



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

August 17, 2009

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

OR2009-11497

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# 352442 (Request No. CC-09-047).

Texas A&M University-Corpus Christi (the "university") received a request for job descriptions and salary history for specific employees, information pertaining to the Student Support Services and Upward Bound programs, the job posting and qualifications for a specific position, specified employment applications, employee training schedules, and information sent to or received from several specified offices. You state that the university has redacted 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 social security numbers have been redacted pursuant to section 552.147 of the Government Code.<sup>2</sup>

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<sup>1</sup> The United States Department of Education Family Policy Compliance Office (the "DOE") 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 purpose of our review in the open records ruling process under the Act. The DOE has determined that 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>.

<sup>2</sup> 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.

You state you will provide some of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, 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>

Initially, we address the requestor's assertion that the university failed to meet its obligations under section 552.301 of the Government Code. Section 552.301 prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires that a governmental body ask for a decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. Gov't Code § 552.301(b). Section 552.301(e) requires that a governmental body submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e)(1)(D). The university originally received the request on May 1, 2009. Because the university's estimated cost to process the request was over \$100, the university explains it 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 that a governmental body may require a deposit for payment of anticipated costs if the estimated cost exceeds \$100 if the governmental body has more than 15 full-time employees. *Id.* § 552.263(a)(1). Further, section 552.263(e) provides if the governmental body requires a deposit under section 552.263, a request for public information is considered to have been received by the governmental body on the date the governmental body receives the deposit. *Id.* § 552.263(e). The university informs us that it received the deposit on June 1, 2009. Thus, pursuant to section 552.263(e), June 1, 2009, is the date the university received this request for the purposes of 552.301. The university's ten-business-day deadline was June 15, 2009. The university's request for a ruling from this office was postmarked June 12, 2009. The university's fifteen-business-day deadline was June 22, 2009. The university submitted a copy of the specific information requested, labeled to indicate which exceptions apply to which parts of the documents, on June 22, 2009. Thus, we find that the university fully complied with section 552.301.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information made confidential by other statutes, such as the Medical Practice Act (the "MPA"). Medical records are confidential

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<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.

under the MPA, subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See* Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982).

Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We have marked the medical records that may only be released in accordance with the MPA.

Section 552.101 also encompasses chapter 201 of the Occupations Code. Section 201.402 of the Occupations Code provides in part:

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a chiropractor that are created or maintained by a chiropractor are confidential and privileged and may not be disclosed except as provided by this subchapter.

(c) A person who receives information from the confidential communications or records, excluding a person listed in Section 201.404(a) who is acting on the patient's behalf, may not disclose the information except to the extent that

disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 201.402(b)-(c). Chapter 201 also includes exceptions to confidentiality and consent provisions. *See id.* §§ 201.403, .404, .405. Consent for release of chiropractic records must specify: (1) the information records covered by the release; (2) the reason or purpose for the release; and (3) the person to whom the information is to be released. *See id.* § 201.405(c). The chiropractic records that we have marked may only be released in accordance with chapter 201 of the Occupations Code.

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 disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses is protected by common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we conclude that the information we have marked is intimate or embarrassing and of no legitimate public interest. Thus, this information must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find that none of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Therefore, no portion of the remaining information is confidential under common-law privacy.

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. Gov't Code § 552.117(a)(1). Section 552.117 also encompasses a personal cellular telephone number, provided that a governmental body does not pay for the service. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). 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). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. You state the employees at issue timely elected to withhold their personal information from public access. Accordingly, we find that the

university must withhold the information we have marked under section 552.117(a)(1) of the Government Code. However, the university may only withhold the cellular telephone numbers if the employees at issue paid for the cellular service with their own funds. Furthermore, no portion of the remaining information consists of a current or former employee's home address and telephone number, social security number, or family member information. Therefore, no portion of the remaining information may be withheld under section 552.117 of the Government Code

You claim Exhibit B-2 is excepted from disclosure under section 552.107(1) 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. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re 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 that the information you have marked under section 552.107 reveals communications between an attorney for the Texas A&M University System and university administrators and staff. You have specifically identified each of the individuals who were party to the e-mails at issue. You represent that these communications were made for the purpose of facilitating the rendition of professional legal services. You also represent that the confidentiality of these communications has been maintained. We therefore conclude that section 552.107 is applicable to Exhibit B-2. Thus, the university may withhold the information at issue under section 552.107 of the Government Code.

You assert that Exhibit B-3 is excepted under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). In Open Records Decision No. 615, this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, and opinions reflecting the policymaking processes of the governmental body. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *see also Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin, 2001, no pet.). The purpose of section 552.111 is "to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.).

An agency's policymaking functions do not encompass internal administrative or personnel matters. Disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *See* ORD 615 at 5-6. However, 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). Section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

Upon review, we note that the submitted records appear to consist of information pertaining to personnel matters that do not relate to policymaking. Therefore, we find that you have failed to demonstrate how the submitted information reflects the policymaking process of the university. *See* Gov't Code § 552.301(e)(1) (requiring the governmental body to explain the applicability of the raised exception). Accordingly, no portion of the submitted information

may be withheld under section 552.111 of the Government Code, and it must be released to the requestor.

Next, we address your claim under section 552.136 of the Government Code, which provides as follows:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value;

or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(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. You inform us that the information at issue contains a universal identification number that is used to access employee payroll and benefit information. Based on your representations, we agree that the system must withhold this information under section 552.136. The university must also withhold the information we have marked under section 552.136.

Section 552.137 of the Government Code provides that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure. *Id.* § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We note that a portion of the information you have marked pertains to an e-mail address maintained by a governmental entity for one of its officials or employees. Accordingly, this e-mail address may not be withheld under section 552.137. The remaining e-mail addresses are personal e-mail addresses that do not appear to be of a type specifically excluded by section 552.137(c). You state the owners of the e-mail addresses have not consented to release. Accordingly, with the exception of the information we have marked for release, the

university must withhold the e-mail addresses you have marked under section 552.137 of the Government Code.

In summary, the university may only release the marked medical records in accordance with the MPA and the marked chiropractic records in accordance with chapter 201 of the Occupations Code. The university must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The university must withhold the information we have marked under section 552.117(a)(1) of the Government Code. However, the university may only withhold the cellular telephone numbers if the employees at issue paid for the cellular service with their own funds. The university may withhold Exhibit B-2 under section 552.107(1) of the Government Code. The university must withhold the information you have marked, and the additional information we have marked, under section 552.136. With the exception of the information we have marked for release, the university must withhold the information you have marked under section 552.137 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Chris Schulz  
Assistant Attorney General  
Open Records Division

CS/cc

Ref: ID# 352442

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)