



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 8, 2013

Mr. R. Brooks Moore
Managing Counsel, Governance
The Texas A&M University System
301 Tarrow Street, Sixth Floor
College Station, Texas 77840-7896

OR2013-00433

Dear Mr. Moore:

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# 475456 (TAMU-CC 12-082).

Texas A&M University-Corpus Christi (the "university") received a request for the personnel file of the requestor's client, the personnel files of two named faculty members, and records related to faculty members who have sought extensions of their tenure application period. You have redacted social security numbers under section 552.147(b) of the Government Code.¹ You claim that the remaining information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested third party may submit comments to this office stating why the information at issue should or should not be released).

Initially, we note you have not submitted any information responsive to the request for the personnel file of the requestor's client. We assume that, to the extent any information responsive to this portion of the request existed in the possession of the university when it

¹Section 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. *See* Gov't Code § 552.147(b).

received the request for information, you have released it to the requestor. *See* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible). If you have not released any such information, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302.

Next, as you acknowledge, the university failed to meet the deadlines set forth in section 552.301(e) of the Government Code with respect to a portion of the submitted information. Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released unless the governmental body overcomes this presumption by demonstrating a compelling reason to withhold the information. *Id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). A compelling reason generally exists when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). You raise section 552.101, which can provide a compelling reason to withhold information, thus, we will consider your argument under this exception for the untimely submitted information.

We note portions of the information at issue are subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). Portions of the submitted information consist of evaluations subject to subsection 552.022(a)(1). The information subject to subsection 552.022(a)(1) must be released unless it is made confidential under the Act or other law. *See id.* Although you raise section 552.103 of the Government Code for the information at issue, this section is a discretionary exception to disclosure and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). As such, section 552.103 does not make information confidential for the purposes of section 552.022. Therefore, none of the

information subject to subsection 552.022(a)(1) may be withheld under section 552.103 of the Government Code. However, because section 552.101 of the Government Code protects information made confidential under law, we will consider the applicability of section 552.101 to the information subject to section 552.022, as well as to the remaining information at issue.

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." Gov't Code § 552.101. Section 552.101 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.

...

(e) Information is excepted from disclosure under [the Act] if it is collected or produced:

(1) in a compliance program investigation and releasing the information would interfere with an ongoing compliance investigation[.]

Educ. Code § 51.971(a), (e)(1). You state the university, through its Director of Equal Opportunity, commenced an internal investigation into an allegation of discrimination following notification that an individual had submitted an EEOC Charge of Discrimination. You state the timely submitted information is relevant to the pending investigation of alleged civil rights violations under investigation by the university as part of its compliance program. Upon review, we agree the information at issue relates to an investigation conducted under the university's compliance program. *See id.* § 51.971(a)(1). You represent release of the information at this time would interfere with the pending investigation. Accordingly, we

conclude the university must withhold the timely submitted information under section 552.101 of the Government Code in conjunction with section 51.971(e)(1) of the Education Code.²

You raise section 552.101 in conjunction with common-law privacy for portions of the untimely submitted information. Section 552.101 of the Government Code also encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both elements of the test must be established. *Id.* at 681-82. Common-law privacy encompasses the specific types of information held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). 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 No. 455* (1987) (prescription drugs, illnesses, operations, and handicaps). Upon review, we find the information you have marked, as well as the additional information we have marked, is highly intimate or embarrassing and of no legitimate public concern. Accordingly, the university must withhold the information marked under section 552.101 of the Government Code in conjunction with common-law privacy.

We note portions of the remaining information are subject to section 552.117 of the Government Code.³ Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, 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 is also applicable to cellular telephone numbers, provided the cellular telephone service or pager service is not paid for 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 piece of 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). Therefore, a governmental body must withhold information under

² As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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

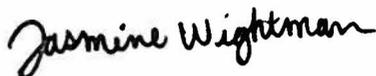
section 552.117 on behalf of a current or former official or employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, the personal cellular telephone number we have marked under section 552.117(a)(1) must be withheld if the individual whose information is at issue timely requested confidentiality pursuant to section 552.024 and the individual pays for the cellular telephone service with her personal funds. The university may not withhold the marked information under section 552.117 if the individual did not make a timely election to keep the information confidential or the cellular telephone service is not paid for with personal funds.

In summary, the university must withhold the timely submitted information under section 552.101 of the Government Code in conjunction with section 51.971 of the Education Code. The university must withhold the information you have marked, as well as the additional information we have marked, on the untimely submitted information under section 552.101 in conjunction with common-law privacy. The university must withhold the information we have marked under section 552.117 of the Government Code if the individual whose information is at issue timely requested confidentiality and if the individual pays for the cellular telephone service with her personal funds. 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,



Jasmine D. Wightman
Assistant Attorney General
Open Records Division

JDW/dls

Ref: ID# 475456

Enc. Submitted documents

**c: Requestor
(w/o enclosures)**