



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 30, 2016

Mr. Fernando C. Gomez, J.D., Ph.D
Vice Chancellor and General Counsel
Texas State University System
208 East 10th Street, Suite 600
Austin, Texas 78701-2407

OR2016-22085

Dear Mr. Gomez:

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# 628717.

Lamar University (the "university") received a request for all e-mail exchanges between named current and former employees within a specified period of time. You state you will redact information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g(a).¹ You claim some of the submitted information is not subject to the Act. Additionally, you claim some of the submitted information is excepted from disclosure under sections 552.101, 552.111, and 552.1235 of the Government Code. We have received comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted representative sample of information.²

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental or an adult student's 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 FERPA determinations must be made by the educational authority in possession of the educational records. We have posted a copy of the letter from the DOE on the Attorney General's website at <http://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

²We 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.

Initially, we note the requestor excluded any manuscripts from his request. Thus, such information in the submitted documents is not responsive to the request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the university is not required to release this information in response to this request.³ See generally *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed).

Next, you argue the e-mails contained in Attachment 3 are not public information subject to the Act. The Act is applicable only to “public information.” Gov’t Code §§ 552.002, .021. Section 552.002(a) defines “public information” as information that is

(a) . . . 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). Thus, almost all of the information in a governmental body’s physical possession constitutes public information and is subject to the Act. See *id.*; see also Open Records Decision No. 549 at 4 (1990), 514 at 1–2 (1988). You assert that the e-mails in Attachment 3 are personal e-mails created by individuals not acting in their official government capacities and do not pertain to the transaction of the university’s official business. Based upon these representations and our review of the e-mails at issue, we agree that Attachment 3 does not constitute public information for purposes of section 552.002 of the Government Code. See Open Records Decision No. 635 at 4 (1995) (recognizing that section 552.002 is not applicable to personal information unrelated to official business and created or maintained by a public employee involving a de minimis use of public resources).

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Therefore, we conclude Attachment 3 is not subject to the Act and need not be released in response to the present request for information.

Next, we address the requestor's claim the university failed to comply with the section 552.301(b) of the Government Code in requesting a ruling from this office. Section 552.301 prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. 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* Gov't Code § 552.301(b). The university received the request for information on June 6, 2016. You state, on June 15, 2016, the university provided the requestor with a cost estimate pursuant to section 552.2615 of the Government Code and required a deposit. *See id.* §§ 552.2615(a), .263(a). You provide documentation showing, in response to the cost estimate, the requestor modified his request on June 17, 2016. Further, you state, and provide documentation showing, the university sought clarification of the request on June 20, 2016, and received clarification of the request on June 28, 2016. *See id.* § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). You state the university provided the requestor with a second cost estimate on July 5, 2016 pursuant to section 552.2615 of the Government Code and required a deposit. *See* Gov't Code §§ 552.2615(a), .263(a). You state the university received payment of the deposit on July 12, 2016. Thus, July 12, 2016, is the date on which the university is deemed to have received the request. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date that the governmental body receives deposit or bond). Accordingly, the ten-business-day deadline for requesting a ruling from this office was July 26, 2016. The university submitted the information required by section 552.301(b) on July 26, 2016. *See id.* § 552.308(a)(1) (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(b) of the Government Code in requesting this decision.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses information made confidential by section 181.006 of the Health and Safety Code. Section 181.006 states that "[f]or a covered entity that is a governmental unit, an individual's protected health information . . . is not public information and is not subject to disclosure under [the Act]." Health & Safety Code § 181.006(2). Section 181.001(b)(2)(A) defines "covered entity," in part, as any person who:

(A) for commercial, financial, or professional gain, monetary fees, or dues, or on a cooperative, nonprofit, or pro bono basis, engages, in whole or in part,

and with real or constructive knowledge, in the practice of assembling, collecting, analyzing, using, evaluating, storing, or transmitting protected health information. The term includes a business associate, health care payer, governmental unit, information or computer management entity, school, health researcher, health care facility, clinic, health care provider, or person who maintains an Internet site[.]

Id. § 181.001(b)(2)(A). You assert the university is a covered entity for purposes of section 181.006 of the Health and Safety Code. However, in order to determine whether the university is a covered entity, we must address whether the university engages in the practice of assembling, collecting, analyzing, using, evaluating, storing, or transmitting protected health information. Section 181.001 states that “[u]nless otherwise defined in this chapter, each term that is used in this chapter has the meaning assigned by the Health Insurance Portability and Accountability Act and Privacy Standards [“HIPAA”].” *Id.* § 181.001(a). Accordingly, as chapter 181 does not define “protected health information,” we turn to HIPAA’s definition of the term. HIPAA defines “protected health information” as individually identifiable health information that is transmitted or maintained in electronic media or any other form or medium. *See* 45 C.F.R. § 160.103. HIPAA defines “individually identifiable health information” as information that is a subset of health information, including demographic information collected from an individual, and:

- (1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
- (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
 - (i) That identifies the individual; or
 - (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

Id. The information in Attachment 2 was created by the university as a health care provider and consists of e-mails relating to the payment for the provision of health care and the provision of health care to individuals. Upon review, we find the information we have marked in Attachment 2 consists of protected health information for purposes of section 181.006 of the Health and Safety Code. We understand the university collects and stores this information for the purpose of providing health care-related services. Therefore, with respect to this information, the university is a health care entity that is in the practice of collecting, using, and storing protected health information, and is a covered entity for purposes of section 181.006 of the Health and Safety Code. Accordingly, the university must withhold the information we have marked in Attachment 2 under section 552.101 in conjunction with section 181.006. However, we find none of the remaining information consists of protected health information

for purposes of section 181.006 of the Health and Safety Code. Therefore, the university may not withhold any of the remaining information under section 552.101 of the Government Code on that basis.

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* Open Records Decision No. 455 (1987). Upon review, we find the remaining information either pertains to de-identified individuals whose privacy interests are protected or does not satisfy the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Thus, the university may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy, which 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)). After review of the remaining information, we find you have failed to demonstrate any portion of the information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the university may not withhold any of the remaining information under section 552.101 of the Government Code on the basis of constitutional 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, writ ref'd n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, 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, 364 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions 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). Further, section 552.111 does not protect facts and written observations of facts and events severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152, 157 (Tex. App.—Austin 2001, no pet.); *see* ORD 615 at 5. But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, section 552.111 protects the factual information. *See* Open Records Decision No. 313 at 3 (1982).

You state Attachment 5 consists of advice, opinions, and recommendations relating to the university's policymaking. Based on your representation and our review, we find the university may withhold the information we have marked in Attachment 5 under section 552.111 of the Government Code. However, we find the remaining information at issue consists of either general administrative information that does not relate to policymaking or information that is purely factual in nature. Thus, we find the university has failed to demonstrate the remaining information at issue is excepted under section 552.111. Accordingly, the university may not withhold the remaining information at issue under section 552.111 of the Government Code.

Section 552.1235 of the Government Code excepts from disclosure "[t]he name or other information that would tend to disclose the identity of a person, other than a governmental body, who makes a gift, grant, or donation of money or property to an institution of higher education[.]" Gov't Code § 552.1235(a). For purposes of this exception, "institution of higher education" is defined by section 61.003 of the Education Code. *Id.* § 552.1235(c). Section 61.003 defines an "institution of higher education" as meaning "any public technical institute, public junior college, public senior college or university, medical or dental unit, public state college, or other agency of higher education as defined in this section." Educ. Code § 61.003(8). Because section 552.1235 does not provide a definition of "person," we look to the definition provided in the Code Construction Act. *See* Gov't Code § 311.005. "Person" includes a corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity. *Id.* § 311.005(2). The university states some of the information in Attachment 6 identifies donors for purposes of section 552.1235. Based on this representation, we agree the university must withhold the identifying information of these donors in Attachment 6 under section 552.1235 of the Government Code.

In summary, Attachment 3 is not subject to the Act and need not be released in response to the present request for information. The university must withhold the information we have marked in Attachment 2 under section 552.101 of the Government Code in conjunction with section 181.006 of the Health and Safety Code. The university may withhold the information we have marked in Attachment 5 under section 552.111 of the Government Code. The university must withhold the identifying information of the donors in Attachment 6 under section 552.1235 of the Government Code. The remaining responsive 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,



Kavid Singh
Assistant Attorney General
Open Records Division

KVS/bhf

Ref: ID# 628717

Enc. Submitted documents

c: Requestor
(w/o enclosures)