



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 11, 2014

Ms. Audra Gonzalez Welter
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2014-10050

Dear Ms. Welter:

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# 525641 (OGC# 154792).

The University of Texas of the Permian Basin (the "university") received a request for eleven categories of information related to a named university employee. You indicate the university has no information responsive to a portion of the request.¹ You state the university will release some information to the requestor, but will redact information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.² You also state you will redact information pursuant to sections 552.024(c), 552.130(c), and 552.147(b) of the Government Code and Open Records

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²The 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>.

Decision No. 684 (2009).³ 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, 552.102, 552.136, and 552.139 of the Government Code.⁴ Further, you state release of this information may implicate the proprietary interests of the Heartland Conference. Accordingly, you state you notified the Heartland Conference of the request and of its right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that 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 your arguments and reviewed the submitted information, a portion of which constitutes a representative sample.⁵ We have also received and 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 some of the submitted information is not subject to the Act. The Act is applicable only to "public information." *See id.* §§ 552.002, .021. Section 552.002(a) defines "public information" as

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

³Section 552.117 of the Government Code 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. *See* Gov't Code § 552.117(a)(1). 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 id.* § 552.024(c). Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. *See id.* § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). 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. *See id.* § 552.147(b). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold specific categories of information without the necessity of requesting an attorney general decision, including: a Form I-9 and attachments under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code; W-2 and W-4 forms under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code; and an e-mail address of a member of the public under section 552.137 of the Government Code.

⁴Although you do not raise section 552.136 in your brief, we understand you to raise this exception based on your markings in the submitted information.

⁵We 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.

- (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). 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). Further, in Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, which 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 assert the marked University of Texas Electronic Identification Number ("UTEID"), as well as the passwords within the submitted information, are not subject to the Act. You inform our office that when combined with an individual's password, a UTEID serves as "the required log on protocol to access the computer mainframe, the [university's] centralized hub that runs all its high-level electronic functions." You further indicate the UTEID and passwords are used solely to access the university's computer mainframe and have no other significance other than its use as a tool for the maintenance, manipulation, or protection of public information. Based on your representations and our review, we determine the UTEID you have marked, as well as the passwords within the submitted information, do not constitute public information under the Act. *See* Gov't Code § 552.002. Accordingly, this information is not subject to the Act and need not be released.

Next, you inform us the e-mails you have marked consist of personal exchanges maintained by a university employee that have no connection with the university's business and constitute incidental personal use of university resources by a university employee. You state the university's policy allows for incidental use of university e-mail accounts by university employees and officials. You further state the use of university resources to create and maintain the marked information was *de minimis*. *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). Based on your representations and our review of the information at issue,

we agree the e-mails you have marked do not constitute "information that is written, produced, 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 § 552.002. Therefore, we conclude the e-mails you have marked are not subject to the Act and need not be released in response to the present request for information.

Next, we must address the requestor's assertion the university failed to comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *See id.* § 552.301. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See id.* § 552.301(b). Further, pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e). You state, and provide documentation showing, the university received the request for information on March 10, 2014. You further state, and provide documentation showing, the university provided the requestor with a written statement itemizing the estimate of the charges for responding to his request and requiring a deposit on payment of these charges pursuant to sections 552.2615 and 552.263 of the Government Code on March 20, 2014. *See id.* §§ 552.2615 (providing governmental body shall provide requestor with estimate of charges if charges exceed \$40), .263(a) (governmental body may require deposit or bond for payment of anticipated costs in certain instances if governmental body provides requestor with written itemized statement). In response to the itemized statement, the requestor modified his request on March 24, 2014, agreeing to seek access to, instead of copies of, the requested information. Thus, March 24, 2014 is the date on which the university is deemed to have received the request. *See id.* § 552.263(e-1) (modified request is considered received on the date the governmental body receives the written modification); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification or narrowing of unclear or over-broad request for public information, 10-day period to request attorney general ruling is measured from date request is clarified or narrowed). Accordingly, the ten-business-day deadline for requesting a ruling from this office was April 7, 2014, and the fifteen-business-day deadline was April 14, 2014. The university requested a ruling from this office on April 7, 2014, and submitted the information required by section 552.301(e) in an envelope postmarked April 14, 2014. *See* Gov't Code § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Therefore, we find the university complied with the procedural requirements of section 552.301 of the Government Code in requesting this decision.

Next, we note 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 id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from the Heartland Conference explaining why its information should not be released. Therefore, we have no basis to conclude the Heartland Conference has a protected proprietary interest in the information at issue. *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 of the information at issue on the basis of any proprietary interest the Heartland Conference may have in it.

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 both a closed compliance investigation and an open, ongoing compliance investigation pertaining to ethical questions and the standard of conduct exhibited by university employees. Specifically, you state the information at issue was collected and/or produced as part of a closed compliance investigation involving a personnel matter that was undertaken by the university's human resources department. However, you state this information is currently being used in an open, ongoing compliance investigation, and release of the information at issue would interfere with, and potentially compromise, the university's ability to continue this ongoing investigation. Based on your representations, we find the information at issue relates to an ongoing investigation being 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(e)(1) of the Education Code.

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 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 information you have marked 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 individuals who you inform us seek to attend the university, a representative sample of which we have marked, under section 552.101 of the Government Code on the basis of constitutional privacy. 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. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* ORD 455. This office has also found that personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. *See* Open Records Decision No. 600 (1992). However, we note, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 at 9 (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure), 545 (1990) (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy). We further note the public generally has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decision Nos. 542, 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 432 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find some of the information you have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, with the exception of the information we have marked for release,

the university must withhold the information you have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

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 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.*, 354 S.W.3d 336, 348 (Tex. 2010). Upon review, we find the university must withhold the date of birth you have marked under section 552.102(a) of the Government Code.

Section 552.136(b) of the Government Code states that “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b). This office has determined that insurance policy numbers are access device numbers for purposes of section 552.136. *See* ORD 684 at 9. Accordingly, the university must withhold the insurance policy numbers you have marked under section 552.136 of the Government Code.

Section 552.139 of the Government Code provides, in relevant part:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report;

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body’s or contractor’s electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Gov’t Code § 552.139(a), (b)(1)-(2). Section 2059.055 of the Government Code provides, in pertinent part:

(b) Network security information is confidential under this section if the information is:

- (1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;
- (2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or
- (3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

Id. § 2059.055(b). You state the information you have marked relates to information security systems, including computer e-mail addresses, passwords, networks and programs that manage university e-mail servers and security access to controlled areas. You explain the release of the information at issue would make the computer networks and programs of the university vulnerable to unauthorized access or harm. Based on your arguments and our review of the submitted information, we find you have established some of the information at issue is related to computer network security. Accordingly, the university must withhold the information we have marked under section 552.139 of the Government Code. However, we find you have not demonstrated any of the remaining information relates to computer network security, or to the design, operation, or defense of a computer network as contemplated by section 552.139(a), consists of a computer network vulnerability report or assessment as contemplated by section 552.139(b), or relates to computer network security or restricted information under section 2059.055. Therefore, the university may not withhold any of the remaining information under section 552.139.

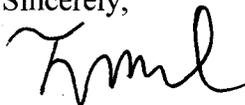
In summary, the UTEID you have marked, the passwords within the submitted information, and the personal e-mails you have marked are not subject to the Act and need not be released to the requestor. The university must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 51.971(e)(1) of the Education Code. The university must withhold the identifying information of individuals who you inform us seek to attend the university under section 552.101 of the Government Code in conjunction with constitutional privacy. With the exception of the information we have marked for release, the university must withhold the information you have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The university must withhold the date of birth you have marked under section 552.102(a) of the Government Code. The university must withhold the insurance policy numbers you have marked under section 552.136 of the Government Code. The university must withhold the information we have marked under section 552.139 of the Government Code. The university must release the remaining information.

You have asked this office to issue a previous determination finding UTEIDs are not subject to the Act without the necessity of requesting a decision from this office. *See id.* § 552.301(a) (allowing governmental body to withhold information subject to previous determination); Open Records Decision No. 673 (2001). After due consideration, we have

decided to grant your request. Therefore, this letter ruling shall serve as a previous determination under section 552.301(a) that UTEIDs do not constitute public information under the Act, and need not be released in response to a request for information under the Act. *See* Gov't Code § 552.011 (stating “[t]he attorney general shall maintain uniformity in the application, operation, and interpretation” of the Act, and may “prepare, distribute, and publish any materials, including detailed and comprehensive written decisions and opinions, that relate to or are based on” the Act). Therefore, so long as the elements of law, fact, and circumstances do not change so as to no longer support the findings set forth above, the university need not ask for a decision from this office with respect to this type of information. *See* ORD 673 at 7.

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,



Tim Neal
Assistant Attorney General
Open Records Division

TN/bhf

Ref: ID# 525641

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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