



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 10, 2013

Ms. Neera Chatterjee
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OR2013-17663

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# 501864 (U.T. OGC # 151124).

The University of Texas at Austin (the "university") received a request for all e-mails or letters received by the university during a specified time period from members of the Texas legislature "regarding admissions policies at the [u]niversity and/or the matter of admission of any person to the [u]niversity, in particular The University of Texas School of Law." You state the university is releasing some responsive information and has redacted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ Further, you state the university will redact information under section 552.117 of the Government Code pursuant to section 552.024 of the Government Code, personal e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009), and social security numbers pursuant to section 552.147(b) of the Government Code.² You claim some of the submitted

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that 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 that 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/20060725usdoe.pdf>.

²Section 552.024 authorizes a governmental body to redact from public release a current or former employee's home address and telephone number, emergency contact information, social security number, and family member information excepted from disclosure under section 552.117(a)(1) without the necessity of requesting a decision from this office under the Act, if the employee timely elected to withhold such

information is not subject to the Act. You also claim the submitted information is excepted from disclosure under sections 552.101, 552.106, and 552.111 and of the Government Code.³ Further, you state, and provide documentation showing, you have notified third parties of the request and their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released). We have considered your arguments and reviewed the submitted representative sample of information.⁴ We have also received and considered correspondence from the Secretary of the Senate of the State of Texas (the "secretary") and from a representative of the requestor. *See id.*

Initially, we note some of the submitted information consists of correspondence from a former member of the United States Senate, and not a member of the Texas legislature. Thus, this information, which we have marked, is not responsive to the present request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the university need not release such information in response to this request.

Next, you state some of the requested information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2013-14911 (2013). In that ruling, we determined, in the event the requestor was requesting the information in his personal capacity, the university (1) may withhold certain information under sections 552.107, 552.106, 552.111, and 552.116 of the Government Code; (2) must withhold certain information under section 552.101 of the Government Code in conjunction with section 51.971(e) of the Education Code, constitutional privacy, and common-law privacy; (3) must withhold certain information under sections 552.117(a)(1) and 552.1235 of the Government Code; and (4) must release the remaining responsive information. There is no indication the law, facts, or circumstances on which the prior ruling was based have changed. Thus, the university must continue to rely on Open Records Letter No. 2013-14911 as a previous determination and withhold or release any identical information in accordance

information. *See* Gov't Code §§ 552.024(a)-(c), .117(a)(1). Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684. Section 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).

³We note that, although you raise sections 552.107, 552.116, and 552.1235 of the Government Code, you did not submit to this office written comments supporting these exceptions, nor have you identified any information you seek to withhold under these exceptions. Therefore, we presume you no longer assert these exceptions. *See* Gov't Code §§ 552.301, .302.

⁴We 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 that those records contain substantially different types of information than that submitted to this office.

with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We will consider the submitted arguments against disclosure of the submitted responsive information, which is not encompassed by the previous ruling.

Next, you contend some of submitted information is not subject to the Act. The Act is applicable only to "public information." *See* Act of May 27, 2013, 83rd Leg., R.S., S.B. 1368, § 1 (to be codified as an amendment to Gov't Code § 552.002); Gov't Code § 552.021. Section 552.002(a) defines "public information" as the following:

[I]nformation that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body;
- (2) for a governmental body and the governmental body:
 - (A) owns the information;
 - (B) has a right of access to the information; or
 - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
- (3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Act of May 27, 2013, 83rd Leg., R.S., S.B. 1368, § 1 (to be codified as an amendment to Gov't Code § 552.002). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and thus is subject to the Act. *Id.*; *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). Information is subject to the Act even if a governmental body does not physically possess it as long as it is collected, assembled, or maintained for the governmental body and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). Thus, information collected, assembled, or maintained by a third party may be subject to disclosure under the Act if a governmental body owns or has a right of access to the information. *See* ORD 462; *cf.* Open Records Decision No. 499 (1988). You inform us some of the information you have marked consists of personal e-mails that have no connection with the university's business and constitute

incidental use of e-mail by employees of the university. You also inform us this information was not collected or assembled and is not maintained pursuant to any law or ordinance or in connection with the transaction of the university's business. You state the university's policy allows for incidental use of e-mail by employees and officials. Based on your representations and our review of the information at issue, we find this information does not constitute public information for purposes of section 552.002 of the Government Code. *See* Open Records Decision No. 635 at 4 (1995) (section 552.002 not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Therefore, we conclude the e-mails at issue, which you have marked, are not subject to the Act and need not be released in response to the present request for information.

You also assert the University of Texas Electronic Identification Number ("UTEID") you have marked is not subject to the Act. In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. You inform our office that, when combined with an individual's password, UTEIDs serve as "the required log on protocol to access the computer mainframe, the [u]niversity's centralized hub that runs all its high-level electronic functions." You indicate UTEIDs are used solely to access the university's computer mainframe and have no other significance other than their use as tools for the maintenance, manipulation, or protection of public information. Based on your representations and our review, we find the UTEID you have marked does not constitute public information under section 552.002 of the Government Code. Therefore, the UTEID you have marked is not subject to the Act and need not be released to the requestor.

You and the secretary claim some of the remaining information is not subject to the Act, but is instead governed by sections 306.003 and 306.004 of the Government Code. Section 306.003 of the Government Code provides, in part, as follows:

(a) Records of a member of the legislature or the lieutenant governor that are composed exclusively of memoranda of communications with residents of this state and of personal information concerning the person communicating with the member or lieutenant governor are confidential. However, the member or the lieutenant governor may disclose all or a part of a record to which this subsection applies, and that disclosure does not violate the law of this state.

(b) The method used to store or maintain a record covered by Subsection (a) does not affect the confidentiality of the record.

Gov't Code § 306.003(a)-(b). Section 306.003 pertains to only records of a member of the legislature or the lieutenant governor. *See id.*; Open Records Decision No. 648 (1996). The responsive information consists of records of the university rather than those of a member

of the legislature or the lieutenant governor. Therefore, we conclude that section 306.003 does not apply to this information.

While section 306.003 applies to records that are composed of memoranda of communications and records of personal information of a legislator or the lieutenant governor, section 306.004 refers to the communications themselves and provides as follows:

(a) To ensure the right of the citizens of this state to petition state government, as guaranteed by Article I, Section 27, of the Texas Constitution, by protecting the confidentiality of communications of citizens with a member of the legislature or the lieutenant governor, the public disclosure of all or part of a written or otherwise recorded communication from a citizen of this state received by a member or the lieutenant governor in his official capacity is prohibited unless:

(1) the citizen expressly or by clear implication authorizes the disclosure;

(2) the communication is of a type that is expressly authorized by statute to be disclosed; or

(3) the official determines that the disclosure does not constitute an unwarranted invasion of personal privacy of the communicator or another person.

(b) This section does not apply to a communication to a member of the legislature or the lieutenant governor from a public official or public employee acting in an official capacity.

(c) A member or the lieutenant governor may elect to disclose all or part of a communication to which this section applies, and that disclosure does not violate the law of this state.

Gov't Code § 306.004(a)-(c). Section 306.004(a) applies to "a written or otherwise recorded communication from a citizen of this state" received by a member of the legislature or the lieutenant governor in his official capacity. *Id.* § 306.004(a). For the purposes of section 306.004, a "communication" includes "conversation, correspondence, and electronic communication." *Id.* § 306.001. We note that a legislator or the lieutenant governor has the discretion to disclose all or part of records that are subject to section 306.004(a). *Id.* § 306.004(c). However, section 306.004 does not apply to a communication to a member of the legislature or the lieutenant governor from a public official or public employee acting in an official capacity. *Id.* § 306.004(b).

The responsive information you and the secretary seek to withhold does not consist of communications of a member of the legislature or the lieutenant governor with a citizen

of this state. The records are communications between a member of the legislature and university employees acting in their official capacity. Therefore, we conclude section 306.004 is inapplicable to the responsive communications at issue, and the communications at issue are university records subject to the Act. *See id.* Accordingly, we will address your remaining arguments against disclosure of this information.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses the doctrine of constitutional privacy, which protects two kinds of interests. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); *see also* Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the “zones of privacy,” which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *See Fajjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); *see also* ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir.1985); *see also* ORD 455 at 6-7. This aspect of constitutional privacy balances the individual’s privacy interest against the public’s interest in the information. *See* ORD 455 at 7. 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 (quoting *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

You contend the information you have marked is confidential under constitutional privacy. Upon review, we agree some of the information at issue falls within the zones of privacy. Accordingly, the university must withhold the identifying information of applicants to the university contained in the responsive information you have indicated under section 552.101 in conjunction with constitutional privacy.⁵ However, we find the university has failed to demonstrate any of the remaining information falls within the constitutional zones of privacy or implicates an individual’s privacy interests for purposes of constitutional privacy. Therefore, none of the remaining responsive information may be withheld under section 552.101 in conjunction with constitutional privacy.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical

⁵As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we find none of the remaining responsive information you have marked is both highly intimate or embarrassing and of no legitimate public concern. Thus, none of the remaining responsive information at issue may be withheld under section 552.101 on the basis of common-law privacy.

Section 552.106 of the Government Code excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation[.]” Gov’t Code § 552.106(a). Section 552.106(a) ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. *See* Open Records Decision No. 460 at 1 (1987). The purpose of this exception is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body. *Id.* at 2. Therefore, section 552.106 is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *Id.* Section 552.106 does not protect purely factual information from public disclosure. *See id.* at 2; *see also* Open Records Decision No. 344 at 3-4 (1982) (for purposes of statutory predecessor, factual information prepared by State Property Tax Board did not reflect policy judgments, recommendations, or proposals concerning drafting of legislation). However, a comparison or analysis of factual information prepared to support proposed legislation is within the scope of section 552.106. *See* ORD 460 at 2.

You assert the information you have marked, “contains communications regarding legislation and other working drafts of legislation that [the university] prepared in response to legislative inquiries.” Upon review, we find the information you have marked under section 552.106 constitutes advice, opinion, analysis, and recommendations related to the preparation of proposed legislation for the purposes of section 552.106. Accordingly, the university may withhold the information you have marked under section 552.106 of the Government Code.⁶

In summary, the university must continue to rely on Open Records Letter No. 2013-14911 as a previous determination and withhold or release any identical information in accordance with that ruling. The personal e-mails and the UTEID you have marked are not subject to the Act and need not be released in response to the present request for information. The university must withhold the identifying information of applicants to the university contained in the responsive information you have indicated under section 552.101 of the Government Code in conjunction with constitutional privacy. The university may withhold the information you have marked under section 552.106 of the Government Code. The university must release the remaining responsive information.

⁶As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



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LEH/tch

Ref: ID# 501864

Enc. Submitted documents

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