



September 5, 2000

Mr. Robert A. Schulman  
Schwartz & Eichelbaum, P.C.  
Attorneys At Law  
800 Brazos Street, Suite 870  
Austin, Texas 78701

OR2000-3431

Dear Mr. Schulman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 138634.

The San Felipe Del Rio Consolidated Independent School District (the "district"), which you represent, received a request for any and all correspondence, notes, and documentation regarding a named individual that support any and all of his: 1) coach in need of assistance plan; 2) teacher in need of assistance plan; 3) intervention plan; and 4) growth plan, and a copy of the tapes of the Level II hearing that occurred on Monday, June 12, 2000. You state that most of the material responsive to the request has already been released. You claim that the submitted information, Exhibits B, C, and D, is excepted from disclosure under sections 552.026, 552.101, and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by Family Education Rights and Privacy Act ("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. In this instance, however, you have submitted the documents at issue to

this office for consideration. Therefore, we will consider whether these documents are excepted from disclosure under sections 552.026 and 552.114 of the Government Code.

“Education records” under FERPA 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.

Information must be withheld from required public disclosure under FERPA only to the extent “reasonable and necessary to avoid personally identifying a particular student.” See Open Records Decision Nos. 332 (1982), 206 (1978). You state that Exhibits B, C, and D contain education records as defined by FERPA. You state the Exhibit B should be withheld in its entirety as it contains documents that are in the handwriting of students. You state that Exhibits C and D should be withheld in their entirety as the exhibits contain information that taken as a whole personally identifies particular students. After reviewing Exhibits B, C, and D, we find that these exhibits contain student records for the purposes of FERPA. Further, we agree that Exhibit B should be withheld in its entirety as it contains handwritten documents created by students. See Open Records Decision No. 224 (1979) (student’s handwritten comments would make identity of student easily traceable and such comments are therefore excepted by statutory predecessor to section 552.114). We also agree with most of the markings you have made in Exhibits C and D. In those instances, where we disagree with your markings, we have marked the information for release. We have marked additional types of information contained in Exhibits C and D that may reveal or tend to reveal information about a student that must be withheld pursuant to FERPA. The remaining information in Exhibits C and D must not be withheld under FERPA.

Next you state that Exhibits C and D must be excepted from public disclosure pursuant to section 552.101 because of the personally intimate character of the information contained in the exhibits. Section 552.101 encompasses the common law and constitutional rights to privacy. Common law privacy excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992).

The constitutional right to privacy protects two interests. Open Records Decision No. 600 at 4 (1992) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). The first is the interest in independence in making certain important decisions related to the “zones of privacy” recognized by the United States Supreme Court. Open Records Decision No. 600 at 4 (1992). The zones of privacy

recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.* The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. *See* Open Records Decision No. 455 at 5-7(1987) (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." *See* Open Records Decision No. 455 at 5 (1987) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986).

After careful review, we do not believe that Exhibits C and D contain the type of information that may be excepted from public disclosure pursuant to section 552.101 in conjunction with common law or constitutional privacy. Therefore, the district must release the remainder of Exhibits C and D to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839.

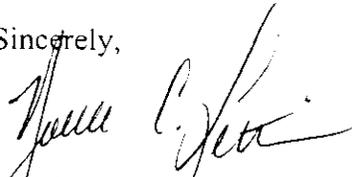
The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Noelle C. Letteri  
Assistant Attorney General  
Open Records Division

NCL/pr

Ref: ID# 138634

Encl. Submitted documents

cc: Mr. Michael J. Currie  
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P. O. Box 1489  
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(w/o enclosures)