



September 22, 2000

Ms. R. Yvette Clark
General Counsel
Stephen F. Austin State University
P. O. Box 13065, SFA Station
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OR2000-3687

Dear Ms. Clark:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 139283.

Stephen F. Austin State University (the “university”) received a request for a faculty member’s entire personnel file and for the class rosters and grade distributions of each class the member has taught in the past three years. You have released most of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.026, 552.101, 552.102, 552.114, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

First we address your claim that the documents stamped 55 through 60 and documents represented by the pages stamped 81 and 82 contain information which may qualify as student education records.¹ The federal Family Educational Rights and Privacy Act of 1974 (“FERPA”), 20 U.S.C. § 1232g, and section 552.026 of the Government Code provide that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student’s education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student, if 18 or older or attending a post-secondary educational institution. *See* 20 U.S.C.

¹We 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). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than those submitted to this office.

§ 1232g(b)(1). "Education records" means those records that contain information directly related to a student and 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), 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). You must withhold any information that identifies students. We agree that the handwritten document, stamped 55, must be withheld entirely. *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). The student-identifying information must be redacted, as you have done, on documents stamped 56 through 60. We conclude that the redactions you have made are sufficient to avoid personally identifying a particular student, so those documents must be released as redacted. The document stamped 81 indicates grade distributions. We find that the information relating to only one course would identify a particular student, so you must withhold only that information, as we have marked. The university must release that page as redacted.

Additionally, FERPA provides that "directory information" may be released to the public if the institution or agency complies with section 1232g(a)(5)(B) of title 20 of the United States Code. "Directory information" includes 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. § 1232g(a)(5)(A). Section 1232g(a)(5)(B) provides as follows:

[a]ny educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

20 U.S.C. § 1232g(a)(5)(B). This office has previously held that a class roster is directory information. *See* Open Records Decision No. 244 (1980). The document stamped 82 is a class roster. Accordingly, the university must release that page, after complying with federal notice requirements for release of directory information. *Id.*

We note that you state that you have withheld the academic and student records of the faculty member *as a student* under section 552.114 and FERPA. You have not requested a decision from this office regarding those records and have not submitted them for our review. Therefore, we have no basis to reach any conclusions regarding those records. However, an educational institution may withhold from public disclosure personally identifiable nondirectory information in "education records" as defined in FERPA, without the necessity

of requesting an attorney general decision as to that exception, and an educational institution that is also state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," without the necessity of requesting an attorney general decision. Open Records Decision No. 634 (1995).² If you have further 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 at 4 n.6, 8 (1995).

You state that you have released information from the Vice President for Academic Affairs file, with the faculty member's social security number, home phone number, and home address redacted under section 552.117(1) in accordance with an election made under section 552.024. You also seek to withhold the faculty member's social security number, home phone number, home address, and family member information from documents submitted to us, stamped 61 through 80. Section 552.117(1) of the Government Code excepts from required public disclosure the home addresses, home telephone numbers, social security numbers, or family member information of public employees who request that this information be kept confidential under section 552.024. Therefore, section 552.117(1) requires you to withhold this information if a current or former employee or official requested that this information be kept confidential under section 552.024. See Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold this information of a current or former employee who made the request for confidentiality under section 552.024 after this request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 at 5 (1989).

Among the submitted documents is one titled "New Employee Data," which contains an "Open Records Selection." That selection indicates that the employee has elected not to permit access to his home address and home telephone number. No election regarding social security number or family member information is apparent. If this employee has not elected to keep his social security number or family member information confidential, that information is not protected by section 552.117. Furthermore, section 552.024 does not

²In Open Records Decision No. 634 (1995), we cautioned educational agencies and institutions not to submit to this office any education records that might be confidential under FERPA without first either obtaining parental or student consent, as applicable, to the disclosure of personally identifiable nondirectory information in the records or editing the records to ensure that they contained no personally identifiable nondirectory information. *Id.* at 11. Subsequent to that decision, the Attorney General was advised that educational agencies and institutions may submit to this office information that is encompassed by FERPA, including personally identifiable nondirectory information, for purposes of obtaining rulings as to whether any of the submitted information must be withheld from disclosure under either federal or state law. See Office of the Attorney General, 2000 PUBLIC INFORMATION HANDBOOK at 124 n.593, (citing Letter from LeRoy S. Rooker, Director, Family Policy Compliance Office, United States Department of Education, to David Anderson, Chief Counsel, Texas Education Agency (April 29, 1998)).

provide an employee the option to make his date of birth confidential; therefore, the date of birth is not protected from required disclosure by section 552.117(1).

Social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered confidential by law, either constitutional, statutory, or by judicial decision." A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the records here are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained pursuant to any provision of law enacted on or after October 1, 1990.

You also assert that section 552.101 or 552.102 may require withholding the highlighted information. Section 552.101 encompasses confidentiality provisions such as section 6103(a) of title 26 of the United States Code. Section 6103(a) renders tax return information confidential. The term "return information" includes "the nature, source, or amount of income" of a taxpayer. 26 U.S.C. § 6103(b)(2). This term has been interpreted by federal courts to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *Mallas v. Kolak*, 721 F. Supp 748 (M.D.N.C. 1989); *Dowd v. Calabrese*, 101 F.R.D. 427 (D.C. 1984). Our office has specifically held that W-4 forms must be withheld in their entirety. Open Records Decision No. 600 at 9 (1992); *see also* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 226 (1979) (W-2 forms). Therefore, you must withhold the submitted W-4 forms under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

We also note that the document stamped 61 is an Employment Eligibility Verification, Form I-9. Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that the form "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Release of this document under the Public Information Act would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that Form I-9 is confidential under section 552.101 and may only be released in compliance with the federal laws and regulations governing the employment verification system.

We also find that certain information contained in the records submitted is confidential under Title I of the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101 *et seq.* The ADA provides that information about the medical conditions and medical histories of applicants or employees must be 1) collected and maintained on separate forms, 2) kept in separate medical files, and 3) treated as a confidential medical record. In addition, information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his job, is to be treated as a confidential medical record. 29 C.F.R. § 1630.14(c). *See also* Open Records Decision No. 641 (1996). The Equal Employment Opportunity Commission (the "EEOC") has determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). We have marked the information that the university must withhold under section 552.101 and the ADA.

Section 552.101 also encompasses common law privacy and excepts from disclosure private facts about an individual. Section 552.102 of the Government Code protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The protection of section 552.102 is the same as that of the common law right to privacy under section 552.101. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Information may be withheld from the public under the common law right of privacy 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. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision No. 611 at 1 (1992). The date of birth of the faculty member is not intimate or embarrassing; therefore, that information must be released.

Financial information concerning an individual is in some cases protected by a common law right of privacy. *See* Open Records Decision Nos. 545 (1990), 523 (1989). A previous opinion of this office states that "all financial information relating to an individual . . . ordinarily satisfies the first requirement of common law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities." Open Records Decision No. 373 at 3 (1983). However, information regarding a financial transaction between a person and a governmental body is a matter of legitimate public interest; thus the second prong of the *Industrial Foundation* test is not met and the doctrine of common law privacy does not protect this information from disclosure. Open Records Decision No. 385 at 2 (1983). For example, this office has held that an employee's required participation in the Texas Municipal Retirement System or in a group insurance plan funded by the governmental body is not excepted from disclosure under common law privacy. Open Records Decision Nos. 600 at 9-10 (1992), 480 (1987). On the other hand, we have previously determined that

information revealing the designation of beneficiaries of insurance and retirement funds is not considered a financial transaction between the individual and the governmental body and is confidential under the right of privacy. Open Records Decision No. 600 at 10 (1992). Also, a public employee's participation in a voluntary investment program or deferred compensation plan that is not funded by the governmental body is confidential. Open Records Decision No. 545 (1990). Therefore, documents stamped 70, 71, 74, and 76 through 80 must be withheld. We have also marked some information in the remaining documents which must be withheld under section 552.101 and common law privacy.

Finally, the submitted documents include information excepted under section 552.130 of the Government Code. This section governs the release and use of information obtained from motor vehicle records, and provides in relevant part:

(a) Information is excepted from [required public disclosure] if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]

You must withhold the driver's license numbers from the submitted information pursuant to section 552.130, and you must withhold the photocopy of the Texas driver's license on the document stamped 65.

In summary, you must withhold any information which identifies a student, in accordance with section 552.101 in conjunction with FERPA. You must withhold any section 552.117(1) information that the employee timely elected to keep confidential under section 552.024. You must withhold the I-9 and W-4 forms, stamped 61 through 63, under section 552.101 in conjunction with federal law. You must withhold the information we have indicated under section 552.101 and the ADA. You must withhold Texas driver's license numbers and the photocopy of the Texas driver's license under section 552.130. You must withhold documents stamped 70, 71, 74, and 76 through 80 under section 552.101 and common law privacy. You may be required to withhold the social security numbers under section 552.101 in conjunction with federal law. You must release the remaining information, as redacted.

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,



Patricia Michels Anderson
Assistant Attorney General
Open Records Division

PMA/ljp

Ref: ID# 139283

Encl. Marked documents

cc: Ms. Claudia Fields-Jones
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(w/o enclosures)