



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 28, 2004

Ms. Myra McDaniel
Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, L.L.P.
816 Congress Avenue, Suite 1700
Austin, Texas 78701

OR2004-10838

Dear Ms. McDaniel:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 215716.

Austin Community College ("ACC"), which you represent, received a request for "copies of materials contained in the grievance file of [a named ACC employee]." You claim that the submitted information is not responsive to the request. Alternatively, you argue that the submitted information is excepted from required public disclosure under sections 552.101 and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin with your argument that the submitted information is not responsive to the request. The Public Information Act (the "Act") requires a governmental body to release only information that it believes to be responsive to a request. However, in determining whether information is responsive, a governmental body has a duty to make a good faith effort to relate the request to information that it holds. Open Records Decision No. 590 at 1 n. 1 (1991). We have reviewed the submitted information and conclude that it is responsive to the request. We therefore address ACC's claimed exceptions with respect to this information.

Initially, we note that the submitted information consists of a completed investigation pertaining to a complaint made by a student against an adjunct instructor, which is subject to section 552.022 of the Government Code. This section provides that "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body" is public and may not be withheld unless it is expressly confidential under other law or excepted from

disclosure by section 552.108. Gov't Code § 552.022(a)(1). You do not claim that the submitted information is excepted under section 552.108. However, you assert that the submitted information is excepted under sections 552.101, 552.114, and FERPA; therefore we will address those arguments.

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. This office generally applies the same analysis under section 552.114 and the Family Educational Rights and Privacy Act of 1974 ("FERPA"), which is encompassed by section 552.101 of the Government Code.¹ Open Records Decision No. 539 (1990). 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); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). "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. *See* 20 U.S.C. § 1232g(a)(4)(A). Section 552.026 of the Government Code provides that "information contained in education records of an educational agency or institution" may only be released under the Act in accordance with FERPA. 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). Such information includes information that directly identifies a student as well as information that, if released, would allow the student's identity to be easily traced. *See* Open Records Decision No. 224 (1979) (finding student's handwritten comments protected under FERPA because they make identity of student easily traceable through handwriting, style of expression, or particular incidents related).

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, 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. Nevertheless, you have submitted the information at issue to this office for our consideration; therefore, we will consider whether the submitted documents contain information excepted from disclosure under FERPA. We have marked the information that must be withheld pursuant FERPA.

¹Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information made confidential by other statutes.

We now address your argument under section 552.101 for the remaining submitted information. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the doctrine of common law 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. *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. *Id.* at 683. This office has found that the following types of information are excepted from required public disclosure under 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).

You assert that release of the remaining submitted information would constitute a clearly unwarranted invasion of the privacy of the named employee. We have reviewed the information in question and conclude that none of the remaining information is excepted from disclosure under section 552.101 in conjunction with common-law privacy. *See* Open Records Decision Nos. 542 at 5 (1990) (information regarding public employee's qualifications is of legitimate concern to public), 455 at 9 (1987) (public interest in information relating to applicants for public employment justified its disclosure, as information bore on applicants' past employment records and suitability for position in question), 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and circumstances of his resignation or termination), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow).

However, a portion of the submitted information may be subject to section 552.117 of the Government Code.² Section 552.117(a)(1) 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*

²The Office of the Attorney General will raise a mandatory exception like section 552.117 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Open Records Decision No. 530 at 5 (1989). ACC may only withhold information under section 552.117 on behalf of current or former employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, to the extent that the employee in question made a timely election under section 552.024, ACC must withhold the information we have marked.

In summary, ACC must withhold 1) the information we have marked pursuant to FERPA and 2) the information we have marked pursuant to section 552.117(a)(1), if the employee timely elected to keep this information confidential. The remaining 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,



Tamara L. Harswick
Assistant Attorney General
Open Records Division

TLH/sdk

Ref: ID# 215716

Enc. Submitted documents

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(w/o enclosures)