



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

May 16, 2016

Ms. Vanessa A. Gonzalez  
Counsel for Baylor University  
Bickerstaff Heath Delgado Acosta, L.L.P.  
Building One, Suite 300  
3711 South MoPac Expressway  
Austin, Texas 78746

OR2016-11239

Dear Ms. Gonzalez:

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# 608288.

The Baylor University Police Department (the "department"), which you represent, received a request for all records of two specified sexual assault investigations as well as certain information pertaining to all sexually-related offenses for a specified time period. The department also received a second request for all sexually-related offenses for the specified time period (the "second requestor"). The department claims some of the requested information is not subject to the Act. Additionally, the department claims the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.<sup>1</sup> We have also received and considered comments submitted on behalf of the second requestor. *See* Gov't Code § 552.304 (permitting

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<sup>1</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a 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 that those records contain substantially different types of information than that submitted to this office.

interested third party to submit to attorney general reasons why requested information should or should not be released).

We note the 84th Legislature added section 51.212(f) of the Education Code, which reads as follows:

(f) A campus police department of a private institution of higher education is a law enforcement agency and a governmental body for purposes of [the Act], only with respect to information relating solely to law enforcement activities.

Educ. Code § 51.212(f). We understand the department is a campus police department of a private institution of higher education. *See id.* §§ 51.212(e), 61.003. Thus, the department is a governmental body for purposes of the Act, and information maintained by the department is subject to disclosure under the Act, to the extent such information relates solely to law enforcement activities. Some of the requested information, including some of the submitted information, was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2015-24446 (2015) and 2016-02971 (2016). In Open Records Letter Nos. 2015-24446 and 2016-02971, we determined, in part, the information at issue was related solely to law enforcement activities and, thus, subject to the Act in its entirety. Although the department again states it created and maintains the information at issue in those rulings for law enforcement purposes, the department now asserts some of this information does not relate solely to law enforcement activities because the information is also maintained in duplicate by the Judicial Affairs Office or Title IX Office of Baylor University (collectively, the “offices”) and, thus, is not subject to release under the Act pursuant to section 51.212(f). Nevertheless, the information at issue in those previous rulings involves investigations by the department of possible criminal violations. *See* Penal Code §§ 22.011, .021 (sexual assault; aggravated sexual assault). Therefore, we find this information relates “solely to law enforcement activities” for purposes of section 51.212(f) of the Education Code and, thus, is subject to the Act.

As previously noted, in its request for a ruling from this office in Open Records Letter No. 2015-24446, the department submitted a number of offense reports in their entirety, with the exception of certain student-identifying information it redacted under the Family Educational Rights and Privacy Act (“FERPA”), section 1232g of title 20 of the United States Code. In Open Records Letter Nos. 2015-24446 and 2016-02971, we also determined, in part, FERPA was not applicable to the information at issue because it consisted of law enforcement records that were maintained and created by the department for a law enforcement purpose. The department now indicates it is withholding some of the requested offense reports in their entireties pursuant to FERPA. *See* Gov’t Code § 552.026 (incorporating FERPA into the Act); *see also id.* § 552.114 (excepting from disclosure “student records”); Open Records Decision No. 539 (1990) (determining same analysis applies under section 552.114 of Government Code and FERPA). The department states it

created and maintains the information at issue for a law enforcement purpose. As previously discussed in Open Records Letter Nos. 2015-24446 and 2016-02971, although 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, 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. However, the department informs us some of the responsive information is also maintained by the offices, which are components of an educational agency. Thus, the department contends this information is subject to FERPA because it is not maintained exclusively by the department. However, this information is maintained separate and apart from the records of the offices. Further, the requests for information were made to the department, and the requestors seek law enforcement records that the department created and maintained for a law enforcement purpose, rather than student records maintained by the offices.<sup>2</sup> Accordingly, none of the previously requested information is encompassed by FERPA, and the department may not withhold any of it on that basis.

Nevertheless, in Open Records Letter No. 2015-24446, we also determined the department (1) with the exception of basic information, may withhold certain information under section 552.108(a)(1) of the Government Code and certain information under section 552.108(a)(2) of the Government Code; (2) must withhold certain information under section 552.101 of the Government Code in conjunction with common-law privacy; and (3) must release the remaining requested information. Further, in Open Records Letter No. 2016-02971, we determined the department must withhold the information at issue in its entirety under section 552.101 in conjunction with common-law privacy because the requestor knew the identities of the alleged victims of sexual assault. As this office has long held, information that either identifies or tends to identify a victim of sexual assault or other sex-related offense is highly intimate or embarrassing and of no legitimate public interest. *See* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1992). The department asserts there is no change in the circumstances concerning the requestors' knowledge of the identities of the victims at issue in Open Records Letter No. 2016-02971 because the names of the victims involved are available in the media. Thus, the department asserts withholding only the victims' identifying information would not preserve the victims' common-law rights to privacy. Conversely, counsel for the second requestor asserts the second requestor has no knowledge of the victims' identities. Whether the current requestors know the identities of the victims at issue in Open Records Letter No. 2016-02971 is a question of fact. This office is unable to resolve factual disputes in the open records ruling process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where a fact issue cannot

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<sup>2</sup>We note this ruling does not address the public availability of any records maintained by the offices, and the offices are not required to release any information in response to this request.

be resolved as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our decision, or upon those facts that are discernible from the documents submitted for our inspection. *See* ORD 552 at 4. Accordingly, we have no indication the law, facts, or circumstances on which the prior rulings were based have changed. Therefore, the department must continue to rely on Open Records Letter Nos. 2015-24446 and 2016-02971 as previous determinations and withhold or release the identical information in accordance with those rulings.<sup>3</sup> *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, you indicate the information submitted in Exhibits B5, B6, and B7 is not subject to previous rulings. Thus, we will address the exceptions you claim for this information.

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 the common-law right of privacy, which protects information if it (1) 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, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683.

In Open Records Decision No. 393 (1983), this office concluded generally, only information that either identifies or tends to identify a victim of sexual assault or other sex-related offense may be withheld under common-law privacy; however, because the identifying information was inextricably intertwined with other releasable information, the governmental body was required to withhold the entire report. ORD 393 at 2; *see* Open Records Decision No. 339 (1982); *see also 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); Open Records Decision No. 440 (1986) (detailed descriptions of serious sexual offenses must be withheld).

Further, in considering whether a public citizen’s date of birth is private, the Third Court of Appeals looked to the supreme court’s rationale in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336 (Tex. 2010). *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at \*3 (Tex. App.—Austin May 22, 2015, pet.

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<sup>3</sup>As our ruling is dispositive, we need not address your arguments against disclosure of this information.

denied) (mem. op.). The supreme court concluded public employees' dates of birth are private under section 552.102 of the Government Code because the employees' privacy interest substantially outweighed the negligible public interest in disclosure.<sup>4</sup> *Tex. Comptroller*, 354 S.W.3d at 347-48. Based on *Texas Comptroller*, the court of appeals concluded the privacy rights of public employees apply equally to public citizens, and thus, public citizens' dates of birth are also protected by common-law privacy pursuant to section 552.101. *City of Dallas*, 2015 WL 3394061, at \*3.

Additionally, this office has also found that a compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. We note information relating to routine traffic violations is not excepted from release under section 552.101 in conjunction with common-law privacy. *Cf. Gov't Code* § 411.082(2)(B).

Upon review, we find a portion of the information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. The department must withhold the identifying information of the sexual assault victim we marked under section 552.101 of the Government Code in conjunction with common-law privacy.<sup>5</sup> We have marked additional information, including dates of birth, in these exhibits that must be withheld on this basis. However, we note the remaining information contains the date of birth of an individual who has been de-identified and whose privacy interests are, thus, protected. We also find you have failed to demonstrate the remaining information is highly intimate or embarrassing and of no legitimate public interest. Thus, the department may not withhold the remaining information in Exhibits B5, B6, and B7 under section 552.101 in conjunction with common-law privacy.

Section 552.130 of the Government Code provides that 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.<sup>6</sup> Gov't

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<sup>4</sup>Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a).

<sup>5</sup>We note the second requestor has specifically excluded identifying information from his request.

<sup>6</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See Open Records Decision No. 481 (1987), 480 (1987), 470 (1987).*

Code § 552.130. The department must withhold the information we have marked in Exhibits B5, B6, and B7 under section 552.130 of the Government Code. The remaining information in these exhibits must be released.

The department indicates it is withholding the remaining responsive information in its entirety pursuant to FERPA. *See* Gov't Code § 552.026; *see also id.* § 552.114; ORD 539. As previously noted, 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.<sup>7</sup> Such determinations under FERPA must be made by the educational authority in possession of the education records. 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”). The department asserts the remaining information at issue is subject to FERPA and has not submitted this information to our office for review. Because the department has not submitted this information to our office for review to determine if this information consists of a law enforcement record to which FERPA does not apply, we must rely on the department’s assertion this information is subject to FERPA.<sup>8</sup> Questions regarding the applicability of FERPA should be directed to the United States Department of Education Family Policy Compliance Office at (202) 260-3887.

In summary, the department must continue to rely on Open Records Letter Nos. 2015-24446 and 2016-02971 as previous determinations and withhold or release the identical information in accordance with those rulings. The department must withhold the information we marked in Exhibits B5, B6, and B7 under section 552.101 of the Government Code in conjunction with common-law privacy and section 552.130 of the Government Code. The department must release the remaining submitted information to the respective requestors.

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.

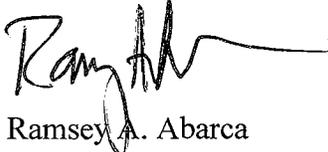
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<sup>7</sup>A copy of this letter may be found on the Office of the Attorney General’s website: <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

<sup>8</sup>As previously noted, 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.

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](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,

A handwritten signature in black ink, appearing to read "Ramsey A. Abarca", with a long horizontal flourish extending to the right.

Ramsey A. Abarca  
Assistant Attorney General  
Open Records Division

RAA/dls

Ref: ID# 608288

Enc. Submitted documents

c: 2 Requestors  
(w/o enclosures)