Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 13, 1997

Mr. Jeffrey J. Horner
Bracewell & Patterson, L.L.P.
South Tower Pennzoil Place
711 Louisiana St. Ste. 2900
Houston, Texas 77002-2781

OR97-2267

Dear Mr. Horner:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 109250.

The Dickinson Independent School District (the "district"), which you represent, received a request for all documents in the district's possession that contain information relating to the requestor, Mr. John Hinojosa, Ms. Susan Wilcox, or any other witnesses in Mr. Hinojosa's grievance proceeding. You state that the district has made some of the requested documents available to the requestor. You contend that the remaining documents are excepted from disclosure under sections 552.101, 552.102, and 552.114 of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue.

You note that you have submitted to this office documents that you claim are excepted from disclosure, as well as those documents that have been made available to the requestor. However, because your numbered tabs and markings do not correspond, we are unable to determine which documents have been released and which ones are being submitted for our consideration. Therefore, in reaching a decision on the exceptions to disclosure you have claimed, we have examined all of the submitted documents. We believe it is proper to proceed in this manner since each of the exceptions you have claimed protects the rights of third parties and encompasses information that is confidential by law. *See* Gov't Code § 552.007 (governmental body has no discretion to release information deemed confidential by law).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.102 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." Section 552.102

excepts information in personnel files only if it meets the test articulated under section 552.101 for common-law invasion of privacy. *Hubert v. Harte-Hanks Tex. Newspapers,* 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Accordingly, we will consider your section 552.101 and section 552.102 claims together.

For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In *Industrial Foundation,* the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release 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. The 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.

Having reviewed the submitted documents, we find that they do not contain the types of information considered to be highly intimate and embarrassing. Furthermore, the public has a legitimate interest in the job performance of public employees, and the submitted documents relate to the job performance of district employees. Open Records Decision Nos. 444 (1986), 405 (1983). For these reasons, we conclude that the submitted documents are not excepted from disclosure under sections 552.101 and 552.102 of the Government Code.

You also ask whether the submitted documents are excepted from disclosure as "student records." In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, and excepted from required public disclosure by sections 552.026 and 552.101 of the Government Code 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 Government Code 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. In this instance, however, you have submitted to this office documents containing the identities of district students. Therefore, we will consider whether these documents are excepted from disclosure under sections 552.026 and 552.114 of the Government Code.

"Education records" under FERPA are records that

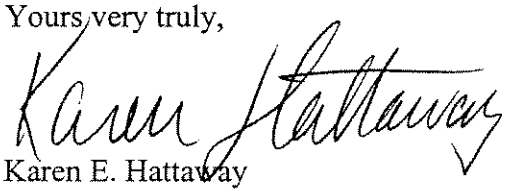
> (i) contain information directly related to a student; and
>
> (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A). *See also* Open Records Decision Nos. 462 (1987), 447 (1986). Some of the submitted documents appear to be education records under FERPA. Prior to releasing these documents, FERPA requires the district to delete information from the documents to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982), 206 (1978). This identifying information is deemed confidential under FERPA and must be withheld from disclosure.

We have not marked the documents to indicate which information is protected by FERPA, because in many instances we are unable to determine whether the individuals identified in the documents were district students at the time the documents were created. However, the district should observe the following guidelines in redacting identifying information from the documents. Only the identities of those individuals who were district students at the time the documents were created are protected by FERPA. In other words, FERPA does not protect the identities of former students contained in documents that were created after those individuals were no longer students in one of the district's schools. We note that in certain circumstances an individual's handwriting may identify him/her. *See* Open Records Decision No. 224 (1979). Once the information that identifies students has been redacted from the submitted documents, the documents must be released to the requestor.

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 any questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref: ID# 109250

Enclosures: Submitted documents

cc: Mr. Darryl W. Pruett
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(w/o enclosures)