



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

May 18, 1995

Mr. William J. Philbin  
College System Counsel  
Houston Community College System  
P.O. Box 7849  
Houston, Texas 77270-7849

OR95-284

Dear Mr. Philbin:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 30897.

The Houston Community College System (the "college") has received a request for information relating to a certain college employee. Specifically, the requestor seeks the following information:

1. [A] copy of a consultation report generated by Dr. Munns of the Texas Cosmetology Board relating to the cosmetology program and department at Houston Community College Central Campus. . . .
2. Any written documents, including but not limited to, letters from cosmetology students and/or parents which negatively reflect upon Elizabeth Jolivette. . . .

You object to release of information responsive to item 1, above, which you have submitted to us for review. You claim that sections 552.101, 552.102, 552.103, and 552.111 of the Government Code except this information from required public disclosure. As you do not comment on the remaining requested information, we presume that it has been or will be made available to the requestor. See Open Records Decision No. 363 (1983).

At the outset, we note that you are responsible for submitting in writing the reasons you believe the requested information is excepted from disclosure. Under the Open Records Act, all information held by governmental bodies is open to the public unless it is within a specific exception to disclosure. The custodian of records has the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). If a governmental body does not claim an exception or fails to show how it applies to the records, it will ordinarily waive the exception unless the information is deemed confidential by law. See Attorney General Opinion JM-672 (1987).

We note, however, that some of the information must not be released pursuant to sections 552.026 and 552.114 of the Government Code. Under section 552.114(a), information is excepted "if it is information in a student record at an educational institution funded wholly or partly by state revenue." Section 552.026 incorporates another source of law, specifically, the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), into the Open Records Act, providing that the act

does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026; see also Open Records Decision No. 431 (1985). 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 educational records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) . . .) 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 which:

- (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). Sections 552.114(a) and 552.026 may not be used to withhold entire documents; the school district must delete information only to the extent "reasonable and necessary to avoid personally identifying a particular student" or "one or both parents of such a student." Open Records Decision No. 332 (1982) at 3. Thus, only information identifying or tending to identify students or their parents must be withheld

from required public disclosure. We have marked the information that appears to be identifying information regarding students. If these individuals are not students as defined in FERPA, the names and identifying information must be released.

Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You do not assert section 552.101 in your brief, but have indicated the exception on portions of the document submitted to us for review with the notations "101-witness statement" and "101-violation of law." We are not aware that section 552.101, as a rule, protects a "witness statement" or information revealing a "violation of law," nor do you explain why section 552.101 might be applied in this case to except such information from disclosure. We conclude that in this case section 552.101 does not except from disclosure the information marked as "witness statement" or "violation of law." Accordingly, the college may not withhold the submitted information from disclosure under section 552.101 of the Government Code.<sup>1</sup>

Section 552.102 excepts "information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." While you assert section 552.102 in your brief, you have not indicated which portions of the submitted document you seek to protect under section 552.102. Section 552.102 protects information only if its release would cause an invasion of privacy under the test articulated for section 552.101 by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). *See Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Under the *Industrial Foundation* case, information must be withheld on common-law privacy grounds only if it is highly intimate or embarrassing and is of no legitimate concern to the public. *See also* Open Records Decision No. 343 (1982) (concluding that information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/seizures, or emotional/mental distress is protected by common-law privacy). Generally, the public has a legitimate interest in the job qualifications and job performance of public employees. Open Records Decision Nos. 470 (1987), 467 (1987). We have examined the information submitted to us for review and conclude that most of the information is of

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<sup>1</sup> Federal law may prohibit disclosure of the social security numbers included in this request for records. A social security number is excepted from required public disclosure under section 552.101 of the act in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(vii), *if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. See* Open Records Decision No. 622; *see also* 42 U.S.C. § 405(c)(2)(C)(v) (governing release of social security number collected in connection with the administration of any general public assistance, driver's license or motor vehicle registration law). Based on the information you have provided, we are unable to determine whether the social security numbers at issue are confidential under this federal statute. We note, however, that section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information. Therefore, prior to releasing any social security number information, the college should ensure that the information is not confidential under this federal statute.

legitimate public concern. We have marked the information that the college must withhold on the basis of common-law privacy. The remaining information may not be withheld under section 552.102 of the Government Code.

Next, we address your assertion that section 552.103(a) excepts the submitted information from required public disclosure. For information to be excepted from public disclosure by section 552.103(a), litigation must be pending or reasonably anticipated and the information must relate 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.); see also Open Records Decision No. 551 (1990) at 5. A surmise that litigation will occur is not enough; there must be some concrete evidence pointing to litigation. Attorney General Opinion JM-266 (1984) at 4; Open Records Decision Nos. 518 (1989) at 5, 328 (1982);

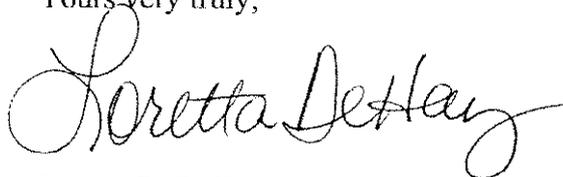
You do not explain how litigation is pending or reasonably anticipated, but state merely that "[t]he report is currently the basis of an ongoing investigation regarding Ms. Jolivette's work activities to include an analysis of whether she has complied with our policies and state laws and regulations." Obviously, an investigation into wrongdoing is not in itself litigation, nor is it always grounds to reasonably anticipate litigation. We conclude that you have failed to establish the applicability of section 552.103(a) of the Government Code in this instance. Accordingly, you may not withhold the submitted information under section 552.103(a).

Finally, we address your assertion that section 552.111 of the Government Code excepts some of the requested information from required public disclosure. Section 552.111 excepts "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In a recent opinion that reexamined section 552.111, this office concluded that it excepts from public disclosure only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body at issue. Open Records Decision No. 615 (1993) at 5. The policymaking functions of an agency, however, do not encompass routine internal administrative and personnel matters. *Id.* Furthermore, section 552.111 does not except purely factual information from disclosure. *Id.*

You have submitted to us for review a document titled "Evaluation Report: Central Campus Houston Community College" and have marked the information that you believe to be excepted under section 552.111. We agree that some of the marked information constitutes internal communications consisting of advice, recommendations, and opinions reflecting the policymaking process of the college. We have marked in red brackets the information that the college may withhold under section 552.111 of the Government Code. However, except as noted above, the college must promptly release the remainder of the requested information in its entirety.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in cursive script that reads "Loretta DeHay". The signature is written in black ink and is positioned above the typed name.

Loretta R. DeHay  
Assistant Attorney General  
Open Government Section

LRD/GCK/rho

Enclosures: Marked documents

Ref.: ID# 30897

cc: Mr. Carleton C. Casteel  
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(w/o enclosures)