



November 20, 2001

Mr. Michael C. Wynne
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OR2001-5389

Dear Mr. Wynne:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 155120.

Grayson County College (the "college"), which you represent, received a request for information pertaining to nine former students who graduated from the college's police academy program. You have submitted for our review information that you indicate comprises a representative sample of the information responsive to the request. Among other assertions, you claim that the requested information is excepted from disclosure under sections 552.026, 552.101, 552.102, 552.114, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Initially, we address your assertion that the requested information is not a "public record" as defined in section 552.002 of the Act. Section 552.002 defines "public information," *i.e.*, information that is subject to the Act, as information "collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business . . . by a governmental body" or "for a governmental body and the governmental body owns the information or has a right of access to it." Gov't Code § 552.002(a). You do not argue that the college is not a "governmental body." *See* Gov't Code § 552.003(1)(A) (defining "governmental body"). Neither have you explained how or why the requested information is not information "collected, assembled, or maintained under a law or ordinance or in

¹We assume that the "representative sample" of records submitted to this office is 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.

connection with the transaction of official business” by the college, or for the college and the college owns the information or has a right of access to it. From our review of the submitted sample that you indicate to be representative of the responsive information, we conclude that the requested information meets the definition of “public information” and therefore is subject to the Act.

Having determined that the Act applies to the information, we next address certain procedural matters. Among other requirements, a governmental body that requests a decision from this office in order to withhold information responsive to a request must, no later than the fifteenth business day after its receipt of the request, submit to this office “written comments stating the reason why the stated exceptions apply that would allow the information to be withheld” and “a copy of the written request for information[.]” Gov’t Code § 552.301(e)(1)(A), (B). In addition, the governmental body is required to label the submitted information to indicate which exceptions apply to which parts of the copy.” *Id.* § 552.301(e)(2). You did not comply with these requirements.²

If a governmental body does not request a decision as provided by section 552.301, section 552.302 provides that the requested information “must be released unless there is a compelling reason to withhold the information.” This office has found such a compelling reason where the information is confidential by law. *See, e.g.*, Open Records Decision No. 150 (1977); *see also* Gov’t Code § 552.352 (prohibiting the distribution of confidential information). Because the exceptions you have asserted make information confidential by law, and therefore, if applicable, demonstrate a compelling reason under section 552.302, we shall address these exceptions.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This exception encompasses information protected by other statutes. Section 552.026 of the Government Code provides that the Act “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 (“FERPA”). Section 552.114 of the Act excepts from disclosure “information in a student record at an educational institution funded wholly or partly by state revenue.” Generally, section 552.114 protects information only to the extent it is or would be protected under section 552.026 and section 552.101 in conjunction with FERPA. Open Records Decision No. 539 (1990).

With respect to students of a postsecondary institution such as the college, FERPA provides that, except for certain types of release that are not applicable here, 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

²Although you state in your correspondence that you have attached, as Exhibit A, a copy of the request, this office received no such attachment.

in a student's education records, unless such release is authorized by the student. *See* 20 U.S.C. § 1232g. FERPA thus applies to an educational agency or institution that receives federal funds. And as indicated by the language of section 552.114, quoted above, section 552.114 applies to an educational agency or institution that receives state funds. As you do not inform us otherwise, because the college appears to be a public college, we assume that the college receives federal funds, state funds, or both.

An "education record" subject to FERPA, as well as a "student record" under section 552.114, means those records that contain information directly related to a student, maintained by an educational agency or institution, or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). The submitted sample consists entirely of records maintained by or for the college that contain information directly related to a student. We therefore conclude that both FERPA and section 552.114 may apply in this instance. Accordingly, we next address the extent to which the information may be subject to required withholding under FERPA, section 552.114, or both.

Importantly, FERPA does not make confidential "directory information" of a student, the public release of which has not been timely objected to by the student. Section 1232g(a)(5)(B) provides that an educational agency or institution "shall give public notice of the categories of information which it has designated as [directory] information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given" for the student to inform the agency or institution that any or all of the information concerning that student that has been designated as "directory" should not be released without the student's prior consent. *See also* 34 C.F.R. § 99.37. Examples of information that FERPA provides may constitute "directory information" include the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student. *See* 20 U.S.C. § 1232g(a)(5)(A). This office has also concluded that a class roster may constitute directory information. *See* Open Records Decision No. 244 (1980).

Here, you do not inform us of what categories of information the college designated as "directory" with respect to the records at issue, nor do you advise whether any of the students whose information is at issue, after notice, timely informed the college that their directory information should not be released absent their consent. We note that some of the information at issue falls within the examples of directory information provided for under FERPA. This information includes certain documents titled "Report of Training" that appear to essentially comprise a class roster, other documents that contain the title "Class Roster," copies of certificates of course completion, and certain documents reflecting certifications earned by the student. To the extent this information was designated as "directory" by the college, and assuming that after notice of such designation, each student whose information is at issue did not thereafter timely object to the release of the information about the student,

we conclude that the information is not confidential under FERPA. Such information, therefore, may not be withheld on the basis of section 552.101 in conjunction with FERPA, nor is such information excepted from disclosure under section 552.114.

With respect to those records that do not fall within the purview of "directory information," absent the student's written consent authorizing release, FERPA requires the withholding of the information contained in the record, but *only to the extent* "reasonable and necessary to avoid personally identifying a particular student." See Open Records Decision Nos. 332 (1982), 206 (1978). Thus, information in *non-directory records* such as the student's name, social security number, address, telephone number, and names of family members must be redacted, unless the student provides written authorization to release the information. In addition, if information contained in non-directory records does not *directly* identify the student but would nevertheless make the student's identity easily traceable, it also must be withheld absent the student's authorization to release it. See, e.g., Open Records Decision No. 224 (1979) (student's handwritten comments that would make identity of student easily traceable through handwriting, style of expression, or particular incidents related in comments protected under FERPA). However, we note that to the extent the requested information contained in a non-directory record does not either directly identify the student, or allow the student's identity to be easily traced, it is not or would not be protected under FERPA, and it therefore may not be withheld under section 552.101 on that basis, nor under section 552.114.

Based on the limited information you have provided this office, we are unable to mark the sample documents at issue to indicate the extent to which the information contained therein is or would be confidential under FERPA, and must therefore be withheld under section 552.101 on that basis, and/or under section 552.114. However, we advise that 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. Thus, the college may withhold the information, but *only to the extent it is or would be protected by FERPA*, without again seeking a decision from this office. If you need additional assistance, other than the guidance set forth above, in determining the extent to which the information at issue is or would be protected by FERPA, you may consult with the U.S. Department of Education's Family Policy Compliance Office, the agency responsible for enforcing FERPA. That office can answer questions by telephone at (202) 260-3887, or through e-mail via the internet at its web site: www.ed.gov/offices/OM/ferpa. Because at least some of the requested information evidently is not or would not be protected by FERPA, we next address the remaining exceptions you have asserted.

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). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Act. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). The information at issue here is that of students, not employees of the college. Section 552.102 is therefore inapplicable to the information. However, because section 552.102 employs the same test as section 552.101 in conjunction with the common law right to privacy, we have considered your section 552.102 assertion to essentially be an assertion of common law privacy under section 552.101.

For information to be protected from public disclosure under section 552.101 on the basis of the common law right of privacy, the information must meet the criteria set out in *Industrial Foundation*. The Texas Supreme Court in that case 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. *Id.* at 685. Having carefully reviewed the submitted records, we conclude that none of the information meets this test. Accordingly none of the requested information is excepted from disclosure under section 552.101 on the basis of common law privacy.

You assert section 552.117 of the Government Code. Section 552.117(2) excepts from disclosure a peace officer's home address, home telephone number, social security number, and information that reveals whether the officer has family members. Information must be withheld under section 552.117(2) regardless of whether the officer made a confidentiality election under section 552.024 of the Government Code. Section 552.117(2) applies to the information at issue, to the extent the individual was a peace officer at the time the information was requested. See Open Records Decision No. 532 (1989). We conclude that for each individual who was a peace officer at the time of the present request, the college must withhold the officer's home addresses, home telephone number, social security number, and information that reveals whether the officer has family members. The college must also withhold the officer's former home addresses and telephone information. See Open Records Decision No. 622 (1994). For any individuals who were not peace officers at the time the information was requested, the college may not withhold any such information on the basis of section 552.117. Such information, therefore, is subject to withholding only to the extent it is otherwise confidential as provided herein.

Finally, the social security numbers in the records at issue may be subject to required withholding under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). See Open Records Decision No. 622

(1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the college pursuant to any provision of law, enacted on or after October 1, 1990.

In summary, the college must withhold the information under section 552.101 and/or section 552.114, but *only to the extent* it is or would be protected under FERPA as explained above. The social security numbers must be withheld under section 552.101 if they were obtained or are maintained by the college pursuant to any provision of law enacted on or after October 1, 1990. To the extent individuals whose information is at issue were peace officers at the time the information was requested, the college must withhold under section 552.117(2) the officer's current and former home address and telephone number, the officer's social security number, and information that reveals whether the officer has family members. The remaining information must be released.

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

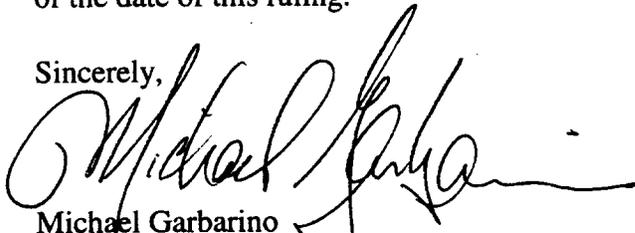
of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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,



Michael Garbarino
Assistant Attorney General
Open Records Division

MG/seg

Ref: ID# 155120

Enc. Submitted documents

c: Mr. Creta Lynn Carter, II
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(w/o enclosures)