



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

April 28, 1993

Ms. Phyllis McFarland  
Director  
Community Youth Services  
6425 Chimney Rock  
Houston, Texas 77081

OR93-216

Dear Ms. McFarland:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, V.T.C.S. article 6252-17a. Your request was assigned ID# 18466.

Community Youth Services ("CYS") is part of the Harris County Children's Protective Services Board, a county agency organized under the laws of Texas. *See* Hum. Res. Code § 152.1073. CYS received an open records request for four items of information. You contend that pursuant to sections 3(a)(1) and 3(a)(14) of the Open Records Act, you may withhold information that identifies CYS clients on two items: pages 2 and 3 of the CYS Monthly Report for October, 1992, and page 2 of the CYS Monthly Expense Report for October, 1992. You assert that certain information on the reports allows the identification of CYS clients.

We begin with section 3(a)(14) of the Open Records Act, which generally excepts "student records *at educational institutions* funded wholly, or in part, by state revenue." You contend that because CYS specialists produced the requested reports in connection with their work at schools within the Katy Independent School District ("KISD"), the reports constitute student records at an "educational institution" for purposes of section 3(a)(14).

Because the term "educational institution" is not defined in section 3(a)(14), this office gives that term its ordinary and popular meaning. *See* Open Records Decision No. 427 (1985) at 2. Thus, an "educational institution" for purposes of section 3(a)(14) is an entity that educates or provides education through educators. *See id.* at 3. You inform us that CYS provides "crisis counseling and information concerning the availability of . . . the full spectrum of social services available to Harris County to deal with the mental and physical health, emotional, economic and other sociological problems of Harris County

families." See Hum. Res. Code §§ 41.002(d); 152.1073(b). CYS does not educate or provide education through educators; thus, even though the reports may contain information about KISD students, CYS is not an "educational institution" within the meaning of section 3(a)(14) of the Open Records Act. Accordingly, the reports are not excepted from disclosure by section 3(a)(14) of the Open Records Act. See Open Records Decision No. 390 (1983) at 3.

However, the reports may be subject to the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. Section 14(e) of the Open Records Act states as follows:

Nothing in this Act shall be construed to require the release of information contained in education records of any educational agency or institution except in conformity with the provisions of the Family Educational Rights and Privacy Act of 1974.

FERPA provides that no federal funds will be made available

to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of their parents.

*Id.* § 1232g(b)(1). "Education records" are those records, files, documents and other material which

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

*Id.* § 1232g(a)(4)(A). A "student"

includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

*Id.* § 1232g(a)(6).

CYS is not attended by students. Thus, reports prepared by CYS specialists, though they are about KISD students, are not subject to FERPA, unless the source of the information on the reports is an educational institution subject to FERPA. The following

regulation limits the redisclosure of information obtained from an education record subject to FERPA:

An education agency or institution may disclose personally identifiable information from an education record only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student.

34 C.F.R. § 99.33(a)(1). Assuming that KISD received federal funds, the educational records maintained by a KISD school are subject to FERPA. If information on the reports is derived from a student's educational records maintained by a KISD school, the reports are subject to the FERPA requirement that all personally identifiable information not be disclosed. Conversely, if the educational records of a KISD school are not the source of the information on the reports, the reports are not subject to FERPA requirements. We cannot determine the source of the information on the reports. Thus, CYS must determine the source of the information on these reports and delete the identifying information accordingly. We must next consider what information on the reports allows the identification of a KISD student.

You assert that information about the age, sex, race, school, and grade on the Monthly Report readily allows the identification of a student.<sup>1</sup> Under FERPA, "personally identifiable" means information that makes a student's identity "easily traceable." Attorney General Opinion JM-36 (1983); Open Records Decision No. 165 (1977) at 4-5.

A student's identity may be easily traceable in instances in which the number of students to whom the information may apply is relatively small. *See* Open Records Decision Nos. 352 (1982); 294 (1982); 181 (1977). In particular, this office has stated that information about the race of students may in some instances make a student's identity easily traceable. Open Records Decision No. 165 (1977). In contrast, when the number of students to whom the information may apply is large, a student's identity is not easily traceable. Open Records Decision Nos. 352 (1982) at 5-6; 165 at 2-3. Thus, the disclosure of the age, sex, race, school, and grade of all students in a large school district does not make a student's identity easily traceable. *Id.*; *cf.* Attorney General Opinion H-529 (1975) at 3 (information about age, race, and sex provides no real opportunity for identification of a juvenile offender for purposes of section 51.04 of the Texas Family Code).

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<sup>1</sup>The name of the client was not requested.

In this case, you have not provided facts to explain how the disclosure of information about sex, race, school, and age on the CYS Monthly Report will make a particular CYS client's identity easily traceable. Thus, we conclude that based on FERPA you may delete information about sex, race, school, and age if you reasonably conclude, based on the number of students to whom the information may apply, that the release of that information makes a particular client's identity easily traceable. See Open Records Decision No. 352 (1982). This requirement is in addition to the requirement that CYS determine that the source of the information on the reports is educational records maintained by a KISD school.

Because KISD educational records may not be the source of the information on the reports, we will address the other exceptions to disclosure you raise. Section 3(a)(1) of the Open Records Act excepts from required public disclosure "information deemed confidential by law, either Constitutional, statutory or by judicial decision." You assert you must withhold this identifying information based on section 3(a)(1), in conjunction with several statutes and for the protection of the privacy rights of the CYS clients.

We agree that the common-law privacy rights of the CYS clients are implicated by some of the information that may appear on the report.<sup>2</sup> In order to be within the common-law right of privacy, the information must (1) contain highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person, *and* (2) be of no legitimate concern to the public. *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

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<sup>2</sup>In our letter to you dated January 22, 1993, we informed you that section 7(b) of the Open Records Act states that when a governmental body requests an attorney general decision about whether information is within an exception to required disclosure, "[t]he specific information requested shall be supplied to the attorney general but shall not be disclosed to the public or the requesting party until a final determination has been made by the attorney general. . ." Nevertheless, you enclosed for our inspection the forms used in the preparation of these reports, rather than the requested reports themselves. Consequently, we are unable to determine whether particular information in the requested reports is subject to an exception under the Open Records Act. We therefore will inform you of the kinds of information to which the common-law right of privacy may apply.

The kinds of information we address in this letter are suggested to us by the arguments you make in your letter requesting this decision and by the forms you submitted, in which you supplied examples of information that appears on a bona fide report. On page two of the CYS Monthly Report form you list "family problems, school behavior problem, personal problem, suicide, runaway, and truancy" as an "offense" or "reason." Page three of the CYS Monthly Report form you submitted is blank. In your letter, you say that CYS provides services pertaining to child abuse, medical care, mental health, suicide, substance abuse, marital relationships, procreation and contraception, family relationships, child rearing, and medical, psychological, and educational decisions.

Information about a person's emotional/mental distress, such as a suicide attempt, drug and alcohol use, family problems and relationships, sexual abuse, and decisions about procreation and contraception are highly private matters in which the public has no legitimate interest. *See, e.g.*, Attorney General Opinion JM-81 (1983); Open Records Decision Nos. 440 (1986); 422 (1984); 339 (1982). Thus, where the "offense" or "reason" section of page two of the CYS Monthly Report or the "type of session" section of page three of the CYS Monthly Report contains information about these private matters, you may withhold information that identifies a CYS client.<sup>3</sup>

On the other hand, information about the truancy of a client is not protected by common-law right of privacy. A truant violates the compulsory attendance laws of the state. *See* Educ. Code §§ 21.032, 21.033; *see also* § 4.25 (penal provision of compulsory attendance laws); Family Code § 51.03 (defining delinquent conduct and conduct indicating a need for supervision). The public has a legitimate interest in the name of someone who has violated the law. *See Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14 Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision 394 (1983). Thus, the common-law right of privacy does not shield the identity of truant clients.

We turn to the CYS Monthly Expense Report. You contend that you may withhold page three of that report based on the common-law right of privacy. Page three is a CYS worker's mileage record, which contains the date, address, purpose, and total mileage travelled. While we agree that the address of a client makes a particular client's identity easily traceable, the "purpose" section, as completed in the sample you enclosed, does not contain the sort of highly intimate or embarrassing information that is protected from disclosure by the common-law right of privacy.<sup>4</sup>

FERPA and common-law right of privacy may not apply to all of the information in the reports; thus, we examine the other exceptions you raise. You contend several statutes make the reports confidential. You raise section 34.08(a) of the Family Code, which states that

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<sup>3</sup>The FERPA cases about personally identifiable information are instructive for purposes of applying the common-law right of privacy to information that may allow the identification of a CYS client. Consequently, whether age, sex, race, and school identify a CYS client is contingent upon your conclusion that such information makes a particular client's identity easily traceable. *See supra* at p. 4.

<sup>4</sup>The sample mileage record lists the following purposes: school visit, Jones H.V., Lewis H.V., MHMRA, HCPC, Social Services.

[e]xcept as provided in subsections (b) and (c) of this section,<sup>5</sup> the reports, records and working papers used or developed in an investigation made under this chapter are confidential and may be disclosed only for purposes consistent with the purposes of this code under regulations adopted by the investigating agency. [Footnote added.]

Chapter 34 of the Family Code sets forth the requirements for reports of child abuse. Section 34.08(a) makes confidential information in reports, records, and working papers used in an investigation of a report of child abuse. *See* Open Records Decision No. 440 (1986). Neither the CYS Monthly Report or the CYS Monthly Expense Report is a report, record, or working paper used in an investigation of child abuse. Thus, section 34.08 of the Family Code does not make those reports confidential.

You raise section 576.005 of the Health and Safety Code, which states as follows:

Records of a mental health facility that directly or indirectly identify a present, former, or proposed patient are confidential unless disclosure is permitted by other state law.

The Health and Safety Code contains no definition of "mental health facility." However, section 574.041 provides that when a court orders temporary or extended mental health services specifying inpatient care, "the court shall commit the patient to a designated mental health facility," which includes one of the following: (1) the facility of a single portal authority for the area, if an authority has been designated for the area; (2) a private mental hospital under section 574.042 of the Health and Safety Code; (3) a hospital operated by a federal agency under section 574.043 of the Health and Safety Code; or (4) an inpatient mental health facility of the institutional division of the Texas Department of Criminal Justice under section 574.044 of the Health and Safety Code.

CYS is a part of the Harris County Children's Protective Services Board, which has the powers and duties of a child welfare board created under section 41.002 of the Texas Human Resources Code. *See* Hum. Res. Code § 152.1073(b). A child welfare board created under section 41.002 of the Texas Human Resources Code is an entity of the Texas Department of Human Services, which provides coordinated state and local public welfare services for children and their families. *See* Hum. Res. Code § 41.002(d). Clearly, CYS is not a "mental health facility" for purposes of section 576.005 of the Health and Safety Code. That provision, therefore, does not make the requested reports confidential.

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<sup>5</sup>Sections (b) and (c), which pertain to the rights of adoptive parents, are not pertinent here.

You raise section 290dd-3 of title 42 of the United States Code. Subsection (a) of that provision states as follows:

Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to alcoholism or alcohol abuse education, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

This provision applies to information about programs or activities relating to alcoholism and alcohol abuse. Because we have determined that the common-law right of privacy applies to information about alcohol use, we need not consider whether this provision applies to any information in the CYS reports.

Finally, you raise Rule 510 of the Texas Rules of Criminal Evidence, which states that

A communication to any person involved in the treatment or examination of alcohol or drug abuse by a person being treated voluntarily or being examined for admission to treatment for alcohol or drug abuse is not admissible.

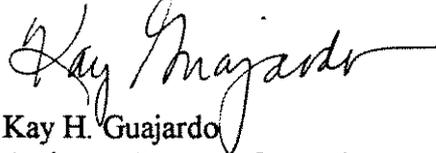
Pursuant to this rule, certain communications are "not admissible." This means that those communications may not be admitted into evidence during a criminal proceeding. Thus, the rule is applied only by a court and only in the context of a criminal proceeding. Section 3(a)(1) of the Open Records Act does not encompass discovery privileges. *See* Open Records Decision No. 575 (1990) at 2. Therefore, you may not withhold the requested information based on Rule 510 of the Texas Rules of Criminal Evidence.

In summary, we have determined that you must withhold pursuant to FERPA information which identifies a student if you determine that the source of the information on the reports is the education records of a KISD student. Sex, age, race, and school are identifying information, which you must withhold, if you reasonably conclude, based on the number of students to whom the information may apply, that the release of that information makes a particular student's identity easily traceable. Based on the common-law right of privacy, you must withhold identifying information on the reports that pertains to a client's emotional/mental distress, drug and alcohol use, family problems and relationships, sexual abuse, and decisions about procreation and contraception. Finally,

we have determined that the statutes you raise in conjunction with section 3(a)(1) of the Open Records Act are inapplicable.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR93-216.

Yours very truly,



Kay H. Guajardo  
Assistant Attorney General  
Opinion Committee

KHG/KKO/le

Ref: ID# 18466

cc: Ms. Karen Fine  
4414 Wee Lassie  
Houston, Texas 77084