



May 14, 2001

Mr. S. Anthony Safi  
Mounce, Green, Myers, Safi & Galatzan  
P.O. Box 1977  
El Paso, Texas 79950-1977

OR2001-1978

Dear Mr. Safi:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 147151.

The El Paso Independent School District (the "district") received a written request for records pertaining to an investigation of public lewdness conducted by the district's police department. You contend that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.130, and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You contend that all information in the documents at issue that reveals the identity of a student is excepted from disclosure under section 552.101 of the Government Code in conjunction with the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. In this regard, section 552.026 of the Government Code provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with [FERPA].

FERPA provides 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. *See* 20 U.S.C. § 1232g(d). “Education records” are 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). 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).

After reviewing the information at issue, we conclude that the following documents, as you described them in your brief, constitute “education records” under FERPA: the “one-page memorandum dated February 16, 2001,” the “one-page ‘Incident Report’ dated February 16, 2001,” and the “four pages of handwritten notes made by the District Compliance Officer as part of his investigation of this matter.” Consequently, the district must withhold these records in their entirety until such time that it receives from the student an authorization that comports with the requirements of FERPA. *See id.* § 1232g(b)(2)(A) (requiring specification of records to be released and the reasons for such release).

Please note, however, the district police department records submitted to this office do not constitute “education records” for purposes of FERPA. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); Open Records Decision No. 612 (1992) (term “education records” does not include records maintained by law-enforcement unit of educational agency or institution created by that law-enforcement unit for purpose of law enforcement). Consequently, no information contained in the law-enforcement records, including the student’s identity, is excepted from public disclosure under FERPA.

You next contend that certain information contained in the “El Paso County Detention Facility Arrest Supplement” is excepted from public disclosure pursuant to section 552.102 of the Government Code. Section 552.102(a) is designed to protect public employees’ personal privacy. The scope of section 552.102(a) protection, however, is very narrow. *See* Open Records Decision No. 336 (1982); *see also* Attorney General Opinion JM-36 (1983). The test for section 552.102(a) protection is the same as that for information protected by common law privacy under section 552.101: the information must contain highly intimate or embarrassing facts about a person’s *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref’d n.r.e.). This office has held that section 552.102(a) may be invoked only when information reveals “intimate details of a highly personal nature.” Open Records Decision No. 315 (1982).

In *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977), the Texas Supreme Court held that common law privacy protects information that relates 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. 540 S.W.2d at 683. This office has also determined that common law privacy protects the following information: the kinds of prescription drugs a person is taking, Open Records Decision No. 455 (1987); the results of mandatory urine testing, *id.*; illnesses, operations, and physical handicaps of applicants, *id.*; the fact that a person attempted suicide, Open Records Decision No. 422 (1984); the names of parents of victims of sudden infant death syndrome, Attorney General Opinion JM-81 (1983); and information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/seizures, or emotional/mental distress. Open Records Decision No. 343 (1982). We agree that the district must withhold pursuant to section 552.102 the portions of the arrest supplement showing the "Suspect's Physical Condition" and "Officer's Remarks" as information that is highly intimate or embarrassing and is of no legitimate concern to the public.

You also contend that the five district police department records at issue, which pertain to the criminal investigation of public lewdness, are excepted from public disclosure pursuant to section 552.108 of the Government Code. Section 552.108(a)(1) excepts from public disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime." You state that the criminal prosecution of the lewdness charge is pending "at this time." Based on this representation, we conclude that you have established that the release of the five district law enforcement records would interfere with law enforcement efforts and that the district therefore may withhold most of the information contained in these records pursuant to section 552.108(a)(1) of the Government Code. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976).

Section 552.108 does not, however, except from required public disclosure "basic information about an arrested person, an arrest, or a crime." Gov't Code § 552.108(c). We therefore conclude that, except for the information discussed below, the district must release these types of information, including a detailed description of the offense and of the arrest, in accordance with *Houston Chronicle*.

Although the identity of a complainant is normally considered basic information under *Houston Chronicle*, you contend that the identities of the "reporter" and the "complainant" are excepted from required public disclosure pursuant to section 552.131 of the Government Code, as enacted by House Bill 211. *See* Act of May 30, 1999, 76<sup>th</sup> Leg., R.S., ch. 1335, § 6, 1999 Tex. Gen. Laws 4543, 4545 (codified at Gov't Code § 552.131). Section 552.131, as enacted by House Bill 211, provides in pertinent part as follows:

- (a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's

or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

(c) Subsection (b) does not apply:

- (1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or
- (2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or
- (3) if the informer planned, initiated, or participated in the possible violation.

As noted above, the district police department documents pertain to a criminal investigation of an alleged instance of public lewdness. After reviewing the information at issue, we conclude that both the "reporter" and the "complainant" "furnished a report of another person's or persons' possible violation of criminal . . . law to the school district." Furthermore, neither of these individuals "planned, initiated, or participated in the possible violation." Gov't Code § 552.131(c)(3). We therefore conclude that you have properly invoked section 552.131 in this instance. Assuming neither of these individuals has consented to the release of their respective identities, we conclude that the district must withhold pursuant to section 552.131 of the Government Code the identities of the "reporter" and "complainant" identified in the district law enforcement records. Additionally, the district must also withhold these individuals' identities contained in the "El Paso County Detention Facility Arrest Supplement" and the "Complainant Affidavit" you submitted to this office.

Finally, you seek to withhold the arrested individual's driver's license number. Section 552.130(a)(1) of the Government Code requires the withholding of "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state." Accordingly, the district must withhold the arrestee's driver's license number pursuant to section 552.130(a)(1) of the Government Code.

In summary, the district must withhold pursuant to FERPA the "one-page memorandum dated February 16, 2001," the "one-page 'Incident Report' dated February 16, 2001," and the "four pages of handwritten notes made by the District Compliance Officer as part of his investigation of this matter." The district must also withhold, pursuant to section 552.102,

the portions of the arrest supplement showing the "Suspect's Physical Condition" and "Officer's Remarks." The district must withhold, pursuant to section 552.131, the identities of the "reporter" and "complainant" contained in the records at issue. The district must also withhold driver's license information pursuant to section 552.130. Finally, the district is authorized to withhold the remaining information contained in the district's law enforcement records pursuant to section 552.108, except to the extent the information qualifies as "basic information" under section 552.108(c).

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).

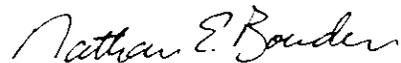
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

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 Hadassah Schloss at 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, -



Nathan E. Bowden  
Assistant Attorney General  
Open Records Division

NEB/RWP/seg

Ref: ID# 147151

Encl. Submitted documents

cc: Ms. Tracy Pancoast Jones  
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(w/o enclosures)