



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

June 10, 2003

Mr. Stephen D. Broyles
Dean of Administrative Services
North Central Texas College
1525 West California Street
Gainesville, Texas 76240-4699

OR2003-3987

Dear Mr. Broyles:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your requests were assigned ID#s 183132 and 183607. We have combined these files and will consider the issues presented in this single ruling assigned ID# 183132.

North Central Texas College (the "college") received three requests from one requestor. The first request is for a list of faculty who have resigned, been suspended, or were fired in the two weeks prior to the date of the request, and any documents relating to the suspension or subsequent investigation of a named teacher. The second request is for a list of students enrolled in a particular class taught by a named teacher. The third request is for a copy of the teacher's contract, any documents detailing her compensation package, and a copy of a letter written by Dr. Nutt confirming the teacher's suspension. This ruling will address these requests together. You indicate that the college does not have any information responsive to the request for a list of faculty who have resigned, been suspended, or were fired in the two weeks prior to the date of the request. We note that the Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). In addition, you indicate that the college has released information responsive to the request for the teacher's contract and any documents outlining or detailing her entire compensation package. You claim that the remaining requested information is excepted from disclosure

under sections 552.102, 552.111, and 552.026 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Initially, we must address the college's obligations under section 552.301 of the Government Code. Section 552.301(e) requires a governmental body 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 state that the college received the first two requests on April 7, 2003. However, you did not submit to this office a copy of either the written request for information or a copy of the specific information requested or representative samples thereof until May 7, 2003. Consequently, you failed to comply with section 552.301(e) with respect to the April 7, 2003 requests.

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 requested information is public and must be released. Thus, the documents relating to the suspension and subsequent investigation of the named teacher and the list of students enrolled in the specified class taught by the named teacher are presumed public. 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). You claim exception for this information under section 552.111 of the Government Code. Section 552.111 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived by the governmental body. Thus, this exception does not demonstrate a compelling reason to withhold information from the public. *See* Open Records Decision No. 473 (1987) (governmental body may waive section 552.111); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). However, you also claim that some of the submitted information is excepted from disclosure under sections 552.026 and 552.102 of the Government Code, which can provide compelling reasons for overcoming the presumption of openness raised by section 552.302. Accordingly, we will consider your arguments under these exceptions for the submitted information.

¹You indicate that a portion of the submitted information consists of a representative sample. In reaching our conclusion here, we assume that the "representative sample" of the requested records submitted to this office is truly representative of the requested records at issue. *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.

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 in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). In *Industrial Foundation*, the Texas Supreme Court 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. 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.

Upon review, we note that the submitted information relates solely to the work behavior of a public employee. We further note that there is a legitimate public interest in the work behavior of public employees and the conditions for their continued employment. See Open Records Decision No. 438 (1986) (work behavior of a public employee and the conditions for the employee’s continued employment are matters of legitimate public interest not protected by the common-law right of privacy); see also Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in having access to information concerning job performance of governmental employees), 423 at 2 (1984) (scope of public employee privacy is narrow). After reviewing your arguments and the submitted information, we conclude that you may not withhold any of the submitted information from disclosure under section 552.102.

You also argue exception for some of the information under section 552.026 of the Government Code, which provides that the Public Information 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”).” 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).

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). For purposes of FERPA, a student's handwritten letters constitute "education records" in that they contain information about identifiable students. *See* 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). We have marked the information, including the handwritten letters, that may reveal or tend to reveal information about a student that must be withheld pursuant to FERPA and section 552.026 of the Government Code.

With regard to the requested list of students, FERPA provides that "directory information" may be released to the public if the institution or agency complies with section 1232g(a)(5)(B) of title 20 of the United States Code. "Directory information" includes 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. 20 U.S.C. § 1232g(a)(5)(A). Section 1232g(a)(5)(B) provides as follows:

[a]ny educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such 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 a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

20 U.S.C. § 1232g(a)(5)(B). This office has previously held that a class roster is directory information. *See* Open Records Decision No. 244 (1980). Here, the requested list of students is essentially a class roster. Accordingly, the college must release the requested list of students if the college designated the list as directory information. If the college has not designated the list as directory information, the college must withhold the list under FERPA.

We note that section 552.117 may be applicable to some of the remaining information. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the college may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made.

For those employees who timely elected to keep their personal information confidential, the college must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. The college may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential. We have marked the information that must be withheld under section 552.117 if the employee made a timely election under section 552.024.

We also note that the remaining submitted information contains e-mail addresses obtained from the public. Section 552.137 makes certain e-mail addresses confidential.² Section 552.137 provides:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The college, therefore, must withhold the e-mail addresses of members of the public that we have marked under section 552.137.

In summary, the college must withhold the information that we have marked under FERPA and section 552.026, except for the class list, which must be released if the college has designated it as directory information. The college must also withhold the personal employee information we have marked under section 552.117 for employees who made a timely election for non-disclosure under section 552.024, and the e-mail addresses of the members of the public that we have marked. 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

²The language of section 552.136 is identical to that of section 552.137.

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,



Nathan E. bowden
Assistant Attorney General
Open Records Division

NEB/HPR/sdk

Ref: ID# 183132

Enc: Submitted documents

c: Mr. Matthew Zabel
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(w/o enclosures)