



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 16, 2011

Ms. Neera Chatterjee
The University of Texas System
Office of the General Counsel
201 West Seventh Street
Austin, Texas 78701-2902

OR2011-16893

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# 436354 (OGC 139599).

The University of Texas at Brownsville and Texas Southmost College (the “university”) received a request for fourteen categories of information pertaining to a named individual during a specified time period.¹ You state the university will release information responsive to the tenth category of the request and a portion of the information responsive to the seventh category of the request. You state the university does not possess information responsive to the third, fourth, fifth, sixth, eighth, ninth, eleventh, twelfth, or fourteenth categories of the request.² You state the university will withhold information responsive to the thirteenth

¹You state, and provide documentation showing, the university sought and received clarification of the request. *See* Gov’t Code § 552.222(b) (stating if information requested is unclear or large amount has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²We note the Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio, 1978, writ dismissed).

category of the request pursuant to the Family Education Rights and Privacy Act (“FERPA”), section 1232 of title 20 of the United States Code.³ You indicate the university will redact certain information subject to section 552.117 of the Government Code as permitted by section 552.024(c) of the Government Code.⁴ You further state the university will withhold W-2 forms under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code; direct deposit authorization forms under section 552.101 in conjunction with the common-law right to privacy; bank account and routing numbers as well as partial credit card numbers under section 552.136 of the Government Code; and personal e-mail addresses under section 552.137 of the Government Code; pursuant to Open Records Decision No. 684 (2009).⁵ You further state you will redact social security numbers from the submitted information pursuant to section 552.147(b) of

³We note the United States Department of Education Family Policy Compliance Office (the “DOE”) has informed this office that FERPA does not permit a state educational agency or institution to disclose to this office, without parental or an adult student’s consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). The DOE has determined that FERPA determinations must be made by the educational institution from which the education records were obtained. A copy of the DOE’s letter to this office may be found on the Office of the Attorney General’s website: <http://www.oag.state.tx.us/open/20060725usdoe.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.

⁴Section 552.117 of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, 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. 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)). Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the current or former employee or official chooses not to allow public access to the information. *See* Gov’t Code § 552.024(c)(2).

⁵We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including W-2 forms under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code; direct deposit authorization forms under section 552.101 in conjunction with common-law privacy; bank account, bank routing, and credit card numbers under section 552.136 of the Government Code; and e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. However, on September 1, 2011, the Texas legislature amended section 552.136 to allow a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 27 (to be codified at Gov’t Code § 552.136(c)). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 27 (to be codified at Gov’t Code § 552.136(d), (e)). Thus, the statutory amendments to section 552.136 of the Government Code superceded Open Records Decision No. 684 on September 1, 2011. Therefore, a governmental body may only redact information subject to section 552.136(b) in accordance with section 552.136, not Open Records Decision No. 684.

the Government Code.⁶ You claim a portion of the requested information is not subject to the Act. Additionally, you claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, 552.108, and 552.130 of the Government Code. You also state release of some of the requested information may implicate the proprietary interests of the United States Army (the “Army”). Thus, pursuant to section 552.305 of the Government Code, you notified the Army of the request and of its right to submit arguments to this office as to why the information at issue should not be released. 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 to disclosure in certain circumstances). We have considered the submitted arguments and reviewed the submitted representative sample of information.⁷ We have also received and considered comments from the requestor. *See* Gov’t Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address your argument that a portion of the requested information is not public information subject to the Act. The Act applies to “public information,” which is defined by section 552.002 of the Government Code 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; *see also id.* § 552.021. Information is generally subject to the Act when it is held by a governmental body and it relates to the official business of a governmental body, or is used by a public official or employee in the performance of official duties. Thus, virtually all of the information in a governmental body's physical possession constitutes public information and thus is subject to the Act. *Id.* § 552.002(a)(1). You indicate some of the submitted e-mails are not public information subject to the Act. You state the e-mails at issue are personal in nature, have no connection to university business, and represent permitted incidental use of the university’s e-mail system. Upon review, we agree the e-mails you have marked do not constitute “information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business” by or for the university. *See id.* § 552.021; *see also* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Thus, these e-mails do not

⁶Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act. Gov’t Code § 552.147(b).

⁷We assume that the “representative sample” of information 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.

constitute public information as defined by section 552.002 and the university is not required to release them under the Act.⁸

Next, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, the Army has not submitted comments to this office explaining why the submitted information should not be released. Therefore, we have no basis to conclude that the Army has a protected proprietary interest in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the university may not withhold any portion of the submitted information based upon the proprietary interests of the Army. We next address the university's argument under section 552.108, as this is the most encompassing exception you raise.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You explain, and have provided a statement from the university's police department (the "department") showing, the information at issue, which you have marked, relates to a criminal investigation conducted by the department and is maintained by the department. You further state the investigation has concluded and did not result in conviction or deferred adjudication. Based on these representations and our review, we agree section 552.108(a)(2) is applicable to the information you have marked.

However, we note, and you acknowledge, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *Id.* § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); *see* Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). Thus, with the exception of basic information, the university may withhold the information you have marked under section 552.108(a)(2) of the Government Code.⁹

⁸As our ruling is dispositive, we need not address your remaining arguments for this information.

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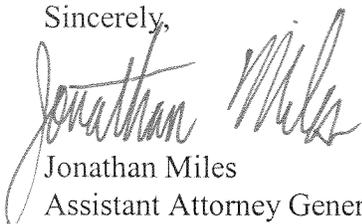
Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the 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.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Having carefully reviewed the information at issue, we find the dates of birth you have marked must be withheld under section 552.102(a) of the Government Code.

In summary, the e-mails you have marked do not constitute public information as defined by section 552.002 and the university is not required to release them under the Act. With the exception of basic information, the university may withhold the information you have marked under section 552.108(a)(2) of the Government Code. The university must withhold the dates of birth you have marked under section 552.102(a) 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, 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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 436354

Enc. Submitted documents

c: Requestor
(w/o enclosures)