



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 10, 2013

Ms. Ana Vieira
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2013-21454

Dear Ms. Vieira:

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# 508031 (OGC# 152290).

The University of Texas at Austin (the "university") received a request for information related to the annual budget of the University of Texas Law School Foundation (the "foundation"), the admissions process of the university's law school, and financial transactions between the university's law school and the foundation during a specified period of time. You claim some of the submitted information is not subject to the Act. Additionally, you claim the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. You provide documentation showing you have notified the foundation of its right to submit comments to this office explaining why the requested information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received and considered comments from the requestor and the foundation. *See id.* We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

¹We 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.

The university and the foundation contend that some of the submitted information, which the university has marked, is not subject to the Act. The Act is applicable to "public information." *See id.* § 552.021. Section 552.002(a) defines "public information" as

information 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.

Id. § 552.002(a). Virtually all information in a governmental body's physical possession constitutes public information that is subject to the Act. *Id.*; *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information a governmental body does not physically possess. Information that is written, produced, collected, assembled, or maintained by a third party may be subject to disclosure under the Act if a governmental body owns, has a right of access, or spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information. Gov't Code § 552.002(a); *see* Open Records Decision No. 462 at 4 (1987); *cf.* Open Records Decision No. 499 (1988). Additionally, information is "in connection with the transaction of official business" if the information is created by, transmitted to, received by, or maintained by a person or entity performing official business or a government function on behalf of a governmental body and the information pertains to official business of the governmental body. *See* Gov't Code § 552.002(a-1).

The university informs us the information at issue consists of foundation records, and explains these records are not records of the university. The foundation explains this information was obtained from a university employee who also works part-time for the foundation. The foundation further explains this employee created and maintains these foundation records solely in her capacity as a foundation employee, and the records are not maintained for any university purpose or function. The foundation asserts these records were

not created “for” the university, but were created and maintained for the foundation’s own activities. Thus, the foundation argues, these records are not maintained in connection with the official business of the university. Based on these representations and our review of the information, we agree the information you have marked does not constitute “information that is written, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business” by or for the university. Accordingly, we agree this information is not subject to the Act, and the university need not release it in response to this particular request.²

Next, you state you will redact information under the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g. The 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.³ Accordingly, we do not address the foundation’s argument under section 552.114 of the Government Code.⁴ *See id.* §§ 552.026, .114 (excepting from disclosure “student records”); Open Records Decision No. 539 (1990) determining the same analysis applies under section 552.114 of the Government Code and FERPA).

Next, we address the requestor’s contention the university did not comply with the procedural requirements of the Act. Pursuant to section 552.301(b), the governmental body must ask for the attorney general’s decision and state the exceptions that apply within ten business days after receiving the request. *See Gov’t Code* § 552.301(b). Additionally, pursuant to section 552.301(d), a governmental body must provide the requestor with (1) a written statement that the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general, and (2) a copy of the governmental body’s written communication to the attorney general within ten business days of receiving the request for information. *See id.* § 552.301(d). We understand the requestor to assert the university did not fully comply with the requirements of section 552.301(d). This office cannot resolve factual disputes in the opinion process. *See Open Records Decision Nos.* 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where a fact issue is not resolvable as a matter

²As our ruling is dispositive for this information, we need not consider the remaining arguments against its disclosure.

³We 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>.

⁴Although the foundation also raises section 552.026 of the Government Code, we note section 552.026 is not an exception to disclosure. Rather, section 552.026 provides the Act does not require the release of information contained in education records except in conformity with FERPA. *Gov’t Code* § 552.026.

of law, we must rely on the facts alleged to us by the governmental body requesting our decision, or upon those facts that are discernible from the documents submitted for our inspection. *See* ORD 552 at 4. You state, and the submitted information reflects, the university received the present request for information on September 19, 2013. Accordingly, the tenth business day after the receipt of the instant request was October 3, 2013. We received the university's request for a ruling on October 3, 2013. We note you have submitted documentation showing you notified the requestor the university wishes to withhold the information at issue and is seeking a decision from the attorney general on October 1, 2013. Moreover, the university's request for a decision reveals it was copied to the requestor on October 3, 2013. *See id.* § 552.301(d). Thus, we conclude the university complied with the requirements of section 552.301 of the Government Code in requesting a decision from this office.

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 information protected by other statutes, including section 51.971 of the Education Code. Section 51.971 of the Education Code provides in relevant part the following:

(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(e)(1). Section 51.971 defines a compliance program as "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[.]" *Id.* § 51.971(a)(1). We note 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 you have marked pertains to an ongoing compliance investigation relating to the use and management of money provided for the support of the university's law school via the foundation. Based on your representations, we find the information at issue relates to an investigation conducted under the university's compliance program. *See id.* § 51.971(a)(1). Accordingly, the university must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 51.971 of the Education Code.⁵

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right

⁵As our ruling is dispositive for this information, we need not consider the remaining arguments against its disclosure.

to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, 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 contend the remaining information is confidential under constitutional privacy. Upon review, we find 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 remaining information under section 552.101 of the Government Code on the basis of constitutional privacy.⁶ 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 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. Upon review, we find none of the remaining information is highly intimate or embarrassing and of no legitimate public concern. Accordingly, the university may not withhold the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.111 of the Government Code excepts from disclosure "[a]n interagency or intraagency 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 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

⁶As our ruling is dispositive for this information, we need not consider the remaining arguments against its disclosure.

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* ORD 615 at 5. 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).

You claim the remaining information is excepted from disclosure under section 552.111. Upon review, however, we find the information at issue is general administrative and purely factual information or has been shared with individuals with whom you have not demonstrated the university shares a privity of interest. Thus, we find you have failed to demonstrate how the information at issue is excepted under section 552.111. Accordingly, the remaining information may not be withheld under section 552.111 of the Government Code.

We note the remaining information contains e-mail addresses that are subject to section 552.137 of the Government Code.⁷ 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). *See id.* § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the university must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.⁸

In summary, the information you have marked is not subject to the Act and need not be released. The university must withhold (1) the information you have marked under section 552.101 of the Government Code in conjunction with section 51.971 of the

⁷The 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).

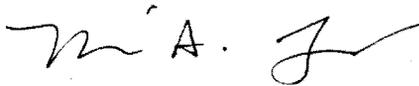
⁸We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies regarding the withholding of certain information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Education Code; (2) the identifying information of applicants to the university in the remaining information under section 552.101 of the Government Code in conjunction with constitutional privacy; and (3) the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. 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.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,



Nicholas A. Ybarra
Assistant Attorney General
Open Records Division

NAY/ac

Ref: ID# 508031

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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