 may not be withheld under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

Section 552.105 of the Government Code excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. Section 552.105 is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information excepted from disclosure under section 552.105 pertaining to such negotiations may be excepted from disclosure so long as the transaction relating to that information is not complete. *See* ORD 310. A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" ORD 357 at 3 (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiating position with regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good-faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564.

You state the e-mails in Exhibits 68 through 70 pertain to the locations and purchase prices of three parcels of land the university is negotiating to purchase for public use. You claim release of the information in Exhibits 68 through 70 would significantly harm the university's negotiating position with respect to the purchase of the land at issue. Based on your representations and our review of the information in question, we conclude the university may withhold the e-mails in Exhibits 68 through 70 under section 552.105 of the Government Code.

You assert the e-mails and attachments in Exhibits 5 through 67 are excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630

S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Additionally, section 552.111 does not generally except from disclosure purely factual information severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5.

This office has also concluded a preliminary draft of a document intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

Section 552.111 can also encompass communications between a governmental body and a third-party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9.

You assert the e-mails and attachments in Exhibits 5 through 67 consist of communications between and among university officials and consultants. Based on your representations and

our review, we find you have established the deliberative process privilege is applicable to the portions of the e-mails and the draft attachments we have marked in Exhibits 5 through 19, 21, 22, 25 through 27, 29 through 31, 34 through 36, 38 through 43, 46, 47, 53, 58, 60 through 64, 66, and 67. Accordingly, you may withhold this information under section 552.111 of the Government Code. However, you have failed to demonstrate how the factual, administrative, and personnel information contained in the remaining portions of Exhibits 5 through 67 constitutes advice, recommendations, opinions, or material reflecting the policymaking processes of the university. Consequently, this remaining information may not be withheld under section 552.111 of the Government Code.

Section 552.116 of the Government Code provides:

(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 state the requested documents in Exhibit 72 consist of working papers created or used during the course of an audit authorized under chapters 321 and 2102

of the Government Code. *See id.* chapters 321 and 2102 (authorizing and setting forth procedures for state and internal audits of state agencies and institutions of higher learning). Based on your representations and our review, we agree the documents in Exhibit 72 constitute audit working papers under section 552.116. Thus, the university may withhold Exhibit 72 pursuant to section 552.116 of the Government Code.

Section 552.117(a)(1) of the Government Code 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 this information be kept confidential under section 552.024 of the Government Code. *Id.* § 552.117(a)(1). Additionally, section 552.117 encompasses personal cellular telephone numbers, provided the cellular telephone service is paid for by the employee with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117(a)(1) exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024). 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). The university may only withhold information under section 552.117(a)(1) 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 made. You state the employees whose information is at issue timely chose to not allow public access to her personal information. Accordingly, the university must withhold the home telephone, home address, and family information we have marked in Exhibits 74 and 75 pursuant to section 552.117(a)(1) of the Government Code. Furthermore, if the employees paid for the cellular telephone service associated with the cellular telephone numbers marked in Exhibits 74 and 75, the marked numbers must be withheld under section 552.117(a)(1) of the Government Code. However, if the employees did not pay for the cellular telephone service associated with the cellular telephone numbers marked in Exhibits 74 and 75, the marked numbers may not be withheld under section 552.117(a)(1) of the Government Code.

Section 552.1235 of the Government Code 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 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 seek to withhold information in Exhibits 38 and 71 under section 552.1235. You contend some of the information either identifies or tends to identify donors to the university.

Based upon your representations and our review, we agree the information we have marked in Exhibit 38 identifies persons as actual donors to the university. Accordingly, we conclude the university must withhold the information we have marked in Exhibit 38 under section 552.1235. However, you have failed to establish how any of the remaining information in Exhibits 38 and 71 identifies or tends to identify donors to the university. Therefore, you may not withhold any of the remaining information in Exhibits 38 and 71 under section 552.1235.

You claim some of the remaining information is protected by section 552.130 of the Government Code, which provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). Therefore, the university must withhold the Texas motor vehicle record information you have marked in Exhibit 73, and the additional information we have marked in Exhibits 73, 74, and 78, under section 552.130 of the Government Code.

We note the remaining information includes e-mail addresses subject to section 552.137 of the Government Code, which 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).⁵ *See id.* § 552.137(a)-(c). The e-mail addresses we have marked in Exhibits 10, 14, 25, 27, 32, 34, 35, 37, 38, 52, 56, 61, 62, 66, 74, and 76 are not specifically excluded by section 552.137(c). As such, these e-mail addresses must be withheld under section 552.137, unless the owners of the addresses have affirmatively consented to their release. *See id.* § 552.137(b).

In summary, the university may withhold the requested unsuccessful applicants' identifying information under section 552.123 of the Government Code in accordance with Open Records Letter No. 2008-01068. The university may withhold Exhibits 68 through 70 under section 552.105 of the Government Code; the information we have marked in Exhibits 5 through 19, 21, 22, 25 through 27, 29 through 31, 34 through 36, 38 through 43, 46, 47, 53, 58, 60 through 64, 66, and 67 under section 552.111 of the Government Code; and Exhibit 72 under section 552.116 of the Government Code. The university must withhold the marked fingerprints in Exhibit 77 under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code; Exhibit 79 under section 552.101 of the Government Code in conjunction with section 418.177 of the Government Code; the marked donor information in Exhibit 38 under section 552.1235 of the Government Code; the marked Texas motor vehicle record information in Exhibits 73, 74, and 78 under section 552.130 of the Government Code; the e-mail addresses we have marked in

⁵ The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Exhibits 10, 14, 25, 27, 32, 34, 35, 37, 38, 52, 56, 61, 62, 66, 74, and 76 under section 552.137 of the Government Code; and the home telephone number, home address, and family information we have marked in Exhibits 74 and 75 pursuant to section 552.117(a)(1) of the Government Code. If the employees paid for the cellular telephone service associated with the cellular telephone numbers marked in Exhibits 74 and 75, the marked numbers must be withheld under section 552.117(a)(1) of the Government Code. The remaining 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).

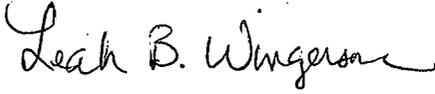
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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

A handwritten signature in cursive script that reads "Leah B. Wingerson".

Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/ma

Ref: ID# 328830

Enc. Submitted documents

c: Requestor
(w/o enclosures)