



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 25, 2014

Mr. R. Brooks Moore
Managing Counsel, Governance
The Texas A&M University System
301 Tarrow Street, 6th Floor
College Station, Texas 77840-7896

OR2014-04959

Dear Mr. Moore:

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# 517736 (TAMU 14-004).

Texas A&M University (the "university") received a request for (1) the complete student file and records of a specified former university student; (2) all documents related to any hearings, complaints, or grievances involving the former student; (3) investigation reports and the hearing transcript related to any grievance filed by or against the student; and (4) records of any investigation conducted by university campus police involving the student. You indicate the university will release information responsive to the first three categories of the request. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, you state the university will redact some of the information you have marked 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 and Family

¹We assume the "representative sample" of records submitted to this office is truly representative of the requested records as whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

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.² 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"). However, we note FERPA is not applicable to law enforcement records maintained by the university's police department (the "department") for law enforcement purposes. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3, .8. The submitted information consists of investigations conducted by the department. Further, you indicate this information is maintained by the department for law enforcement purposes. Accordingly, the submitted information constitutes law enforcement records created and maintained by the university for law enforcement purposes. As such, this information is not subject to FERPA, and the university may not withhold any of the submitted information on that basis. However, we will address your remaining arguments for this information.

Section 552.108(a)(2) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]" Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that concluded in a final result other than conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (providing that a governmental body must provide written comments explaining why exceptions raised should apply to information requested). You state the submitted information relates to a matter that "*has not resulted* in a conviction or deferred adjudication" (emphasis added). We note, however, section 552.108(a)(2) is applicable only if the information at issue is related to a concluded criminal case that "*did not result* in conviction or deferred adjudication" (emphasis added). *See id.* § 552.108(a)(2). Thus, we find you have failed to demonstrate the applicability of section 552.108(a)(2) to the submitted information. Accordingly, the university may not withhold any of the submitted information under section 552.108(a)(2) of the Government Code.

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 the common-law physical safety exception. For many years, this office determined section 552.101, in conjunction with the common-law

²A 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>.

right to privacy, protected information from disclosure when “special circumstances” exist in which the disclosure of information would place an individual in imminent danger of physical harm. *See, e.g.*, Open Records Decision Nos. 169 (1977) (special circumstances required to protect information must be more than mere desire for privacy or generalized fear of harassment or retribution), 123 (1976) (information protected by common-law right of privacy if disclosure presents tangible physical danger). However, the Texas Supreme Court has held freedom from physical harm does not fall under the common-law right to privacy. *Tex. Dep’t of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112 (Tex. 2011) (holding “freedom from physical harm is an independent interest protected under law, untethered to the right of privacy”). Instead, in *Cox*, the court recognized, for the first time, a separate common-law physical safety exception to required disclosure that exists independent of the common-law right to privacy. *Id.* at 118. Pursuant to this common-law physical safety exception, “information may be withheld [from public release] if disclosure would create a substantial threat of physical harm.” *Id.* In applying this new standard, the court noted “deference must be afforded” law enforcement experts regarding the probability of harm, but further cautioned, “vague assertions of risk will not carry the day.” *Id.* at 119.

You state the information you have marked reveals the identities of individuals who provided information to the department. You argue release of the marked information could jeopardize the individuals’ safety, given the nature of the suspect’s actions and expressed intentions. Upon review, we find disclosure of the information we have marked would create a substantial threat of physical harm. Therefore, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the common-law physical safety exception. However, we find you have failed to demonstrate release of any of the remaining information would create a substantial threat of physical harm. Accordingly, the university may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

We note portions of the remaining information are subject to sections 552.130 and 552.137 of the Government Code.³ Section 552.130 provides information relating to a motor vehicle operator’s or driver’s license or permit or motor vehicle title or registration issued by an agency of this state or another state or country is excepted from public release. *Id.* § 552.130(a). Upon review, we find the university must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). The e-mail addresses at issue are not of a type excluded by subsection (c). Accordingly, the university must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure.⁴

In summary, the university must withhold (1) the information we have marked under section 552.101 of the Government Code in conjunction with the common-law physical safety exception; (2) the motor vehicle record information we have marked under section 552.130 of the Government Code; and (3) the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure. The university must release the remaining information.⁵

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

⁴Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting a decision from this office.

⁵We note the information being released includes the requestor’s client’s driver’s license and license plate information, to which the requestor has a right of access pursuant to section 552.023 of the Government Code. *See* Gov’t Code § 552.023(a) (person or person’s authorized representative has special right of access to information held by governmental body that relates to person and that is protected from public disclosure by laws intended to protect person’s privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov’t Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Thus, if the university receives another request for this information from a person who does not have such a right of access, section 552.130(c) authorizes the university to redact the requestor’s client’s driver’s license and license plate information without seeking a decision from this office.

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script, appearing to read "Miriam A. Khalifa".

Miriam A. Khalifa
Assistant Attorney General
Open Records Division

MAK/akg

Ref: ID# 517736

Enc. Submitted documents

c: Requestor
(w/o enclosures)