



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 7, 2005

Ms. R. Yvette Clark
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Stephen F. Austin State University
P.O. Box 13065
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OR2005-01935

Dear Ms. Clark:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 219510.

Stephen F. Austin State University (the "university") received two requests from the same requestor for (1) information and photographs pertaining to two former students; (2) university police reports pertaining to one of the former students; and (3) disciplinary or administrative actions taken against one of the former students. You state that you have released some of the requested information. You claim, however, that portions of the submitted information are excepted from disclosure under sections 552.101, 552.108 and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You assert that some of the submitted information is subject to the Family Educational Rights and Privacy Act of 1974 ("FERPA"). *See* 20 U.S.C. § 1232g. 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 id.* § 1232g(b)(1), (d) (for student eighteen years of age or attending institution of postsecondary education, permission or consent required of and rights accorded to parent under FERPA are required of and accorded to student); *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. 20 U.S.C. § 1232g(a)(4)(A). You also raise section 552.114 of the Government Code for the information for which you raise FERPA. This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990).

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 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.

Gov't Code § 552.026. 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. However, because you request that we rule on the applicability of section 552.114 and FERPA to the submitted information, we will do so.

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). We note that FERPA excludes from its statutory definition of education records "records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement." See 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8(b)(1); see also 34 C.F.R. § 99.3 (defining "education records" as not including "[r]ecords of the law enforcement unit of an educational agency or institution, subject to the provisions of § 99.8"); Open Records Decision No. 612 (1992) (FERPA and statutory predecessor to section 552.114 not applicable to incident and arrest reports of the state university campus police departments).

We have marked the documents that constitute education records for purposes of FERPA. See e.g., *Belanger v. Nashua, New Hampshire School District*, 856 F. Supp. 40, 48-50 (D.N.H. 1994) (broadly construing FERPA definition of "education records"). Further, in this case the request for information reflects that the requestor knows the identity of the student whose information we have marked. We therefore find that withholding only the name of this

student would not suffice to avoid the release of personally identifiable information contained in student education records as mandated by FERPA. Accordingly, the documents we have marked are generally confidential in their entirety under section 552.114 of the Government Code and FERPA.

You state that some of remaining education records pertain to a student who is now deceased. Relying on a statement from the director of the Family Policy and Regulations Office, we note that this office has determined that FERPA and the statutory predecessor to section 552.114 do not prevent a governmental body from making the education records of deceased students available to members of the public. *See* Open Records Decision No. 524 (1989). This conclusion is consistent with the premise that the privacy rights of an individual lapse upon death. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.); *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979) (“action for invasion of privacy can be maintained only by a living individual whose privacy is invaded”) (quoting Restatement of Torts 2d); *See* Attorney General Opinions JM-229 (1984) (“the right of privacy lapses upon death”); H-917 (1976) (“We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death.”); Open Records Decision No. 272 (1981) (“the right of privacy is personal and lapses upon death”). Accordingly, we conclude that the university may not withhold any portion of the submitted information pertaining to the deceased student under either section 552.114 of the Government Code or FERPA.

We now turn to your claim under section 552.108 of the Government Code for the submitted offense reports. Section 552.108(a)(2) excepts from disclosure information concerning a criminal investigation that concluded in a result other than conviction or deferred adjudication. A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See generally* Gov't Code § 552.301(e)(1)(A) (governmental body seeking to withhold information must provide “written- comments stating the reasons why the stated exceptions apply that would allow the information to be withheld”). Upon review, we find that you have failed to establish that the submitted reports pertain to investigations that did not result in convictions or deferred adjudications. Thus, the submitted reports may not be withheld on the basis of section 552.108(a)(2). *See id.*

You also contend that the identities of the complainants in both of the submitted offense reports may be withheld on the basis of the common law informer's privilege. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. The common law informer's privilege has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer's privilege protects from disclosure

the identities of persons who report activities over which a governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. *See* Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). The privilege excepts an informer's statement only to the extent necessary to protect the informer's identity. *See* Open Records Decision No. 549 at 5 (1990).

You inform us that the complainants reported possible violations of criminal statutes that carry criminal penalties. These reports were made to the university's police department, which is responsible for enforcing criminal laws. Having reviewed the submitted information, we agree that the complainants' identifying information that you indicate you seek to withhold may be withheld pursuant to section 552.101 of the Government Code in conjunction with the common law informer's privilege.

We note that one of the submitted offense reports includes a dental record that is subject to chapter 258 of the Occupations Code. Section 258.102 provides as follows:

(a) The following information is privileged and may not be disclosed except as provided by this article:

- (1) a communication between a dentist and a patient that relates to a professional service provided by the dentist; and
- (2) a dental record.

(b) The privilege described by this section applies regardless of when the patient received the professional service from the dentist.

Occ. Code § 258.102. A "dental record" means dental information about a patient that is created or maintained by a dentist and relates to the history or treatment of the patient. *See Id.* § 258.101. We have marked the document created or maintained by a dentist that relates to the history or treatment of a patient. This document may only be released in accordance with the access provisions of chapter 258 of the Occupations Code.

We also note that one of the submitted offense reports contains a social security number that may be confidential under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, section 405(c)(2)(C)(viii)(I) of title 42

of the United States Code. *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security number at issue is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing the social security number at issue, you should ensure that it was not obtained or is not maintained by the university pursuant to any provision of law enacted on or after October 1, 1990.

In summary, the university must withhold the marked education records in their entirety under section 552.114 of the Government Code and FERPA. The complainants' identifying information that you indicate you seek to withhold may be withheld under section 552.101 of the Government Code in conjunction with the common law informer's privilege. The marked dental record may only be released in accordance with the access provisions of chapter 258 of the Occupations Code. The submitted social security number may be confidential under federal law. 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/sdk

Ref: ID# 219510

Enc. Submitted documents

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(w/o enclosures)