



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 7, 1998

Ms. Cheryl Elliott
General Counsel
Texas Southern University
3100 Cleburne Avenue
Houston, Texas 77004

OR98-1873

Dear Ms. Elliott:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 117135.

Texas Southern University (the "university") has received two requests for information. The first, dated March 21, 1998, seeks all data related to the "criteria and parameters utilized in formulating the [law school] grading curve" and the effect of one student's dismissal on the grade standings. You have raised no exception to disclosure for this information and have not submitted any information responsive to this request for our review. Thus, we presume that any responsive information to this request, except identical information, has been released. Gov't Code §§ 552.301, .303. The second request, dated April 17, 1998, asks for all records relating to the "alleged misappropriation of first year comprehensive final exams and plagiarism held in December 1997." You have submitted the information you claim is responsive to this part of the request, an offense report and two memoranda, and assert that the records are excepted from required public disclosure by section 552.102 of the Government Code. The April 17, 1998 request also seeks "[a]ll documents, contracts, and results of the first year grading policies, procedures and final grades of first year law students for 1997." You have not submitted any information which appears to be responsive to this request; thus, we again presume that any responsive material, unless it is confidential by law, has been released. 20 U.S.C. § 1232g (the federal Family Educational Rights and Privacy Act of 1974); Gov't Code § 552.114; Open Records Decision No. 634 (1995).

The Open Records Act imposes a duty on governmental bodies seeking an open records decision pursuant to section 552.301 to submit that request to the attorney general within ten business days after the governmental body's receipt of the request for information. The time limitation found in section 552.301 is an express legislative recognition of the importance of having public information produced in a timely fashion. *Hancock v. State Bd.*

of Ins., 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ). When a request for an open records decision is not made within the time period prescribed by section 552.301, the requested information is presumed to be public. See Gov't Code § 552.302. This presumption of openness can only be overcome by a compelling demonstration that the information should not be made public. See, e.g., Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests).

The university received the requests for information on March 21, 1998 and April 17, 1998. You did not seek a decision from this office until May 14, 1998. Consequently, you have not met your statutory burden. Gov't Code 552.301. The requested information is therefore presumed public. However, because you claim that the requested investigation materials are protected by privacy, we will consider your arguments against disclosure. Open Records Decision No. 195 (1978).

Initially, we recognize that some of the requested information is excepted from disclosure because it contains education records made confidential by the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, or section 552.114 of the Government Code. In Open Records Decision No. 634 (1995), this office 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.

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.

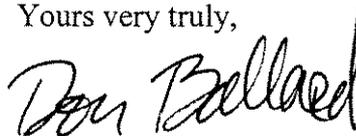
20 U.S.C. § 1232g(a)(4)(A). See also Open Records Decision Nos. 462 (1987), 447 (1986). Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982), 206 (1978). We have marked the information that must be withheld under FERPA. We note that the requestor's own "personally identifying" information need not be withheld for this particular request. He has a right of access to the

information. 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 Act's exceptions to required public disclosure do not authorize withholding of "education records" from adult student). Additionally, much of the information does not appear to personally identify a particular student. Thus, you may only withhold the marked portions under FERPA.

You assert that the requested offense report and two memoranda must be withheld under section 552.102 of the Government Code. Section 552.102 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)(emphasis added). While it does not appear that the material here is "information in a personnel file," we understand your argument to be that the information is protected by the common-law right of privacy. Therefore, we will address whether the information is protected by a right of privacy under section 552.101 of the Government Code. Section 552.101 encompasses common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1. In this case, the requested information must be de-identified to avoid personally identifying a particular student. Consequently, we do not believe that release of the remaining information would violate a right of privacy. *See Star Telegram, Inc. v. Doe*, 915 S.W.2d 471, 474-475 (Tex. 1995). Furthermore, information which only implicates the requestor's own privacy rights may not be withheld under section 552.101. Gov't Code § 552.023 (person has a right of access to information that relates to that person and is protected from disclosure by laws intended to protect that person's privacy interests). You must withhold the information we have marked in the offense report. The remaining information must be immediately released.

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,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/nc

Ref: ID#117135

Enclosures: Submitted documents