



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 12, 2008

Mr. James Fowler  
Vice Chancellor of Human Resources  
San Jacinto College  
4624 Fairmont Parkway, Suite 106  
Pasadena, Texas 77504

Ms. Lisa A. Brown  
Bracewell & Giuliani, L.L.P.  
711 Louisiana Street, Suite 2300  
Houston, Texas 77002

OR2008-08087

Dear Mr. Fowler and Ms. Brown:

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# 312672.

San Jacinto College (the "college") received two requests from the same requestor for all information regarding a complaint lodged by a student, including a specified recording. You claim the requested information is excepted from disclosure under sections 552.101, 552.111, and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Education Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the

purposes of our review in the open records ruling process under the Act.<sup>1</sup> Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which “personally identifiable information” is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). You have submitted for our review, among other information, redacted and unredacted education records. Because our office is prohibited from reviewing education records, we will not address the applicability of FERPA to the information at issue.<sup>2</sup> Such determinations under FERPA must be made by the educational authority in possession of the education records.<sup>3</sup>

Next, we must address the college’s obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for the attorney general’s decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov’t Code § 552.301(b). You inform us that the college received this request on March 14, 2008. You also inform us that the college was closed for business the week of March 17 for spring break. Thus, the college’s ten-business-day deadline was April 4, 2008. However, you did not request a ruling until April 7, 2008. Therefore, we find that the college failed to comply with the procedural requirements of section 552.301. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail).

~~Pursuant to section 552.302 of the Government Code, a governmental body’s failure to~~ comply with the procedural requirements of section 552.301 results in the legal presumption that the submitted information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing that the information is made confidential by another source of law or affects third party interests. *See* Open Records Decision No. 630 (1994). Section 552.111 of the Government Code is a discretionary exception to disclosure that protects a governmental body’s interests and may be waived. *See* Gov’t Code § 552.007; *Dallas Area*

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<sup>1</sup>A copy of this letter may be found on the attorney general’s website, available at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

<sup>2</sup>In the future, if the college does obtain parental consent to submit unredacted education records, and the college seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

<sup>3</sup>Accordingly, we do not address your arguments under section 552.114 of the Government Code. *See* Gov’t Code §§ 552.026 (incorporating FERPA into the Act), .114 (excepting from disclosure “student records”); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 of the Government Code and FERPA).

*Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, this section does not constitute a compelling reason to withhold the information for purposes of section 552.302. Therefore, none of the submitted information may be withheld on that basis. Because your claim under section 552.101 of the Government Code can provide a compelling reason for non-disclosure, we will consider your argument under this exception.

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. Section 552.101 encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. However, information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and therefore generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (public employee’s job performance does not generally constitute employee’s private affairs), 455 (1987) (public employee’s job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow). Further, although you claim that the submitted information is excepted from disclosure under section 552.101 in conjunction with common-law privacy and the ruling in *Morales v. Ellen*, you have not demonstrated that this information pertains to a sexual harassment investigation. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). Therefore, the college may not withhold any of the submitted information under common-law privacy.

We note that the submitted information includes a cellular telephone bill containing an account number. Section 552.136 of the Government Code provides that “[n]otwithstanding 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.”<sup>4</sup> Gov’t Code § 552.136. Accordingly, the college must withhold the cellular telephone account number we have marked under section 552.136.

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<sup>4</sup>Unlike other exceptions to disclosure under the Act, this office will raise section 552.136 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov’t Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

In summary, the college must withhold the cellular telephone account number we have marked under section 552.136 of the Government Code. This ruling does not address the applicability of FERPA to the submitted information. Should the college determine that all or portions of the submitted information consists of "education records" that must be withheld under FERPA, the college must dispose of that information in accordance with FERPA, rather than the Act. The remaining information must be released.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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,



Bill Dobie  
Assistant Attorney General  
Open Records Division

WJD/jh

Ref: ID# 312672

Enc. Submitted documents