



June 11, 2002

Mr. Jeffrey J. Horner  
Bracewell & Patterson  
711 Louisiana Street, Suite 1900  
Houston, Texas 77002-2781

OR2002-3154

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# 164200.

The Galena Park Independent School District (the "district"), which you represent, received a request for twenty categories of information regarding a specified elementary school's policies and procedures, the principal, and a teacher. You state that the majority of the responsive information will be provided to the requestor. However, you claim that the following two categories of the responsive information are excepted from disclosure under sections 552.101, 552.102, and 552.114 of the Government Code:

- 1) Documents or tangible things which evidence other recommendations that the principal of Cimarron Elementary School, Ms. Crystal Murray, has written for other persons; and
- 2) Documents or tangible things which evidence any investigation done by, or disciplinary action taken by the school district, which relates to the principal of Cimarron Elementary School, Crystal Murray, for her conduct in May of the year 2000 at a fifth grade commencement ceremony wherein she threatened to unlawfully detain all persons, including parents, in a school building until the conclusion of the graduation ceremony.

We begin by addressing your statement that "this request for an opinion to you was made within ten (10) business days after receiving [the requestor's] deposit." Section 552.301 of the Government Code provides, in part:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

Section 552.263 provides, in relevant part:

(a) An officer for public information or the officer's agent may require a deposit or bond for payment of anticipated costs for the preparation of a copy of public information if the officer for public information or the officer's agent has provided the requestor with the required written itemized statement detailing the estimated charge for providing the copy and if the charge for providing the copy of the public information specifically requested by the requestor is estimated by the governmental body to exceed:

(1) \$100, if the governmental body has more than 15 full-time employees; or

(2) \$50, if the governmental body has fewer than 16 full-time employees.

....

(e) For purposes of Subchapter E, a request for a copy of public information is considered to have been received by a governmental body on the date the governmental body receives the deposit or bond for payment of anticipated costs or unpaid amounts if the governmental body's officer for public information or the officer's agent requires a deposit or bond in accordance with this section.

You indicate that the district received the instant request for information on February 19, 2002, and that the district requested a deposit from the requestor on March 5, 2002, prior to the start of this project. The requestor provided the district with his deposit check on March 27, 2002. The district then requested an opinion from this office on April 4, 2002.

We note that section 552.301 is found in subchapter G of chapter 552 of the Government Code. While the legislature expressly indicated that the requirements of subchapter E do not take effect until the governmental body requesting a deposit or bond under section 552.263 receives the deposit or bond, the legislature did not specifically provide for the same result regarding the deadlines found in subchapter G of section 552.301. We find that the legislature's inclusion of a specific provision allowing for the tolling of the requirements in subchapter E coupled with its omission of a specific provision allowing for the tolling of deadlines under subchapter G reveals that the legislature did not intend for the deadlines of subchapter G, and specifically section 552.301, to be tolled until a governmental body receives a deposit or bond required under section 552.263. *See Maley v. 7111 Southwest Freeway, Inc.*, 843 S.W.2d 229, 231 (Tex. App.--Houston [14th Dist.] 1992, writ denied) ("an express listing of certain persons, things, consequences, or classes is equivalent to an express exclusion of all others"); *Tex. Real Estate Comm'n v. Century 21 Security Realty, Inc.*, 598 S.W.2d 920, 922 (Tex. Civ. App.--El Paso 1980, writ ref'd n.r.e.) (same); *State v. Jones*, 570 S.W.2d 122, 123 (Tex. App.--Austin 1978, no pet.). Consequently, we find that a governmental body is required to request a decision from this office within ten business days of the date it receives a request for information even if the governmental body has not yet received a deposit or bond required of the requestor under section 552.263. Therefore, you failed to request a decision within the ten business day period mandated by section 552.301(a) of the Government Code. Because the request for a decision was not timely received, the requested information is presumed to be public information. Gov't Code § 552.302.

Additionally, pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You did not, however, submit to this office a copy of the specific information requested or representative samples of that information within fifteen business days of receiving the open records request.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982).

As sections 552.101, 552.102, and 552.114 of the Government Code provide compelling reasons to overcome the presumption of openness, we will address your arguments under those exceptions and review the submitted representative sample of information.<sup>1</sup> See 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).

In regard to the information responsive to the above referenced category two of the request for information, you raise the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. See also Gov't Code §§ 552.026, .114. 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 section 552.026 of the Act without the necessity of requesting a decision from this office, 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." Open Records Decision Nos. 332 (1982), 206 (1978); see also 34 CFR 99.3 (defining "personally identifiable information" subject to withholding under FERPA to include "information that would make the student's identity easily traceable"). You state that the district's "only concern about these documents were any references to students which may be exempt from disclosure under [FERPA]" and that the district "will delete any references that may be violative of FERPA and provide these documents." Accordingly, this ruling does not address such information.

In regard to the documents responsive to the above referenced category one of the request for information, you claim sections 552.101 and 552.102 of the Government Code. 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 552.101 encompasses the doctrine of common-law privacy. Section 552.102 protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The protection of section 552.102 is the same as the protection provided by the common-law right to privacy under section 552.101. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Consequently, we will consider these two exceptions together.

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<sup>1</sup>We 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.

For information to be protected from public disclosure under common-law privacy, 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). 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 at 1 (1992). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information 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. *Id.* at 683. We do not find that the submitted letters of recommendation written by the principal of Cimarron Elementary School are excepted under section 552.101 in conjunction with common-law privacy or section 552.102. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees). Therefore, you must release the submitted information.

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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



W. Montgomery Meitler  
Assistant Attorney General  
Open Records Division

WMM/sdk

Ref: ID# 164200

Enc: Submitted documents

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