



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

September 30, 1994

Mr. Walter C. Schwartz  
President  
Blinn College  
902 College Avenue  
Brenham, Texas 77833

OR94-637

Dear Mr. Schwartz:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552 (formerly V.T.C.S. art. 6252-17a).<sup>1</sup> We assigned your request ID# 27375.

Blinn College (the "college") has received a request for information relating to a certain complaint. Specifically, the requestor seeks:

1. A true and factual copy of Mr. Trant's response to my formal complaint on discrimination.
2. A list of all students in my accounting class of the Spring Semester 1994, excluding SSN, date of birth.
3. A detailed report on the investigations, proceedings[,] rules and regulations to include details of who, what, when, where, how and why.
4. A detailed document from each person involved in this case as to their involvement in this case.

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<sup>1</sup>We note that the Seventy-third Legislature repealed V.T.C.S. article 6252-17a. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

5. A list of students from Mr. Walker's class which met prior to my class, excluding SSN and date of birth.

You advise us that information responsive to items 3 and 4 do not exist.<sup>2</sup> You object to release of the remaining information and claim that sections 552.101 and 552.103 of the Government Code exempt it from required public disclosure.

Section 552.101 of the Government Code exempts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You assert section 552.101 in conjunction with the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. FERPA provides the following:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein . . . ) of students without the written consent of their parents to any individual, agency, or organization . . . .

20 U.S.C. § 1232g(b)(1). "Education records" are records that

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

*Id.* § 1232g(a)(4)(A); *see also* Open Records Decision Nos. 462 (1987) at 14-15; 447 (1986). Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982); 206 (1978). We have reviewed the records submitted for our review and conclude that some of the information identifies a particular student. We have marked the information that the college must withhold pursuant to the FERPA confidentiality provisions.

You also seek to withhold under FERPA the requested student roster information. Student roster information generally falls within the definition of "directory information." The general prohibition against release of student information does not apply to "directory information." "Directory information" may be released under FERPA after compliance with notice requirements that afford affected students the right to object to

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<sup>2</sup>The Open Records Act does not ordinarily require a governmental body to create information that does not exist, *see, e.g.*, Open Records Decision No. 572 (1990), release information that it does not possess, *see, e.g.*, Open Records Decision No. 558 (1990), or to prepare or compile information in a form requested by a member of the public, *see* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 483, 467 (1987).

the release of directory information relating to them. 20 U.S.C. § 1232g(a)(5)(B); *see also* Open Records Decision Nos. 244, 242 (1980); 229 (1979). "Directory information" includes, but is not limited to, the following:

the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

20 U.S.C. § 1232(g)(a)(5)(A). An educational institution may establish additional categories of directory information, provided that it complies with federal notice requirements. *See* 34 C.F.R. §§ 99.3, .37; *see also* Open Records Decision Nos. 244 (1980); 151 (1977). We conclude that the college, after complying with federal notice requirements, must release the requested roster information to the extent that it includes directory information as defined under FERPA.<sup>3</sup>

Next, we address your claim that section 552.103 of the Government Code exempts information responsive to item 1 from required public disclosure. Section 552.103(a) exempts from required public disclosure information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

Section 552.103(a) applies if litigation is pending or reasonably anticipated and the information relates to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). Although section 552.103(a) gives the attorney for a governmental body discretion to determine whether the governmental body should claim section 552.103(a), that determination is subject to the attorney general's review. Open Records Decision Nos. 551 (1990) at 5; 511 (1988) at 3. This office

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<sup>3</sup>Questions about FERPA can be directed to:

Family Policy Compliance Office  
Department of Education  
400 Maryland Avenue, S.W.  
Washington, D.C. 20202-4605  
(202) 732-1807

determines on a case-by-case basis whether a governmental body reasonably may anticipate litigation. Open Records Decision No. 452 (1986) at 4.

You claim that the college reasonably anticipates litigation because the requestor has filed a discrimination complaint against the college. This office has concluded that a reasonable likelihood of litigation exists when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, *see* Open Records Decision No. 551, and when a requestor hires an attorney who then asserts an intent to sue, *see* Open Records Decision No. 555 (1990). On the other hand, the mere fact that a requestor, on more than one occasion, publicly states an intent to sue does not trigger section 552.103(a). Open Records Decision No. 452.

You have provided no information which indicates that the requestor has done more than write a letter to the college complaining of alleged discrimination. Such is not sufficient for purposes of invoking section 552.103(a). We conclude, therefore, that the college may not withhold the requested information under section 552.103(a) of the Government Code. Except to the extent that FERPA prohibits its release, the college must release the requested information in its entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Loretta R. DeHay  
Assistant Attorney General  
Open Government Section

LRD/GCK/rho

Ref.: ID# 27375

Enclosures: Marked documents