



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 15, 2006

Ms. Laura C. Rodriguez
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
P.O. Box 460606
San Antonio Texas 78246-0606

OR2006-01511

Dear Ms. Rodriquez:

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# 242435.

The Fort Sam Houston Independent School District (the "district"), which you represent, received a request for information "detailing any substitute teachers and teachers' aides placed on administrative leave (with or without pay)."¹ You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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, including the Freedom of Information Act (the "FOIA") and the federal Privacy Act. *See* 5 U.S.C. §§ 552 (FOIA), 552a (Privacy Act). The submitted information consists of (1) internal administrative documents pertaining an alleged assault of a student and (2) a report pertaining to the criminal investigation of the assault that was conducted by the United States Army Criminal Investigation Command (the "army"). This office has concluded that FOIA and the Privacy Act do not apply to records held by an agency of this state or its political subdivision. Attorney General Opinion MW-95 at 6 (1979) (neither FOIA nor federal Privacy Act is applicable to Texas law enforcement agency). However, this office has repeatedly held that the transfer of information between state agencies does not destroy the confidentiality of that information. Attorney General

¹You inform us that the district is "a Texas School District which is situated on federal property, a military installation, known as Fort Sam Houston."

Opinions H-917 (1976), H-836 (1974); Open Records Decision Nos. 272 (1981), 183 (1978). In Open Records Decision No. 561 (1979), in the interests of comity between state and federal authorities and to ensure the flow of information from federal agencies to Texas governmental bodies, we held the following:

when information in the possession of a federal agency is “deemed confidential” by federal law, such confidentiality is not destroyed by the sharing of the information with a governmental body in Texas. In such an instance, [the predecessor to section 552.101] requires a local government to respect the confidentiality imposed on the information by federal law.

ORD No. 561 at 6. The army states its criminal investigation report is confidential under FOIA. The Federal Bureau of Investigation asserts that information pertaining to one of its agents in the documents at issue is also confidential under FOIA. Therefore, the district must withhold this information, which we have marked, pursuant to section 552.101 of the Government Code.² *See id.*

Section 552.101 also encompasses the Family Educational Rights and Privacy Act of 1974 (“FERPA”), which 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). This office generally applies the same analysis under section 552.114 as under 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 the following: (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

²As we are able to resolve this under FOIA, we do not address your other arguments for exception of this information.

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, you have submitted some of the requested information to this office for consideration. Therefore, we will consider whether the information is protected by 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)*. We have marked the information that identifies students, and that the district must withhold under section 552.101 in conjunction with FERPA.

Section 552.101 also encompasses section 261.201 of the Family Code. Section 261.201(a) provides as follows:

The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Code § 261.201(a). We note that a school district is not an agency authorized to conduct a chapter 261 investigation. *See id.* §§ 261.301, 261.406. However, some of the submitted information pertains to an investigation into an allegation of child abuse by a district employee against a minor child that the Texas Department of Family and Protective Services created and provided to the district. Because such information, which we have marked, was used in an investigation conducted under chapter 261 of the Family Code, we conclude that this information is made confidential by section 261.201. Accordingly, the district must withhold the information we have marked under section 552.101 of the Government Code as information made confidential by law. However, you have not established that the remaining information was used in the investigation conducted under chapter 261; therefore, the district may not withhold the remaining information under section 552.101 in conjunction with section 261.201.

Section 552.101 also encompasses information protected by common law privacy. Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 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(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101. Accordingly, we address the district’s section 552.102(a) claim in conjunction with its common law privacy claim under section 552.101 of the Government Code.

The doctrine of common law privacy protects information that (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. *Indus. Found.*, 540 S.W.2d 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. But this office has found that the public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). The remaining information is not highly intimate or embarrassing; therefore, the remaining information is not confidential under common law privacy, and the district may not withhold it under section 552.101 on that ground.

You assert that some of the remaining information is excepted under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, and family member information of current or former officials or employees of a Texas governmental body who request that this information be kept confidential under section 552.024. Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Pursuant to section 552.117(a)(1), the district must withhold this personal information that pertains to the district employee at issue in the submitted documents if he elected, prior to the district’s receipt of the request for information, to keep such information confidential. Such information may not be withheld for an individual who did not make a timely election. However, section 552.117 is only applicable to an employee of a Texas governmental body; therefore, the district may not withhold under section 552.117 information pertaining to a federal employee in the documents at issue. *See* Gov’t Code § 552.003(1) (defining governmental body for purposes of the Act). We have marked information that must be withheld if section 552.117 applies.

You assert that some of the remaining information is excepted under section 552.135 of the Government Code, which provides the following:

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

Gov't Code § 552.135(a), (b). Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under that exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See id.* § 552.301(e)(1)(A). You state that the remaining information contains identifying information of an employee who reported an alleged assault of a student by a district teacher. We agree that the district may withhold from disclosure the identity of the employee who reported this alleged assault, unless the informer consents to the release of this information. We have marked the information that the district may withhold pursuant to section 552.135.

To conclude, the district must withhold (1) the report marked under FOIA and section 552.101 of the Government, (2) the student identifying information marked under FERPA, (3) the information marked under section 261.201 of the Family Code in conjunction with section 552.101 of the Government Code, and (4) the information marked under section 552.117 if the district employee at issue timely elected to keep that information confidential. The district may withhold the information marked under section 552.135. The district must release the remaining information.

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).

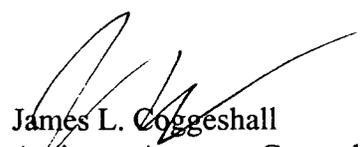
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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); *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 Office of the Attorney General 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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/er

Ref: ID# 242435

Enc. Submitted documents

c: Mr. Brian Collister
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(w/o enclosures)