



May 14, 2001

Ms. Genevieve G. Stubbs  
Senior Associate General Counsel  
The Texas A&M University System  
301 Tarrow, 6<sup>th</sup> Floor  
College Station, Texas 77840-7896

OR2001-1977

Dear Ms. Stubbs:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 146563.

Texas A&M University (the “university”) received two requests for information pertaining to financial relief provided by the Bonfire Relief Fund (the “relief fund”) to the families of victims of the November 17, 1999 collapse of the Aggie bonfire. The first request seeks the following information: 1) all financial transactions from the bonfire relief fund; 2) all of the requests that the families have made for financial relief; 3) the replies made to the families by university Vice President for Student Affairs Malon Southerland, university President Ray Bowen, other university officials, and the Association of Former Students (“AFS”); 4) all offers that the administration has made to these families; 5) records of all payments out of the fund (i.e. people or businesses or organizations that have received money); and 6) all requests made to the fund. The second request seeks “a copy of all documents regarding assistance requested and given (or refused) by Texas A&M and the Bonfire Relief Fund for ourselves and any other families of injured or deceased children.”<sup>1</sup>

You state that the requests appear to cover the same information, and therefore, you have submitted arguments which you consider applicable to information responsive to both

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<sup>1</sup>The second request was made by a family of a deceased student in a letter to this office which also went to the university. In this letter, the family also specifically authorized release of information pertaining to them.

requests. You claim that a portion of the requested information is excepted from disclosure under sections 552.026, 552.101 and 552.114 of the Government Code. In addition, you assert that a portion of the responsive information is not public information, and therefore it is not subject to disclosure under the Public Information Act ( the "Act"). You have also notified those persons whose interests might be affected by the release of the information.<sup>2</sup> We have considered the exceptions you claim and the comments of those who submitted correspondence to this office, and have reviewed the submitted representative sample of information.<sup>3</sup>

We first address your argument that a portion of the submitted information does not constitute public information under the Act. Section 552.021 of the Government Code provides for public access to "public information." Section 552.002 of the Government Code defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it."

You argue that certain letters on the letterhead of the AFS to the families of students injured or killed in the bonfire accident are not subject to the Act. In support of this argument, you inform us that a copy of each letter sent by the AFS to the families was given to the university as a courtesy and that this alone does not make the information subject to the Act. You further assert that the AFS is a 501(c)(3) non-profit entity and therefore not a governmental body, that none of the funds which were distributed by the AFS to the families are public funds, that the university does not hold the funds, nor may it draw upon the account, and that the AFS Executive Director makes the final decision on funding requests. However, you also inform us that "the Office of the Vice President of Student Affairs at the University served as the focal point of contact for the families during and after the crisis. Once the Association had established the special fund, the University was able to direct requests for funding assistance from the families to the Association." You further inform us that "the AFS was not provided with copies of any receipts, medical bills, or letters from the families. All of that information has been maintained as confidential records by the University." In addition, you have submitted documents showing that the university directed disbursement of funds from the AFS to the families of students hurt in the bonfire accident.

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<sup>2</sup>See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances).

<sup>3</sup>We assume that the "representative samples" of records submitted to this office are 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 that those records contain substantially different types of information than that submitted to this office.

Upon consideration of your arguments and review of the submitted information, we conclude that copies of correspondence from the AFS to families, in possession of the university, relate to the transaction of official university business, and therefore this information is public information subject to the Act. *See* Open Records Decision No. 549 (1990) (finding that holding in *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977), makes clear that almost all information in physical possession of governmental body is "public information" subject to Act; thus, information collected by public employee in the course of his employment is "information collected . . . in connection with the transaction of official business" within the meaning of Act).

We will next address your arguments for withholding the requested information. The Family Educational Rights and Privacy Act of 1974 ("FERPA") provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990).

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

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 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.

Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). However, the protection afforded to student records by FERPA and section 552.114 expires upon the death of a student who has reached the age of 18 or who attends an institution of post-secondary education. *See*

Open Records Decision No. 524 (1989); Letter from LeRoy S. Rooker, Director, Family Policy Compliance Office, United States Department of Education, to Honorable John J. Duncan, Jr., House of Representatives, Washington D.C. (March 3, 1993). Thus, in the representative sample of records submitted pertaining to students who survived the bonfire accident, we have marked the types of information that may reveal or tend to reveal information about a student that must be withheld pursuant to FERPA. All other information must be released from these records.

As noted, FERPA does not afford protection to the educational records of those students who did not survive the bonfire accident. Therefore, for records pertaining to the families of those students, we will address your argument under section 552.101 of the Government Code and common law privacy. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 also encompasses the doctrines of common law and constitutional privacy. Common law privacy protects information 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. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

We conclude that documents pertaining to the families of deceased students must be deidentified in order to protect these families' privacy interests. We have marked the types of identifying information that must be withheld under common law privacy. The university should rely on these sample markings when redacting information from the records to be released pertaining to the families of deceased students.<sup>4</sup>

Finally, you also assert that a portion of the requested information is confidential under the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code, as well as section 773.091 of the Health and Safety Code. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

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<sup>4</sup>In this regard, we note that the university has submitted records pertaining to the Heard family, the family of a deceased student, as part of its representative sample of documents responsive to the request. As previously noted, this family is also a requestor in this case. In her letter to this office, Andrea Heard authorized the public release of information regarding the family's request for assistance from the relief fund and the associated responses from Maylon Sutherland, as well as any other information regarding this family in relation to the bonfire accident. Therefore, although we have marked the information in the records related to the Heards as a representative sample of the information to be withheld from the records of families of deceased students under common law privacy, the submitted information relating to the Heard family must be released to the requestors in its entirety. *See also* Gov't Code § 552.023.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. If a patient is deceased, medical records may be released only on the signed consent of the deceased's personal representative. Occ. Code §§ 159.005(a)(5). If the patient is a minor, medical records may be released only on the signed consent of a parent of the minor or the minor's legal guardian. Occ. Code §§ 159.005(a)(2). Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Upon review of the document you seek to withhold under the MPA, we find that it is not a record of the identity, diagnosis or treatment of a patient, and therefore, this document may not be withheld under the MPA.

Section 773.091 of the Health and Safety Code provides:

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

This confidentiality "does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services." *Id.* § 773.091(g). As you have not submitted a representative sample of the type of records made confidential under section 773.091, we have no basis for ruling that any information responsive to the requests in this case is confidential under that statute.

To summarize, we conclude that certain letters on the letterhead of the AFS to the families of students injured or killed in the bonfire accident are public information subject to the Act. For the information contained in these letters and the other information submitted to this office as responsive, we have marked the information that may reveal or tend to reveal information about a student who survived the bonfire accident which must be withheld pursuant to FERPA. Documents pertaining to the families of deceased students must be deidentified in order to protect these families' privacy interests. We have marked the types of identifying information that must be withheld under common law privacy. The document you seek to withhold under the MPA is not a record of the identity, diagnosis or treatment

of a patient, and therefore, this document may not be withheld under the MPA. As you have not submitted a representative sample of the type of records made confidential under section 773.091 of the Health and Safety Code, we have no basis for ruling that any information responsive to the requests in this case is confidential under that statute.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Michael A. Pearle".

Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/seg

Ref: ID# 146563

Encl. Submitted documents

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(w/o enclosures)