



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 13, 1996

Ms. Susan L. Wheeler
Associate University Counsel
University of Houston System
Office of University Counsel
1600 Smith, Suite 3400
Houston, Texas 77002

OR96-0939

Dear Ms. Wheeler:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code.¹ Your requests were assigned ID# 24879 and ID# 26792.

The University of Houston System (the "university") has received several requests for information relating to an internal investigation of the university's athletic department. The university has also received a requests for records of telephone calls and travel and entertainment expenses of one of the university's assistant coaches.² You have submitted a representative sample of the requested information for our consideration. You contend

¹We note that the open records laws were substantially amended by the Seventy-fourth Legislature. Act of May 29, 1995, 74th Leg., R.S., ch. 1035, 1995 Tex. Gen. Laws 5127 (to be codified as amendments to Gov't Code ch. 552). The amendments to chapter 552 "affecting the availability of information, the inspection of information, or the copying of information, including the costs for copying information, apply only to a request for information that is received by a governmental body on or after September 1, 1995." *Id.* § 26(a), 1995 Tex. Gen. Laws at 5142. A request for information that is received by a governmental body prior to September 1, 1995, is governed by the law in effect at the time the request is made. *Id.*

²The university also received a request for "all records and documents pertaining to audits, studies, and investigations of the athletic department since January 1, 1990," including, "materials produced by internal auditors, external auditors, and hired consultants or analysts," and finally, "the policies of the university and system regarding the reporting of suspected thefts and misappropriations." You advise this office that the university will make available the completed audits, investigations, and studies, as well as the requested policy information. Accordingly, this ruling concerns only the internal investigation of the university's athletic department and the records of telephone calls and travel and entertainment expenses of one of the university's assistant coaches.

that this information may be excepted from required public disclosure under sections 552.103 and 552.111 of the Government Code.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The university has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The university must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform this office that the university is a party to pending litigation styled *Steven G. Staggs v. University of Houston*, Cause No. 93-048054, in the 215th Judicial District Court of Harris County, Texas, and have submitted a copy of plaintiff's original petition in that case for our review. Although, you make only a conclusory argument as to how the requested information relates to the pending litigation stating that, "[t]he litigation is currently pending, and involves all of the documents requested," a review of the documents reveals their relatedness to the litigation. See Open Records Decision No. 429 (1985).

However, section 552.103(a) does not except from disclosure all of the information you submitted for review. The opposing party in the litigation has had access to some of the documents. You must release these documents and any others to which the opposing party has had access. You may withhold under section 552.103 only those documents to which the opposing party has not had access. Moreover, once litigation has concluded, the applicability of section 552.103(a) ends. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We note, however, that some of the information contained in the documents submitted for our review may be protected by common-law privacy as incorporated by section 552.101 of the Government Code. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." For information to be protected from public disclosure under the common-law right of privacy as section 552.101 incorporates it, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court stated that

information . . . is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing former V.T.C.S. article 6252-17a, section 3(a)(1)). In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information such as that relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Personal financial information, including sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits, retirement and state assistance benefits, and credit history, ordinarily satisfies the first requirement of common-law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities. Open Records Decision No. 373 (1983) at 3. We believe that a person's credit card number is also personal financial information protected by common-law privacy, in that it can be used to access the person's credit history and other personal financial information. Moreover, we believe that a person's credit card number is of no legitimate concern to the public. Accordingly, you must withhold the credit card numbers from disclosure under section 552.101 of the Government Code.

Furthermore, we note that some of the information you submitted for review appears to be excepted from disclosure under the federal Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. This office has recently issued Open Records Decision No. 634 (1995), which concluded: (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception.

We remind you that this ruling applies only to "education records" under FERPA. "Education records" are records that

- (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.

20 U.S.C. § 1232g(a)(4)(A); *see also* Open Records Decision Nos. 462 (1987), 447 (1986). Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982), 206 (1978).³ If you have further

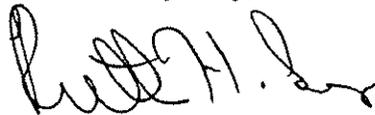
³But *see* 20 U.S.C. § 1232g(a)(1)(A), (d) (parent or adult student has affirmative right of access to that student's education records). *See also* Open Records Decision No. 431 (1985) (Open Records

questions as to the applicability of FERPA to information that is the subject of an open records request, you may consult with the United States Department of Education's Family Policy Compliance Office. See Open Records Decision No. 634 (1995) at 4 n.6, 8 n.9. We believe that this ruling is dispositive as to the information that is excepted from required public disclosure by FERPA or section 552.114 of the Government Code.

Finally, we note that section 552.117 excepts from disclosure the home telephone numbers of all peace officers, as defined by article 2.12 of the Code of Criminal Procedure; security officers commissioned under Education Code section 51.212; and all current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Act of May 4, 1993, 73d Leg., R.S., ch. 268, § 1, 1993 Tex. Gen. Laws 583, 601, *amended by* Act of May 29, 1995, 74th Leg., R.S., ch. 1035, § 9, 1995 Tex. Gen. Laws 5127, 5132. Therefore, section 552.117 requires you to withhold any home telephone number of an official, employee, or former employee who requested that this information be kept confidential under section 552.024. See Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold the home telephone number of an official or employee who made the request for confidentiality under section 552.024 after these requests for information were made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 (1989) at 5.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/LBC/ch

Ref: ID# 24879 and ID# 26792

Enclosures: Submitted documents

(Footnote continued)

Act's exceptions to required public disclosure do not authorize withholding of "education records" from adult student).

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