



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 14, 2011

Ms. Zeena Angadicheril
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2011-10053

Dear Ms. Angadicheril:

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# 423831 (OGC# 137176).

The University of Texas at Arlington (the "university") received a request for all information concerning a named individual, including any e-mails from the past three months; and the personnel file of a named employee. You state the university is releasing some of the requested information. You inform us the university has withheld education records pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code. You claim a portion of the submitted information is not subject to the Act.¹ You also claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108(a)(1), 552.111, 552.117, and 552.130 of the Government Code. We have considered your arguments and reviewed the submitted information.²

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office 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 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/20060725usdoc.pdf>. We note, however, FERPA is generally not applicable to law enforcement records maintained for a law enforcement purpose. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3, .8.

²We 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.

Initially, you argue the submitted information you marked under section 181.006 of the Health and Safety Code is not subject to the Act. Section 181.006 states “[f]or a covered entity that is a governmental unit, an individual’s protected health information . . . is not public information and is not subject to disclosure under [the Act].” Health & Safety Code § 181.006(2). We will assume, without deciding, the university is a covered entity. Section 181.006(2) does not remove protected health information from the Act’s application, but rather states this information is “not public information and is not subject to disclosure under [the Act].” We interpret this to mean a covered entity’s protected health information is subject to the Act’s application. Furthermore, this statute, when demonstrated to be applicable, makes confidential the information it covers. Thus, we will consider your arguments for this information, as well as the other submitted information.

You have marked most of the submitted records under section 552.108(a)(1) of the Government Code. This section excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You provide a letter from the university’s police department (the “department”) stating the marked records pertain to a pending investigation by the department and includes certain information regarding the university’s Behavior Intervention Team (the “BIT”). The letter also states the BIT consists of certain university departments, including individuals from the department; and was created by the university to identify suspicious behavior and evaluate threats to campus security. Further, the letter represents the marked records are maintained by the department, and that release will interfere with the department’s further investigation into this matter. Based on these representations and our review, we conclude release of the information you marked under section 552.108(a)(1) would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Therefore, this information may be withheld under section 552.108(a)(1) of the Government Code.³

You have marked some of the remaining information under section 552.111 of the Government Code. This section excepts from disclosure “an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *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

³As our ruling for this information is dispositive, we need not address your remaining arguments against disclosure.

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 that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. See Open Records Decision No. 615 at 5 (1993). 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).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); see Open Records Decision No. 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).

This office has also concluded a preliminary draft of a document that is 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.

You have marked an e-mail string as a draft document that is protected by section 552.111. The e-mail string pertains to the university's proposed media statement concerning the fatal shooting of a university employee's spouse by a university student. Thus, the e-mail string pertains to an administrative matter. As previously stated, the deliberative process privilege excepts communications pertaining to administrative and personnel matters of broad scope that affect a governmental body's policy mission. See ORD 631 at 3. In this instance, however, you have not explained how the e-mail string pertains to an administrative matter of broad scope that affects the university's policy mission. Therefore, you have failed to

demonstrate how the deliberative process privilege applies to this draft document, and it may not be withheld under section 552.111 of the Government Code.

You have also marked other e-mail strings under section 552.111. You state these e-mail strings pertain to various policymaking matters that affect the university. We note portions of the e-mail strings concern the university's media relations policy and contain advice, recommendations and opinions of university employees regarding that policy. Based on your representations and our review, we conclude the university may withhold the portions of the e-mail strings we marked under section 552.111 of the Government Code. However, we find the remaining information in the e-mail strings you marked consists of facts which are severable from the advice, opinion, or recommendations. Accordingly, no portion of the remaining information may be withheld under section 552.111.

You have marked one document under section 552.101 of the Government Code in conjunction with the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 552.101 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 protected by other statutes, such as the MPA. 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.

Id. § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded 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 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. *See* Occ. Code §§ 159.004, .005. Upon review, we agree the document is a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created by

a physician. Accordingly, the university may only release this document, which we marked, in accordance with the MPA.⁴

Section 552.101 also encompasses section 181.006 of the Health and Safety Code. As previously stated, assuming the university is a covered entity, we must decide whether the records you have marked consists of protected health information. Section 181.001 states that “[u]nless otherwise defined in this chapter, each term that is used in this chapter has the meaning assigned by the Health Insurance Portability and Accountability Act and Privacy Standards [“HIPAA”].” Health & Safety Code § 181.001(a). Accordingly, as chapter 181 does not define “protected health information,” we turn to HIPAA’s definition of the term. HIPAA defines “protected health information” as individually identifiable health information that is transmitted or maintained in electronic media or any other form or medium. *See* 45 C.F.R. § 160.103. HIPAA defines “individually identifiable health information” as information that is a subset of health information, including demographic information collected from an individual, and:

(1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse[.]

45 C.F.R. § 160.103. The information at issue are e-mails between employees of the university’s media relations department and e-mails between employees of the division of student affairs. You do not explain, nor do the communications reflect, how these e-mails were created or received by the university as a health care provider, health plan, employer, or health care clearinghouse. Furthermore, some of the information you seek to withhold relates to the employment of a specific individual. Protected health information does not include individually identifiable health information contained in employment records held by a covered entity in its role as an employer. *See id.* Thus, we find you have failed to demonstrate how the e-mails are protected health information for purposes of section 181.006. Accordingly, none of these records may be withheld under section 552.101 of the Government Code in conjunction with section 181.006 of the Health and Safety Code.

Section 552.101 also encompasses common-law and constitutional privacy. The doctrine of common-law privacy 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently, and (2) an individual’s interest in avoiding disclosure of personal matters. ORD 455 at 4. The first type protects an individual’s autonomy within “zones of privacy” which include matters related to marriage, procreation,

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

contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

You have marked a portion of an e-mail that you indicate contains an employee's medical information which is protected by common-law privacy. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find the medical information we marked is not of legitimate public interest. Accordingly, this information must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.⁵ However, the remaining information you marked in this e-mail does not reveal the employee's medical information. You have not explained how this remaining information is protected by common-law or constitutional privacy. *See* Open Records Decision Nos. 423 at 2 (1984) (scope of public employee privacy is narrow), 212 (1978). Thus, the remaining information you marked in the e-mail is not confidential under common-law or constitutional privacy.

You also claim certain benefit enrollment records reveal the named employee's personal financial decisions that are protected by common-law privacy. This office has found that a public employee's allocation of part of the employee's salary to a voluntary investment, health or other program offered by the employer is a personal financial decision that is protected by common-law privacy. *See, e.g.,* Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1991) (deferred compensation information, participation in voluntary investment program, and election of optional insurance coverage). Some of the information contained in these forms reveals the employee's selection of optional health and financial programs offered by the university. Thus, the university must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. We note, however, the remaining financial information pertains to the employee's participation in health and financial programs that are funded in whole or in part by the university. This office has found there is a legitimate public interest in an employee's participation in an insurance or retirement program funded in whole or in part by a governmental body. *See* Open Records Decision No. 600 at 9-12 (1992) (identifying public and private portions of certain state personnel records). Therefore, the remaining financial information is not protected by common-law privacy. Furthermore, you have not explained how this information is protected by constitutional privacy. Accordingly, no portion of the remaining documents

⁵As our ruling for this information is dispositive, we need not address your remaining argument against disclosure.

may be withheld under section 552.101 of the Government Code in conjunction with common-law or constitutional privacy. *See* ORD Nos. 423 at 2, 212.

You raise section 552.117(a)(1) of the Government Code for portions of the remaining information. This section excepts from disclosure the home address and telephone number, social security number, family member information, and emergency contact information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)(1)). 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 information. *See* Open Record 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 information. The remaining information contains the home address and telephone number of the named employee, and the family member information of a former university employee. In this instance, the submitted information reflects the former employee timely elected to keep his personal information confidential. Accordingly, the university must withhold the former employee's family member information, which we marked, under section 552.117(a)(1) of the Government Code. You have not informed us whether or not the named university employee timely elected confidentiality for her personal information. If this employee did not timely elect confidentiality, her personal information may not be withheld under section 552.117(a)(1) of the Government Code. If, however, she timely elected to keep this information confidential, the university must withhold the home address and telephone number we marked under section 552.117(a)(1).

Finally, you have marked the named employee's birth date in the benefit enrollment forms under section 552.102(a) of the Government Code. This section excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* § 552.102(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex. & The Dallas Morning News, Ltd.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Accordingly, the marked birth date must be withheld under section 552.102(a) of the Government Code. As you raise no other exceptions to disclosure, the remaining information must be released.

In summary, the university may withhold the information you marked under section 552.108(a)(1) of the Government Code. The information we marked under section 552.111 of the Government Code may be withheld. The university may only release the document we marked under the MPA in accordance with the MPA. The university must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The information you marked under section 552.102 must be withheld. The marked family member information of the former university employee must be withheld under section 552.117(a)(1) of the Government Code. Finally,

if the named university employee did not timely elect confidentiality, her personal information may not be withheld under section 552.117(a)(1). If, however, she timely elected to keep this information confidential, the university must withhold the home address and telephone number we marked under section 552.117(a)(1). The remaining information must be released.⁶

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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/eb

Ref: ID# 423831

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁶We note that in some of the records being released, personally identifiable information of students has been redacted in accordance with FERPA.