



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 26, 2011

Ms. Neera Chatterjee
Public Information Coordinator
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2011-07497

Dear Ms. Chatterjee:

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# 418799 (OCG# 136103).

The University of Texas System (the "system") received a request for all communications between the H.J. Lutcher Stark Center for Physical Culture and Sports (the "center"), the Office of the President of the University of Texas, the Nelda C. and H.J. Lutcher Stark Foundation in Orange, Texas (the "foundation"), and any other system entities dealing with gifts made to the system, specifically any communications related to items given or loaned to the center on behalf of the Homer Stark Family, from March 2008 to the date of the request. You state you have released some of the requested information. We understand some of the requested information does not exist.¹ You claim that portions of the requested information are excepted from disclosure under sections 552.124 and 552.1235 of the Government Code. You also state that the request may implicate the proprietary interests of the foundation. Accordingly, you notified the foundation of this request for information and of its right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances).

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

We have received arguments from the foundation. We have considered the submitted arguments and reviewed the submitted representative sample of information.²

Initially, the foundation asserts that the majority of the information submitted by the system is not responsive to the instant request. We note that a governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). In this case, the system has reviewed its records and has determined that the submitted documents are responsive to the request. As the system has identified this information as responsive and has submitted it to our office for review, we will determine whether the system must release this information to the requestor.

The foundation claims the submitted information is excepted from disclosure under section 552.103 of the Government Code, which provides:

(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 state or a political subdivision, as a consequence 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). Section 552.103, however, is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 542 (statutory predecessor to section 552.103 does not implicate the rights of a third party), 522 (1989) (discretionary exceptions in general). As the system does not seek to withhold any information pursuant to this exception, we find section 552.103 is not applicable to the submitted information. *See* ORD 542 (governmental body may waive section 552.103).

You argue that portions of the submitted information are confidential under section 552.124 of the Government Code. The foundation argues that the submitted information is confidential in its entirety under section 552.124. Section 552.124 makes confidential, with

²We 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.

certain exceptions that are not applicable here, “[a] record of a library or library system, supported in whole or in part by public funds, that identifies or serves to identify a person who requested, obtained, or used a library material or service.” Gov’t Code § 552.124(a)-(b); *see also* Open Records Decision No. 100 at 3 (1975) (identifying information of library patrons in connection with object of their attentions is confidential by constitutional law). We note that only the names, addresses, and other information specifically identifying library patrons may be withheld under section 552.124. *See* Open Records Decision No. 649 at 3 (1996) (confidentiality provisions strictly construed).

You state the center is a research center at the system’s University of Texas at Austin campus and contains a research library and is supported partially by public funds. You assert that the center is a library because it provides access to its library and archival collections, which are maintained as library holdings. We agree that the center is a library for purposes of section 552.124 of the Government Code. However, upon review of the submitted information, which concerns donations to the center, we find none of the submitted information identifies or serves to identify a person who requested, obtained, or used the center’s library or archival collections; therefore, the system may not withhold any of the information at issue under section 552.124 of the Government Code.

Section 552.1235 of the Government Code excepts from disclosure “[t]he name or other information that would tend to disclose the identity of a person, other than a governmental body, who makes a gift, grant, or donation of money or property to an institution of higher education[.]” Gov’t Code § 552.1235(a). “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 portions of the submitted information under section 552.1235 of the Government Code. You state the information you have marked pertains to individuals who are system donors and who have not given the system permission to release their names and other identifying information. Based upon your representations and our review, we agree the information you have marked identifies persons who are donors to the system. Accordingly, we conclude that the system must withhold the information you have marked under section 552.1235 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”³ Gov’t Code § 552.101. Section 552.101 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

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 established. *Id.* at 681-82. The type of information considered highly intimate or 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. This office has also found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. 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 find a portion of the remaining information, which we marked, is highly intimate or embarrassing and not of legitimate public concern. Accordingly, the system must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024. See Gov't Code § 552.117(a)(1). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone 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 telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. 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 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. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the individuals at issue timely requested confidentiality under section 552.024, the system must withhold the information we have marked under section 552.117(a)(1); however, the marked cellular telephone numbers may be withheld only if the employees at issue paid for the cellular telephone service with their own funds. Conversely, to the extent the individuals at issue did not timely request confidentiality under section 552.024 or if the system pays for the marked cellular telephone numbers, the system may not withhold the marked information under section 552.117(a)(1) of the Government Code.

You state you will redact the e-mail addresses you have marked in the remaining information under section 552.137 of the Government Code pursuant to Open Records Decision No. 684

(2009).⁴ We have marked additional e-mail addresses in the remaining information that are subject to section 552.137, 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). Gov’t Code § 552.137(a)-(c). The e-mail addresses we have marked are not specifically excluded by section 552.137(c). You state the system has not received affirmative consent for the release of these e-mail addresses. Therefore, the system must withhold the e-mail addresses you have marked, as well as the e-mail addresses we have marked, under section 552.137 of the Government Code. *See id.* § 552.137(b).

In summary, the system must withhold the information you have marked under section 552.1235 of the Government Code and the information we have marked under section 552.101 in conjunction with common-law privacy. To the extent the employees at issue timely elected confidentiality under section 552.024 of the Government Code and the employees at issue paid for the cellular telephone service with their own funds, the system must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The system must withhold the marked e-mail addresses under section 552.137 of the Government Code. The system must release the remaining information to the requestor.

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, 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, toll free at (888) 672-6787.

Sincerely,



Kate Hartfield
Assistant Attorney General
Open Records Division

KH/em

⁴Open Records Decision No. 684 is a previous determination issued by this office to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Ref: ID# 418799

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)