



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

May 29, 2003

Ms. Carol Longoria
Public Information Coordinator
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2003-3638

Dear Ms. Longoria:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181020.

The University of Texas-Pan American (the "university") received a request for eight categories of e-mail communications stored on the university's servers, back-up tapes, or other storage media. You state that the university will release most of the requested information upon receipt of payment for costs from the requestor. You claim, however, that a portion of the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

At the outset, we note that the university received the original request for information on February 21, 2003. However, you have provided documentation showing that the university sought a narrowing of the request on March 4, 2003. In Open Records Decision No. 663 (1999), this office determined that during the interval in which a governmental body and a requestor communicate in good faith to narrow or clarify a request, the Public Information Act (the "Act") permits a tolling of the statutory ten business day deadline imposed by section 552.301. However, a governmental body's request for clarification or narrowing does not give that governmental body an additional ten full days from the date the requestor responds to the clarification request. Rather, "the ten-day deadline is tolled during the process but resumes, upon receipt of the clarification or narrowing response, on the day that the clarification is received." ORD 663 at 5. In this instance, the university received the narrowed request from the requestor on March 11, 2003 and requested a ruling from this office on March 12, 2003. Accordingly, the university's request to this office for a ruling was timely.

We note that you originally argued that portions of the submitted document were confidential under the Health Insurance Portability and Accountability Act of 1996. However, you subsequently informed us that you have “determined that the [university’s Department of Communication Sciences and Disorders Speech and Hearing Center] does not constitute a ‘covered entity’ under [section 160.103 of title 45 of the Code of Federal Regulations].” Therefore, you withdrew this argument from consideration.

Next, we address your contention that much of the requested information is subject to 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 university will release most of the e-mails with the students’ identifying information redacted pursuant to Open Records Decision No. 634. *See* Open Records Decision No. 673 at 7-8 (2001) (decisions such as Open Records Decision No. 634 may be relied on as previous determinations only so long as five criteria are met); Open Records Decision No. 634 at 3 n. 3 (1995). You also state that you will redact this type of information from the e-mail you have submitted for our review. Accordingly, this ruling does not address such information.

We now turn to your arguments regarding the remaining information. You assert that some of the submitted information is confidential under the Medical Practice Act (the “MPA”). Access to medical records is governed by the MPA, chapter 159 of the Occupations 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.

(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. 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 submitted information, we conclude that none of the information constitutes medical records for purposes of the MPA. Further, there is no indication that any of the information in the submitted documents was obtained from medical records. Therefore, the MPA is inapplicable to the submitted information.

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 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). 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. 540 S.W.2d at 683.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open

Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Upon review of the submitted information, we conclude that it is not the type of information made confidential by common law or constitutional privacy. Therefore, with the exception of the information that the university has redacted under FERPA, the submitted information must be released to the requestor.

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 Dep't of Pub. 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,



Jennifer E. Berry
Assistant Attorney General
Open Records Division

JEB/sdk

Ref: ID# 181020

Enc: Submitted documents

c: Ms. Rachel Rivera
1916 Opal Street
Edinburg, Texas 78541
(w/o enclosures)

Dr. Mary Anne Nericcio
Communication Sciences and Disorders
The University of Texas - Pan American
1201 West University Drive
Edinburg, Texas 78541
(w/o enclosures)

Dr. Denis G. Newman
Communication Sciences and Disorders
The University of Texas - Pan American
1201 West University Drive
Edinburg, Texas 78541
(w/o enclosures)

Dr. Nola Radford
Communication Sciences and Disorders
The University of Texas - Pan American
1201 West University Drive
Edinburg, Texas 78541
(w/o enclosures)