



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

March 26, 1996

Mr. Lamar Urbanovsky  
Chancellor  
The Texas State University System  
William P. Hobby Building  
333 Guadalupe, Tower III, Suite 810  
Austin, Texas 78701-3942

OR96-0415

Dear Mr. Urbanovsky:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 38633.

Sam Houston State University (the "university") received a request for information concerning the evaluation records used to award compensation for merit during 1993-94 and 1994-95 for the Department of Health & Kinesiology faculty. You contend that portions of the requested information may be excepted from required public disclosure under sections 552.102 and 552.111 of the Government Code.

Section 552.301(a) of the Open Records Act provides that:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the exceptions under Subchapter C must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions. The governmental body must ask for the attorney general's decision *and state the exceptions that apply* within a reasonable time but not later than the 10th calendar day after the date of receiving the written request.

Section 552.302 provides that:

If a governmental body does not request an attorney general decision as provided by Section 552.301(a), the information requested in writing is presumed to be public information.

Where requests are not made within ten days, the information is presumed to be public. Open Records Decision No. 319 (1982). A governmental body must show a compelling reason to overcome this presumption, for example, that the information is confidential under some other source of law or that third-party privacy interests are at stake. *Id.*; see *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ).

The request for information is dated January 22, 1996. The university's request to the attorney general for a determination is dated February 6, 1996 and was received by this office on February 6, 1996. The tenth day was February 1, 1996. As the university did not meet the ten-day deadline required under section 552.301(a), the information is presumed to be public. You have waived the discretionary exception you raise, section 552.111 of the Government Code.<sup>1</sup> However, as section 552.102 implicates the privacy interests of third parties, we will address the applicability of this section. Furthermore, it appears that some of the records requested may implicate the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, or section 552.114 of the Government Code.

This office has recently issued Open Records Decision No. 634 (1995), which concluded: (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception.

We remind you that only "education records" as defined under FERPA may be withheld from required public disclosure. "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.

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<sup>1</sup>We note that since Open Records Letter No. 92-89 (1992), which you reference in your brief, this office issued Open Records Decision No.615 (1993) in response to *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ). Open Records Decision No.615 (1993) overrules prior attorney general opinions to the extent they conflict with the interpretation of section 552.111 in light of the court's decision in *Gilbreath*.

20 U.S.C. § 1232g(a)(4)(A); *see also* Open Records Decision Nos. 462 (1987), 447 (1986). Moreover 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).<sup>2</sup> If you have questions as to the applicability of FERPA to information that is the subject of an open records request, you may consult with the United States Department of Education’s Family Policy Compliance Office. *See* Open Records Decision No. 634 (1995) at 4 n.6, 8 n.9.

Section 552.102 excepts:

(a) . . . information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, except that all information in the personnel file of an employee of a governmental body is to be made available to that employee or the employee’s designated representative as public information is made available under this chapter. . . .

(b) . . . a transcript from an institution of higher education maintained in the personnel file of a professional public school employee, except that this section does not exempt from disclosure the degree obtained or the curriculum on a transcript in the personnel file of the employee.

Section 552.102 protects personnel file information only if its release would cause an invasion of privacy under the test articulated for common-law privacy under section 552.101. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546, 550 (Tex. App.-Austin 1983, writ ref’d n.r.e.) (ruling that test to be applied in decision under statutory predecessor to § 552.102 was same as that delineated in *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) for statutory predecessor to § 552.101). Information is protected from public disclosure under the common-law right of privacy as section 552.101 incorporates it if

(1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

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<sup>2</sup>*But see* 20 U.S.C. § 1232g(a)(1)(A), (d) (parent or adult student has affirmative right of access to that student’s education records). *See also* Open Records Decision No.431 (1985) (Open Records Act’s exceptions to required public disclosure do not authorize withholding of “education records” from adult student). We note that FES Form 2, the student evaluations of faculty members, does not appear on its face to include any identifying information concerning the individual students. However, we remind the university that identifying student information, such as handwritten comments, may be released only in accordance with FERPA and section 552.114 as stated above.

*Industrial Found.*, 540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing statutory predecessor to § 552.101).

In the *Industrial Foundation* case, the Texas Supreme Court considered intimate and embarrassing information such as that 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. *Industrial Found.*, 540 S.W.2d at 683. The *Hubert* court distinguished the information at issue there, names of candidates for the office of president of a university, from the information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation*. *Hubert*, 652 S.W.2d at 551 (discussing *Industrial Found.*, 540 S.W.2d at 683). As in the *Hubert* case, the information you submitted as a representative sample is distinguishable from the "intimate and embarrassing" information at issue in *Industrial Foundation*. See also Open Records Decision Nos. 473 (1987) (even highly subjective evaluations of public employees may not ordinarily be withheld under § 552.102). Furthermore, a public employee's job performance does not generally constitute his *private* affairs. Open Records Decision No. 470 (1987). Accordingly, you may not withhold the requested information under section 552.102 of the Government Code.<sup>3</sup>

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 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Todd Reese  
Assistant Attorney General  
Open Records Division

RTR/LBC/ch

Ref: ID# 38633

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<sup>3</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 No.499 (1988), 497 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office. We note that a third party's privacy interests are a compelling reason for withholding information. Open Records Decision No.319 (1982); see *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ). If the university has other specific information that it wishes to withhold under common-law privacy, the university should submit that specific information to this office for a determination.

Enclosures: Open Records Decision No. 634 (1995)  
Submitted documents

cc: Ms. Brenda Lichtman  
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Huntsville, Texas 77341  
(w/ enclosure Open Records Decision No. 634 (1995); w/o submitted documents)

