



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

June 18, 2003

Mr. Renaldo L. Stowers
Associate General Counsel
University of North Texas System
P.O. Box 310907
Denton, Texas 76203-0907

OR2003-4214

Dear Mr. Stowers:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 182937.

The University of North Texas (the "university") received a request for certain test and psychological records of the requestor. You indicate that you have released some responsive material to the requestor. However, you claim that the remainder of the requested information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 465.22 of the Texas Administrative Code and section 611.0045 of the Health and Safety Code. We also received comments from the requestor. *See* Gov't Code § 552.304 (permitting interested third party to submit comments explaining why information should or should not be released). We have reviewed the representative samples of submitted information and have considered the issues raised by the university and the requestor.¹

Initially, we address the university's obligations under section 552.301 of the Government Code. According to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. Gov't Code § 552.301(b). Further, pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons

¹ 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.

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. Gov't Code § 552.301(e). In this case, you state the university received the request for information "on or about" February 20, 2003.² You should have submitted your request for an attorney general opinion no later than March 6, 2003. The university should have forwarded all other required documentation to this office by March 13, 2003. We received your letter requesting an opinion from our office and your supporting documentation on April 15, 2003. Therefore, we find that you did not request a ruling from this office or submit the required information within the statutorily mandated periods. Consequently, we conclude the university failed to comply with the requirements of subsections 552.301(b) and 552.301(e) of the Government Code.

According to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the information is public and must be released. A governmental body must release information presumed public unless it 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). Normally, a compelling interest exists when some other source of law makes the information confidential or the information impacts third party interests. Open Records Decision No. 150 at 2 (1977). You raise section 552.101 as an exception to disclosure. Because section 552.101 of the Government Code qualifies as a compelling reason to overcome the presumption of openness, we will address your arguments.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes.³ You contend that the responsive materials are

² We note that in his brief, the requestor asserts that his request was submitted on January 23, 2003, rather than "on or about February 20, 2003" as the university states. However, in either case, the university has failed to timely comply with the requirements of subsections 552.301(b) and 552.301(e) of the Government Code.

³ We note that the records responsive to the request are not "educational records" within the scope of the Family Educational Rights and Privacy Act of 1974 ("FERPA"). FERPA provides in pertinent part:

(B) The term "education records" does not include . . .

(iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a

confidential mental health records which are protected from disclosure under section 552.101 in conjunction with section 611.0045 of the Health and Safety Code.⁴ Sections 611.004 and 611.0045 of the Health and Safety Code provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). Mental health records are deemed confidential by Section 611.002 of the Health and Safety Code which provides in part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

See also Health & Safety Code § 611.001 (defining “patient” and “professional”). Furthermore, section 611.0045 of the Health and Safety Code, provides in part:

(a) Except as otherwise provided by this section, a patient is entitled to have access to the content of a confidential record made about the patient.

(b) The professional may deny access to any portion of a record if the professional determines that release of that portion would be harmful to the patient's physical, mental, or emotional health.

(c) If the professional denies access to any portion of a record, the professional shall give the patient a signed and dated written statement that having access to the record would be harmful to the patient's physical, mental, or emotional health and shall include a copy of the written statement in the patient's records. The statement must specify the portion of the record to which access is denied, the reason for denial, and the duration of the denial.

physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

20 U.S.C. § 1232g(a)(4)(B)(iv).

⁴ Although you also contend that section 465.22(d)(5) of the Texas Administrative Code (TAC) makes the submitted information confidential, we note that this provision of the TAC has been repealed. *See* 24 Tex. Reg. 1170 (2002).

Moreover, section 611.004 of the Health and Safety Code provides for, at the patient's request, the disclosure of confidential communications or records to a properly credentialed mental health professional. Section 611.004 provides that a "professional may disclose confidential information only... to other professionals and personnel under the professionals' direction who participate in the diagnosis, evaluation, or treatment of the patient[.]"

We note that the requestor in this case is seeking his own mental health records, and that the request was denied as to a portion of those records by the director of the university's psychology clinic, as evidenced by submitted attachment No. 3. Upon refusal of the request by the professional, the requestor was informed of the reasons therefore under section 611.0045(c) and the right to have the information released to a properly credentialed mental health professional under section 611.004. Therefore, we find that the submitted information must be withheld from the requestor in this case under section 552.101 in conjunction with section 611.0045(b) of the Health and Safety Code.⁵

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,

⁵ Since we have decided the issue under section 552.101 of the Government Code, we need not address your other arguments.

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,



Robert F. Maier
Assistant Attorney General
Open Records Division

RFM/seg

Ref: ID# 182937

Enc. Submitted documents

c: Mr. Lauren King
P.O. Box 803
Boulder, Colorado 80306
(w/o enclosures)