



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 27, 2009

Ms. Andrea Sheehan
Law Offices of Robert E. Luna, P.C.
4411 North Central Expressway
Dallas, Texas 75205

OR2009-07174

Dear Ms. Sheehan:

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# 344169.

The Carrollton-Farmers Branch Independent School District (the "district"), which you represent, received a request for compensation information for a named district employee, a cassette recorder used in a specified district disciplinary hearing, and documents regarding Level One hearings at a district high school from August 2008 to the date of the request. You state that the district will provide some of the requested information to the requestor. You claim that a portion of the requested information is not subject to the Act. You also contend that portions of the submitted information are excepted from disclosure under sections 552.101, 552.117, and 552.136 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, we address your argument that the requested cassette recorder is not subject to the Act. The Act applies to "public information," which is defined as information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body or for a governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002. This office has ruled that tangible physical items are not "information" as that term is contemplated under the Act. *See, e.g.*, Open Records Decision No. 581 (1990). Thus, any responsive tangible object that is maintained by the district is not public information that

is subject to the Act. Therefore, the district is not required to release the cassette recorder in response to the present request. *See* Gov't Code §§ 552.002, .021.

You state that, pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, you have redacted student-identifying information in the submitted information. The United States Department of Education Family Policy Compliance Office has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.¹ 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"). FERPA is generally not applicable to law enforcement records maintained for a law enforcement purpose. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3, 99.8. However, records created by a law enforcement entity for a law enforcement purpose that are maintained by a component of an educational agency or institution other than the law enforcement unit or that are used exclusively for a non-law enforcement purpose such as a disciplinary proceeding are not records of the law enforcement unit and, therefore, are education records subject to FERPA. *See id.* § 99.8(b)(2). Because our office is prohibited from reviewing education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted information. Such determinations under FERPA must be made by the educational authority in possession of the education records.

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. This section encompasses information protected by other statutes, including article 15.27 of the Code of Criminal Procedure, which provides in part:

(a) A law enforcement agency that arrests any person or refers a child to the office or official designated by the juvenile board who the agency believes is enrolled as a student in a public primary or secondary school, for an offense listed in Subsection (h), shall attempt to ascertain whether the person is so enrolled. If the law enforcement agency ascertains that the individual is enrolled as a student in a public primary or secondary school, the agency shall orally notify the superintendent or a person designated by the superintendent in the school district in which the student is enrolled of that arrest or referral within 24 hours after the arrest or referral is made, or on the next school day. If the law enforcement agency cannot ascertain whether the individual is

¹A copy of this letter may be found on the Office of the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

enrolled as a student, the agency shall orally notify the superintendent or a person designated by the superintendent in the school district in which the student is believed to be enrolled of that arrest or detention within 24 hours after the arrest or detention, or on the next school day. If the individual is a student, the superintendent shall promptly notify all instructional and support personnel who have responsibility for supervision of the student. All personnel shall keep the information received in this subsection confidential. The State Board of Educator Certification may revoke or suspend the certification of personnel who intentionally violate this subsection. Within seven days after the date the oral notice is given, the law enforcement agency shall mail written notification, marked "PERSONAL and CONFIDENTIAL" on the mailing envelope, to the superintendent or the person designated by the superintendent. Both the oral and written notice shall contain sufficient details of the arrest or referral and the acts allegedly committed by the student to enable the superintendent or the superintendent's designee to determine whether there is a reasonable belief that the student has engaged in conduct defined as a felony offense by the Penal Code. The information contained in the notice may be considered by the superintendent or the superintendent's designee in making such a determination.

...

(f) A person who receives information under this article may not disclose the information except as specifically authorized by this article. A person who intentionally violates this article commits an offense. An offense under this subsection is a Class C misdemeanor.

Crim. Proc. Code art. 15.27(a), (f). You state that the documents enclosed as Exhibit B are Notices to Schools provided in accordance with article 15.27(a) or documents referencing receipt of such notices regarding individual students. Because subarticles 15.27(a) and 15.27(f) make information confidential in the hands of school personnel who receive the information pursuant to article 15.27(a), we find the information you have marked in Exhibit B is confidential and must be withheld under section 552.101 of the Government Code.

Section 552.101 also encompasses section 39.030 of the Education Code. Section 39.030 of the Education Code states the following:

(a) In adopting academic skills assessment instruments under [subchapter B, chapter 39 of the Education Code], the State Board of Education or a school district shall ensure the security of the instruments and tests in their preparation, administration, and grading. Meetings or portions of meetings held by the State Board of Education or a school district at which individual

assessment instruments or assessment instrument items are disclosed or adopted are not open to the public under Chapter 551, Government Code, and the assessment instruments or assessment instrument items are confidential.

(b) The results of individual student performance on academic skills assessment instruments administered under [subchapter B, chapter 39 of the Education Code] are confidential and may be released only in accordance with [FERPA].

Educ. Code § 39.030(a)-(b). You state that the information in Exhibit C, as well as the marked information in Exhibit F, consists of individual students' TAAS and TAKS standardized test results. Based upon your representations and our review, we find that the information in Exhibit C and the marked information in Exhibit F is confidential under section 39.030 of the Education Code and may only be released in accordance with FERPA.

Section 552.101 of the Government Code also encompasses section 58.007(c) of the Family Code, which provides in pertinent part as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Fam. Code § 58.007(c). You assert that the information in Exhibit D consists of juvenile law enforcement records subject to section 58.007 of the Family Code. However, you state that the records in Exhibit D are now maintained by the district as part of student discipline files. Although some of these records may have been created by a law enforcement agency for a law enforcement purpose, records maintained by an educational agency or institution that are used exclusively for a non-law enforcement purpose such as a disciplinary proceeding are not law enforcement records, but education records. Therefore, the information in Exhibit D consists of education records which are not subject to section 58.007 of the Family Code and may not be withheld on that basis.

Section 552.101 also encompasses the Medical Practices Act ("MPA"). Section 159.002 of the MPA provides in part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(a)-(c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Medical records may only be released in accordance with the MPA. *See* ORD 598. We note medical records involving a minor may be released under the MPA on the parent's or legal guardian's signed, written consent, provided the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Upon review of the submitted information, we find the district may only release the medical records we have marked in Exhibit F in accordance with the MPA.

Section 552.101 of the Government Code also encompasses section 414.009 of the Government Code, which provides in pertinent part:

- (a) A person who is a member or employee of the [crime stoppers advisory council] or who accepts a report of criminal activity on behalf of a crime stoppers organization commits an offense if the person intentionally or knowingly divulges to a person not employed by a law enforcement agency the content of a report of a criminal act or the identity of the person who made the report without the consent of the person who made the report.

Gov't Code § 414.009. We understand the information you have marked in Exhibits D and G represents reports, tips, and information submitted to a crime stopper's organization.

Accordingly, we conclude that the information marked in Exhibits D and G is confidential under section 414.009 of the Government Code and must be withheld based on section 552.101 of the Government Code.

Section 552.101 also encompasses the common-law right of privacy, which protects information if (1) it 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. 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 demonstrated. *Id.* at 681-82. The types 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. Upon review, we find that the information you have marked pertains to individuals who are not identified. Thus, the information at issue does not implicate any individual's privacy interests, and may not be withheld under section 552.101 on the basis of common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989)*. Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. You inform us that the information you have marked in Exhibit H consists of the personal information of an employee of the district, and that this employee elected to keep his personal information confidential before the district received the present request for information. Therefore, the district must withhold the information you have marked in Exhibit H under section 552.117(a)(1).

Finally, you raise section 552.136 of the Government Code for portions of the information in Exhibit D. This exception provides that "[n]otwithstanding any other provision of [the Act], 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." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). The account number you have marked in Exhibit D must be withheld under section 552.136(b) of the Government Code. However, we find you have failed to demonstrate how the remaining two numbers you have

marked constitute access device numbers for the purposes of section 552.136. Accordingly, this information may not be withheld on that basis.

In summary, the district must withhold the information you have marked in Exhibit B under section 552.101 of the Government Code in conjunction with article 15.27 of the Code of Criminal Procedure. The test results in Exhibits C and F may only be released in accordance with FERPA. The information we have marked in Exhibit F may only be released in accordance with the MPA. The information you have marked in Exhibits D and G must be withheld pursuant to section 552.101 of the Government Code in conjunction with section 414.009 of the Government Code. The information you have marked in Exhibit H must be withheld pursuant to section 552.117(a)(1). The account number you have marked in Exhibit D must be withheld pursuant to section 552.136 of the Government Code. The remaining submitted information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Karen E. Stack
Assistant Attorney General
Open Records Division

KES/jb

Ref: ID# 344169

Enc. Submitted documents

c: Requestor
(w/o enclosures)