



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 7, 2006

Ms. Ann Forbes
Paralegal
Fort Worth Independent School District
100 North University Drive
Fort Worth, Texas 76107

OR2006-07211

Dear Ms. Forbes:

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# 253568.

The Fort Worth Independent School District (the "district") received a request for "a copy of the investigative file pertaining to [a named individual] for the 2005-2006 school year and a copy of the informal and level 1 grievance filed by [the named individual] regarding his resignation and/or investigation by OSI for the 2005-2006 school year." You state that a portion of the requested information is being released to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.114, 552.135, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that one of the submitted compact discs we have marked is not responsive to the present request. This ruling therefore does not address the public availability of this nonresponsive information, and the district is not required to release this information in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information that another statute makes confidential. Gov't Code § 552.101. Section 552.101 encompasses the doctrines of common law and constitutional privacy. Common law privacy protects information if (1) the information contains highly intimate

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. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. 540 S.W.2d at 683.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we note the submitted information relates to the work conduct of a district employee and a district owned computer. The work conduct, job performance, and salary information of public employees is subject to a legitimate public interest and is generally not protected under common law privacy. See Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow), 405 at 2 (1983) (manner in which employee performed his job cannot be said to be of minimal public interest). Thus, none of the submitted information may be withheld under the district employee's common law right to privacy. Furthermore, upon review we find that none of the submitted information is excepted from disclosure based on the constitutional privacy of the employee.

We will next address whether any of the submitted information must be withheld under a common law or constitutional right of privacy for the individuals whose photographs appear in the submitted information. For the photographs in Exhibits B-1, B-2 and B-3 that depict identifiable unclothed individuals, we find that if these pictures were obtained from publicly available websites, the individuals depicted are not afforded protection under either common law or constitutional privacy. If the district determines that these photographs are in the public domain, we believe that the individuals pictured have no reasonable expectation of privacy and the district must release the information. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (action for invasion of privacy cannot be maintained where information is in public domain); *Star Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992) (law cannot recall information once in public domain), *Roberts v. Houston Indep. Sch. Dist.*, 788 S.W.2d 107, 111 (Tex. App.—Houston [1st Dist.] 1990). However, should the district determine that the pictures were not obtained from publicly available websites, we

must determine the privacy rights of the identifiable individuals. We find that the photographs of the identifiable individuals who are partially or completely nude in Exhibits B-1, B-2, and B-3 are excepted from disclosure under section 552.101 based on the constitutional right to privacy. While there is substantial public interest in this information, the individuals depicted have a right of privacy in pictures of their unclothed bodies. *See Poe v. Leonard*, 283 F. 3d 123, 138-39 (2d Cir. 2002). Thus, if the individuals depicted did not voluntarily place such information in the public domain, we conclude that these individuals have a legitimate expectation of privacy in these photographs that outweighs the public interests.

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. The Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, governs the availability of student records held by educational agencies or institutions that receive federal funds under programs administered by the federal government. 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). Under FERPA, "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. This office generally applies the same analysis under section 552.114 of the Government Code and FERPA. Open Records Decision No. 539 (1990).

Generally, information must be withheld from required public disclosure under FERPA to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (a982), 206 (1978). Such information includes both 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). You state that the information in Exhibit B-7 consists of education records. Based on our review of the submitted information and your representations, we find that the photographs in Exhibit B-7 along with the information we have marked must be withheld under section 552.114 and FERPA.

Next, we note that section 552.130 of the Government Code excepts from disclosure information that relates to a driver's license or motor vehicle title or registration issued by

an agency of this state.¹ Gov't Code § 552.130. Therefore, the district must redact the Texas license plate numbers in the submitted DVD.

Section 552.135 of the Government Code provides in relevant part

(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). Section 552.135 protects an informer's identity. Upon review, we find that you have failed to demonstrate that the submitted information identifies an informer. Thus, the district may not withhold any information under section 552.135.

You raise section 552.137 of the Government Code for portions of the remaining information. Section 552.137 makes certain e-mail addresses confidential. Section 552.137 provides in relevant part:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137(b). You do not inform us that any of the individuals whose e-mail addresses are at issue have affirmatively consented to the release of their e-mail address. However, we note that section 552.137 does not apply to a government employee's work e-mail address because such address is not that of the employee as a "member of the public" but is instead the address of the individual as a government employee. One of the submitted e-mail addresses is associated with a public university. If this individual is an employee of the university, then their e-mail address is not excepted under section 552.137 and must be released.

¹The Office of the Attorney General will raise a mandatory exception like section 552.130 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

However, if this individual is not an employee, but is a student of the university, then their email address is excepted from disclosure under section 552.137 and must be withheld from disclosure. Further, the district must withhold the e-mail addresses we have marked under section 552.137.

Finally, the district argues that some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the photographs in Exhibits B-1, B-2 and B-3 must be withheld or released in accordance with constitutional and common law privacy rights as outlined above. The photographs in Exhibit B-7 as well as the information we have marked in that exhibit must be withheld under section 552.114 of the Government Code and FERPA. The Texas license plate numbers in the submitted DVD must be withheld under section 552.130 of the Government Code. The e-mail addresses we have marked must be withheld in accordance with section 552.137 of the Government Code. If the email address associated with the public university belongs to a student of a university, then that email address must also be withheld pursuant to section 552.137 of the Government Code. Finally, the remaining information must be released, but any information protected by copyright must be released in accordance with copyright law.

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. 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,



Matthew T. McLain
Assistant Attorney General
Open Records Division

MM/ir

Ref: ID# 253568

Enc. Submitted documents

c: Ms. Tanya Dawson
4900 S. E. Loop 820
Fort Worth, Texas 76140
(w/o enclosures)