



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 10, 2013

Mr. Tony Resendez
Counsel for Harlandale Independent School District
Walsh, Anderson, Gallegos, Green and Trevino, P.C.
P.O. Box 460606
San Antonio, Texas 78246

OR2013-11763

Dear Mr. Resendez:

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# 492877.

The Harlandale Independent School District (the "district"), which you represent, received a request for page one of a specified incident report. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note the requestor seeks only page one of a specified incident report. You have submitted information beyond the specific requested document. Thus, the submitted information that does not consist of page one of the specified incident report, which we have marked, is not responsive to the present request. This ruling does not address the public availability of any information that is not responsive to the request and the district is not required to release that information in response to the request.

Next, we note you have redacted some information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code. The United States Department of Education Family Policy Compliance Office has informed this office FERPA 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 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

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

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”).

In this instance, the responsive information was created by the district’s police department (the “department”) for a law enforcement purpose. FERPA is not applicable to records that were created by a law enforcement unit of an educational agency or institution for a law enforcement purpose and that are maintained by the law enforcement unit. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3, .8. Thus, to the extent the responsive information is maintained by the department, the information is not encompassed by FERPA. You do not indicate, however, whether the responsive information is maintained exclusively by the department. Records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of an educational agency or institution other than the law enforcement unit are not records of the law enforcement unit. *See* 34 C.F.R. § 99.8(b)(2). Therefore, to the extent the responsive information is maintained by a component of the district other than the department, such records are subject to FERPA. 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 the responsive information. Such determinations under FERPA must be made by the educational authority in possession of the education record.² We will, however, address the applicability of the claimed exception to the responsive information.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which 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, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *See id.* at 681-82. The type of information considered intimate or 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. The responsive information pertains to the conduct of a district employee. We note this office has determined that common-law privacy does not protect information about a public employee’s alleged misconduct on the job or complaints made about a public employee’s job performance. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978). Thus, we find the public has a legitimate interest in the information concerning the employee’s misconduct. Further, you argue that

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

“[t]he only purpose the release of the information in question would serve would be to hold the employees up to public scorn and ridicule.” You also contend the district “is required to ensure that it does not violate an individual’s liberty interest” and “must not release information that would stigmatize to the point of burdening an employee with a ‘badge of infamy.’” You cite to *Wells v. Hico Independent School District*, 736 F.2d 243 (5th Cir. 1984), in which the court stated that

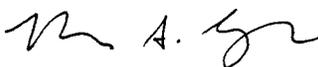
[t]o establish a liberty interest, an employee must demonstrate that *his governmental employer has brought false charges* against him that ‘might seriously damage his standing and associations in his community,’ or that impose a ‘stigma or other disability’ that forecloses ‘freedom to take advantage of other employment opportunities.’ *Board of Regents v. Roth*, 408 U.S. 564 (1972).

Id. at 256 (emphasis added; parallel citations deleted). We note false-light privacy is not an actionable tort in Texas. *See Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex. 1994); Open Records Decision No. 579 (1990). Further, we note the information at issue pertains to an investigation that arose out of charges made by a student, rather than the district. Thus, we find you have failed to demonstrate *Hico* is relevant in this instance. Consequently, the district may not withhold any of the responsive information under section 552.101 in conjunction with common-law privacy. As you raise no further exceptions to disclosure, the district must release the responsive information.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Nicholas A. Ybarra
Assistant Attorney General
Open Records Division

NAY/ac

Ref: ID# 492877

Enc. Submitted documents

c: Requestor
(w/o enclosures)