



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 30, 2012

Ms. Carol Longoria
Public Information Coordinator
Office of General Counsel
The University of Texas System
201 West Seventh Street
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OR2012-19336

Dear Ms. Longoria:

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# 472446 (OGC# 146414).

The University of Texas at Austin (the "university") received a request for ten categories of information pertaining to certain documentation and correspondence during a specified time period pertaining to a specified study. You inform us the university has no information responsive to a portion of the request.¹ You state some of the requested information is not subject to the Act. You also claim that some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. You further state the proprietary interests of certain third parties might be implicated. Accordingly, you state, and provide documentation showing, you notified the Witherspoon Institute, the Lynde and Harry Bradley Foundation, and KNW Networks, Inc. d/b/a Knowledge Networks (collectively, the "third parties") of the request and of their right to submit arguments to this office explaining why their information should not be released. See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be

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), 452 at 3 (1986), 362 at 2 (1983).

released); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have considered your arguments and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, you argue Tab 6 is not subject to the Act. The Act is only applicable to "public information." *See id.* § 552.021. Section 552.002(a) 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(a). You state the submitted e-mails contain purely personal exchanges that have no connection with the transaction of official business of the university. *See* 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). You explain that Tab 6 consists of correspondence to and from a university professor and constitutes personal use of his university e-mail account under the university's electronic communications policy. Upon review of the submitted information, we agree the information does 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* Gov't Code § 552.021. Thus, we conclude Tab 6 is not subject to the Act and need not be released in response to this request.

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." *Id.* § 552.101. This section encompasses section 51.914 of the Education Code, which provides, in pertinent part:

(a) In order to protect the actual or potential value, the following information is confidential and is not subject to disclosure under [the Act], or otherwise:

(1) all information relating to a product, device, or process, the application or use of such a product, device, or process, and all technological and scientific information (including computer programs) developed in whole or in part at a state institution of higher education, regardless of whether patentable or capable of being registered under copyright or trademark laws, that have a potential for being sold, traded, or licensed for a fee[.]

Educ. Code § 51.914(a)(1). As noted in Open Records Decision No. 651 (1997), the legislature is silent as to how this office or a court is to determine whether particular

scientific information has “a potential for being sold, traded, or licensed for a fee.” ORD 651 at 9-10. Furthermore, whether particular scientific information has such a potential is a question of fact that this office is unable to resolve in the opinion process. *See id.* at 10. Thus, this office has stated that in considering whether requested information has “a potential for being sold, traded, or licensed for a fee,” we will rely on a governmental body’s assertion that the information has this potential. *See id.* However, a governmental body’s determination that information has a potential for being sold, traded, or licensed for a fee is subject to judicial review. *See id.* We note section 51.914 is not applicable to working titles of experiments or other information that does not reveal the details of the research. *See Open Records Decision Nos. 557 at 3 (1990), 497 at 6-7 (1988).*

You seek to withhold the information contained in Tabs 7, 8, 9, and 10 under section 51.914(a)(1) of the Education Code. You state the information at issue contains the details of research, scientific data, and research procedures that relate to a product, device, or process, or application of the same, developed by university employees. You assert this information has the potential for being further sold, traded, or licensed for a fee and is therefore confidential pursuant to section 51.914(a)(1). As stated above, section 51.914(a)(1) protects information relating to a product, device, or process, and all technological and scientific information that has a potential for being sold, traded, or licensed for a fee to protect the actual or potential value of such information. We note the university employee conducting the study at issue posted information on the university’s website regarding the study. The information provided on the university’s website includes: the study design, the survey that was provided to each participant in the study, and the survey codebook revealing the data obtained from the survey. You seek to withhold this information, as well as additional information that is directly related to the information posted on the university’s website under section 51.914(a)(1). Upon review, we conclude the university has not demonstrated how release of the information in Tabs 7 through 10 would harm the actual or potential value of the information at issue. Accordingly, the university may not withhold any of the information at issue under section 552.101 of the Government Code in conjunction with section 51.914(a)(1) of the Education Code.

Section 552.101 of the Government Code also encompasses section 51.971 of the Education Code, which provides:

(a) In this section:

(1) “Compliance program” means a process to assess and ensure compliance by the officers and employees of an institution of higher education with applicable laws, rules, regulations, and policies, including matters of:

(A) ethics and standards of conduct;

- (B) financial reporting;
- (C) internal accounting controls; or
- (D) auditing.

...

(c) The following are confidential:

(1) information that directly or indirectly reveals the identity of an individual who made a report to the compliance program office of an institution of higher education, sought guidance from the office, or participated in an investigation conducted under the compliance program; and

(2) information that directly or indirectly reveals the identity of an individual as a person who is alleged to have or may have planned, initiated, or participated in activities that are the subject of a report made to the compliance program office of an institution of higher education if, after completing an investigation, the office determines the report to be unsubstantiated or without merit.

(d) Subsection (c) does not apply to information related to an individual who consents to disclosure of the information.

Educ. Code § 51.971(a), (c)-(d). You inform us the university is an institution of higher education for purposes of section 61.003 of the Education Code. *See id.* § 51.971(a)(2). You assert the information in Tab 11 pertains to a completed compliance inquiry that concluded in a determination the complaint was unsubstantiated or without merit. You state the inquiry stems from an allegation of scientific misconduct related to the study at issue in the request in order to assess and ensure compliance with all applicable laws, rules, regulations, and policies. Based on your representations, we agree the inquiry at issue relates to an investigation conducted under the university's compliance program. *See id.* § 51.971(a). You state releasing the information at issue would directly or indirectly reveal the identities of those individuals making the complaint, seeking guidance from, or participating in the inquiry, or alleged to have participated in the activities subject to the complaint. You also assert the individuals at issue have not consented to release of the information at issue.

The requestor informs our office the university has publicly released the name of the individual who made the complaint and the name of an individual who is alleged to have participated in activities that are the subject of the inquiry, and thus, the university may not now withhold the information at issue under section 51.971 of the Education Code. We note

section 552.007 of the Government Code generally prohibits selective disclosure of information that a governmental body has voluntarily made available to any member of the public. *See Gov't Code § 552.007*. Section 552.007 provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law. *See id.*; Open Records Decision No. 518 at 3 (1989) ; *see also* Open Records Decision Nos. 490 (1988), 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclosure information made confidential by law). Although the university has publicly released the names of certain individuals involved in the inquiry, we have no indication the university has released the documents at issue in Tab 11. Furthermore, because section 552.101 of the Government Code in conjunction with section 51.971 of the Government Code makes information confidential by law, regardless of whether the university previously released any of the information at issue, we must address whether the information is made confidential by law and must now be withheld pursuant to section 552.101 of the Government Code in conjunction with section 51.971 of the Education Code.

As noted above, you state releasing the information at issue would directly or indirectly reveal the identities of those individuals making the complaint, seeking guidance from, or participating in the inquiry, or alleged to have participated in the activities subject to the complaint. Upon review, we agree release of the information in Tab 11 would directly or indirectly reveal the identities of those individuals making the complaint, seeking guidance from, or participating in the inquiry, or alleged to have participated in the activities subject to the complaint. *See Educ. Code § 51.971(c)*. Thus, the university must withhold the information in Tab 11 under section 552.101 of the Government Code in conjunction with section 51.971(c) of the Education Code.

Next, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See Gov't Code § 552.305(d)(2)(B)*. As of the date of this ruling, we have not received comments from any of the third parties. Thus, we have no basis to conclude any of the third parties have a protected proprietary interest in the remaining information. *See id.* § 552.110(a)-(b); 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 of the remaining information on the basis of any proprietary interest the third parties may have in the information.

Next, we note some of the remaining information is subject to common-law privacy. Section 552.101 of the Government Code 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 type of information considered 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 found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). Upon review, we find portions of the remaining submitted information are highly intimate or embarrassing and not of legitimate public concern. Therefore, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

We note the remaining information also contains information that may be subject to section 552.117 of the Government Code.² Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, emergency contact information, 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 of the Government Code. Gov't Code § 552.117(a)(1). Section 552.117(a)(1) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 of the Government Code not applicable to cellular telephone numbers provided and 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. Therefore, if the information we have marked consists of the home telephone number or personal cellular telephone number of an individual who timely requested confidentiality under section 552.024, the university must withhold the marked information under section 552.117(a)(1) of the Government Code. If the information does not consist of the home telephone number or the personal cellular telephone number of an individual who made a timely election under section 552.024, the university may not withhold the information we have marked under section 552.117(a)(1) of the Government Code.

²The 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).

Section 552.137 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). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. Accordingly, the university must also withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release or subsection 552.137(c) applies.

Finally, we note some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, Tab 6 is not subject to the Act and need not be released in response to this request. The university must withhold the information in Tab 11 under section 552.101 of the Government Code in conjunction with section 51.971(c) of the Education Code. The university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. If the information we have marked consists of the home telephone number or personal cellular telephone number of an individual who timely requested confidentiality under section 552.024, the university must withhold the marked information under section 552.117(a)(1) of the Government Code. The university also must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release or subsection 552.137(c) applies. The university must release the remaining information; however, any information protected by copyright may only be released in accordance with copyright law.

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,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/tch

Ref: ID# 472446

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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