



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 9, 2003

Mr. John Peeler
Assistant General Counsel
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311 East Cullen Building
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OR2003-8837

Dear Mr. Peeler:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 192374.

The University of Houston (the "university") received a request for a named university police officer's personnel file. You claim that the requested information, or portions thereof, is excepted from disclosure under sections 552.102, 552.108, 552.114, 552.115, 552.117, 552.119 and 552.130 of the Government Code, as well as the Federal Educational Rights and Privacy Act of 1974 ("FERPA"). We have considered the exceptions you claim and reviewed the submitted sample of information.¹

As a preliminary matter, we note that the submitted information includes information that is not responsive to the present request. Accordingly, we find that this information, which we have marked, need not be released.

We also note that some of the submitted information is subject to section 552.022 of the Government Code, which provides in pertinent part:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

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.

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, the requested information includes a completed evaluation made of, for, or by the university. The university must release the completed evaluation under section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 or expressly confidential under other law. You do not claim that the evaluation is excepted under section 552.108. Therefore, you may withhold this information only if it is confidential under other law. Because section 552.117 constitutes "other law" for purposes of section 552.022, we will consider whether this exception applies to the information subject to section 552.022.

Next, we note that the submitted information contains an accident report form that appears to have been completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 550.065(b) of the Transportation Code states that, except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4) provides for release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. Transp. Code § 550.065(c)(4)). Under this provision, a governmental entity is required to release a copy of an accident report to a person who provides the law enforcement agency with two or more pieces of information specified by the statute. *Id.* In this instance, the requestor has not supplied two of the three pieces of information required by the statute. Thus, you must withhold the accident report, which we have marked, under section 550.065(b) of the Transportation Code in conjunction with section 552.101 of the Government Code.²

Section 552.101 also encompasses the common-law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public.³ *Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types 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.

²Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information made confidential by statute.

³The Office of the Attorney General will raise a mandatory exception like section 552.101 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: an individual's criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (citing *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)); personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); 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); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Having reviewed the submitted information, we find that portions of it are protected by common-law privacy and must be withheld under section 552.101 on that basis. We have marked the information that must be withheld.

You also argue that the submitted transcripts are excepted under section 552.102(a) of the Government Code "as an unwarranted invasion of privacy." The test of whether information is private under section 552.102(a) is the same as the test of common-law privacy under section 552.101 of the Government Code. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.). We find that the transcripts are not protected under common-law privacy.

We next note that the submitted information contains fingerprint information that is subject to sections 560.001, 560.002, and 560.003 of the Government Code.⁴ These sections provide as follows:

Sec. 560.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 560.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:

⁴Sections 559.001, 559.002, and 559.003 of the Government Code were renumbered as sections 560.001, 560.002, and 560.003 of the Government Code by the 78th Legislature, effective September 1. *See* Act of May 20, 2003, 78th Leg., R.S., ch. 1275, § 2(78), 2003 Tex. Sess. Laws 4140, 4144.

(A) the individual consents to the disclosure;

(B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or

(C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

It does not appear to this office that section 560.002 permits the disclosure of the submitted fingerprint information. Therefore, the university must withhold this information, which we have marked, under section 552.101 in conjunction with section 560.003 of the Government Code.

You argue that portions of police procedural manuals contained within the submitted documents are excepted under section 552.108 of the Government Code. Section 552.108(b) excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if: (1) release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov’t Code § 552.108(b)(1). Section 552.108(b)(1) is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *City of Ft. Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.).

This office has stated that under the statutory predecessor to section 552.108(b), a governmental body may withhold information that would reveal law enforcement techniques. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 456 (1987) (release of forms containing information regarding location of off-duty police officers in advance would unduly interfere with law enforcement), 413 (1984) (release of sketch showing security measures to be used at next execution would unduly interfere with law enforcement), 409 (1984) (if information regarding certain burglaries exhibits pattern that reveals investigative techniques, information

is excepted under section 552.108), 341 (1982) (release of certain information from Department of Public Safety would unduly interfere with law enforcement because release would hamper departmental efforts to detect forgeries of drivers' licenses), 252 (1980) (section 552.108 is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted).

However, in order for a governmental body to claim this exception to disclosure, it must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990). Furthermore, generally known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected under section 552.108), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were different from those commonly known). Whether disclosure of particular records will interfere with law enforcement or prosecution must be decided on a case-by-case basis. *See* Attorney General Opinion MW-381 (1981).

You state that release of the submitted portions of police procedure manuals "may put police officers at a position of disadvantage when arresting suspects or investigating crimes." After reviewing your arguments and the submitted information, we find that you have not met your burden of adequately demonstrating that release of this information would interfere with law enforcement or crime prevention. We therefore conclude that the university may not withhold any of the submitted information under section 552.108(b)(1) of the Government Code.

Next, you argue that a portion of the submitted information consists of "school records" which are excepted from disclosure under 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). A "student" is defined to include "any person with respect to whom an educational agency or institution maintains education records or personally identifiable information," but does not include a person who has not been in attendance at such agency or institution. *Id.* § 1232g(a)(6); *see also* 34 C.F.R. § 99.3.

Section 552.026 of the Government Code provides as follows:

This chapter 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, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Thus, FERPA and the accompanying Government Code provisions govern the availability of student or education records held by educational agencies or institutions. *See* 20 U.S.C. § 1232g(b)(1); Gov't Code §§ 552.026, 552.114. FERPA generally does not govern access to records in the custody of governmental bodies that are not educational agencies or institutions. *See* Open Records Decision No. 390 at 3 (1983). An exception to this rule applies if the governmental body received the records from an educational agency pursuant to the written consent of the student. 20 U.S.C. 1232g(b)(4)(B).

A portion of the information at issue appears to be transcripts from the San Jacinto College District, Blinn College, and Austin Peay State University. Consequently, we believe this information is an education record under FERPA while it is maintained by the respective educational agency. Thus, if the university received these documents under the written consent of the student, this information must be withheld from the requestor under FERPA. *See id.* § 1232g(a)(3), (b)(4)(B). However, if the university obtained these documents in some other manner than from the educational agency under the written consent of the student, the information may not be withheld under FERPA and must be released to the requestor, with the exception of the information you have marked pursuant to section 552.117, as discussed below.

You also assert that the submitted information contains a birth record which is excepted from disclosure pursuant to section 552.115 of the Government Code. We note that birth or death records maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official are excepted from disclosure under section 552.115. However, because section 552.115 applies only to records held by the bureau of vital statistics or a local registration official, any birth records held by the department are not excepted from disclosure under section 552.115 of the Government Code. This record, therefore, must be released, with the exception of the information which must be withheld under section 552.117.

Section 552.117(a)(2) of the Government Code excepts from disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of a peace officer regardless of whether the officer requests confidentiality for that information under section 552.024 of the Government Code.⁵ You indicate that the individual at issue was a licensed peace officer when the university received this request, and that the individual is currently a licensed peace officer. Therefore, the university must withhold the information you have marked, as well as the additional information we have marked, under section 552.117(a)(2). We have also marked a small portion of information which you have marked, but which may not be withheld under section 552.117(a)(2).

⁵"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

Next, you argue that photographs of the individual in question are excepted under section 552.119 of the Government Code. Section 552.119 provides:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

- (1) the officer is under indictment or charged with an offense by information;
- (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or
- (3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph exempt from disclosure under Subsection (a) may be made public only if the peace officer or security officer gives written consent to the disclosure.

Gov't Code § 552.119. In this instance, you have not demonstrated, nor is it apparent from our review of the submitted information, that release of the photographs at issue would endanger the life or physical safety of the peace officer depicted. We therefore determine that the university may not withhold the photographs of the officer pursuant to section 552.119 of the Government Code.

Next, section 552.130 excepts from public disclosure information relating to a driver's license or motor vehicle title or registration issued by an agency of this state. Gov't Code § 552.130. Thus, the university must withhold the Texas driver's license and motor vehicle information you have marked, as well as the additional information we have marked, under section 552.130.

Finally, the submitted documents contain information which is excepted from disclosure under section 552.136 of the Government Code, which provides as follows:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value;
- or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. We have marked the account number information the university must withhold under section 552.136.

In summary, we conclude the university must withhold the following information under section 552.101 of the Government Code: (1) the information we have marked under common-law privacy, (2) the fingerprint information we have marked in conjunction with section 560.003 of the Government Code, and (3) the accident report we have marked in conjunction with section 550.065(b) of the Transportation Code. If the university received the submitted transcripts under the written consent of the student, this information must be withheld from the requestor under FERPA. However, if the university obtained these documents in some other manner than from the educational agency under the written consent of the student, the information may not be withheld under FERPA and must be released to the requestor, with the exception of the information you have marked pursuant to section 552.117 of the Government Code. The university must also withhold the information you have marked, as well as the additional information we have marked, under sections 552.117 and 552.130 of the Government Code. We have also marked a small portion of information which you have marked, but which may not be withheld under section 552.117(a)(2). Finally, the university must withhold the information we have marked under section 552.136. All remaining 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,



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Assistant Attorney General
Open Records Division

SIS/lmt

Ref: ID# 192374

Enc. Submitted documents

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