



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 15, 2004

Ms. Lynn Rossi Scott
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OR2004-3077

Dear Ms. Scott:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 199626.

The Grand Prairie Independent School District (the "district"), which you represent, received a request for a specified report. You indicate that the district will provide or has provided the requestor with some of the requested information. You also indicate that portions of the requested information constitute personally identifiable student information contained in student education records which the district is withholding pursuant to Open Records Decision No. 634 (1995).¹ You claim that the remaining requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.026, 552.101, 552.103,

¹ We note that in Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold information that is protected by the Family Educational Rights and Privacy Act ("FERPA") and excepted from disclosure by sections 552.026 and 552.101 of the Government Code without the necessity of requesting an attorney general decision as to those exceptions to disclosure, and (2) an educational agency or institution that is state-funded may withhold information that is excepted from disclosure by section 552.114 of the Government Code 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 to disclosure. Since the district has determined that portions of the requested information constitute personally identifiable student information contained in student education records, the district must comply with FERPA guidelines in withholding that information from the requestor.

552.107, 552.111, and 552.114 of the Government Code.² We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we must address the procedural requirements of section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask the attorney general for a decision and state the exceptions to disclosure that apply to information that is requested of a governmental body not later than the tenth business day after the date of receiving the written request for information. *See Gov't Code § 552.301(b)*. You state that the district received the request for information on January 27, 2004. Thus, the district had until February 10, 2004 to state all of the exceptions to disclosure that applied to the submitted information. However, the district did not claim that any portion of the submitted information is excepted from disclosure under section 552.107 of the Government Code until February 17, 2004. Thus, we find that the district failed to comply with the procedural requirements of section 552.301 in requesting this decision from us regarding its section 552.107 claim. Because the district failed to comply with the procedural requirements of section 552.301 in this matter regarding its section 552.107 claim, the district has waived this particular claim. *See Gov't Code § 552.301; see also Open Records Decision Nos. 676 (2002) (governmental body may waive section 552.107), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 630 at 4-5 (1994) (governmental body may waive statutory predecessor to section 552.107), 522 at 4 (1989) (discretionary exceptions in general)*. Accordingly, we conclude that the district may not withhold any portion of the submitted information under section 552.107 of the Government Code.

You claim that portions of the submitted information are excepted from disclosure pursuant to sections 552.026 and 552.114 of the Government Code. Section 552.026 incorporates the Family Educational Rights and Privacy Act of 1974 ("FERPA") into chapter 552 of the Government Code. *See Open Records Decision No. 634 at 6-8 (1995)*. Section 552.026 provides:

[t]his chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with [FERPA] of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

² Although you claim that portions of the remaining requested information are excepted from disclosure pursuant to sections 552.101 and 552.103 of the Government Code, we note that the appropriate exception to disclosure to assert when claiming that information requested of a governmental body is protected under the attorney-client privilege is section 552.107(1) of the Government Code. *See Open Records Decision No. 676 at 2-3 (2002) (appropriate law for claim of attorney-client privilege for information not subject to section 552.022 is section 552.107(1) of Government Code)*. Accordingly, we will address your section 552.101 and section 552.103 claims regarding these portions of the remaining requested information in conjunction with your section 552.107(1) claim.

Gov't Code § 552.026. 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's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). Under FERPA, "education records" are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). Section 552.114(a) excepts from disclosure "information in a student record at an educational institution funded wholly or partly by state revenue." Gov't Code § 552.114(a). This office generally has treated "student record" information under section 552.114(a) as the equivalent of "education record" information that is protected by FERPA. *See* Open Records Decision No. 634 at 5 (1995).

Generally, FERPA requires that information be withheld only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* 34 C.F.R. § 99.3 ("personally identifiable information" under FERPA includes, among other things, "[o]ther information that would make the student's identity easily traceable"); *see also* Open Records Decision Nos. 332 at 3 (1982), 224 (1979) (finding student's handwritten comments making identity of student easily traceable through handwriting, style of expression, or particular incidents related in comments protected under FERPA), 206 at 2 (1978). Based on your arguments and our review of these portions of the submitted information, we have marked the information that is confidential under FERPA. *See* Open Records Decision Nos. 539 (1990), 332 (1982), 206 (1978). Accordingly, we conclude that the district must withhold this particular marked information pursuant to section 552.114 of the Government Code and FERPA.

You also claim that portions of the submitted information are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with regulations promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA").³ At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. Pts. 160, 164. Under these standards, a

³ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes.

covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. *See* 45 C.F.R. § 164.502(a).

This office recently addressed the interplay of the Privacy Rule and the Act. *See* Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* Open Records Decision No. 681 at 8 (2004); *see also* Gov’t Code §§ 552.002, .003, .021. We, therefore, held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See* Open Records Decision No. 681 at 9 (2004); *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the district may withhold requested protected health information from the public only if an exception in subchapter C of the Act applies.

In addition, you claim that portions of the submitted information are excepted from disclosure pursuant to section 552.101 in conjunction with the common-law right to privacy. Section 552.101 also encompasses information that is protected from disclosure by the common-law right to privacy. Information must be withheld under the common-law right to privacy when it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information 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. *See id.* at 683. Prior decisions of this office have found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Based on your arguments and our review of the submitted information, we find that portions of this information, which we have marked, are protected from disclosure by the common-law right to privacy. Accordingly, we conclude that the district must withhold this particular marked information pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.

Further, you claim that portions of the submitted information are excepted from disclosure pursuant to section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.- Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, and opinions reflecting the policymaking processes of the governmental body. See *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); see also *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.- Austin, 2001, no pet.). The purpose of section 552.111 is "to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.- San Antonio 1982, writ ref'd n.r.e.).

An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. See Open Records Decision No. 615 at 5-6 (1993). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. See *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; see also Open Records Decision No. 615 at 4-5. However, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. See Open Records Decision No. 313 at 3 (1982). Based on our review of your arguments and these portions of the submitted information, we find that some of this information, which we have marked, reflects intraagency communications consisting of advice, opinions, or recommendations reflecting the policymaking processes of the district. Accordingly, we conclude that the district may withhold these particular marked portions of the submitted information pursuant to section 552.111 of the Government Code.

We note that a portion of the remaining submitted information may be excepted from disclosure pursuant to section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that this information be kept confidential under section 552.024 of the Government Code. See Gov't Code § 552.117(a)(1). However, information that is responsive to a request may not be withheld from disclosure under section 552.117(a)(1) if the employee did not request confidentiality for this information in accordance with section 552.024 or if the request for confidentiality under section 552.024 was not made until after the request for information was received by the governmental body. Whether a particular piece of information is public must be determined at the time the

request for it is received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). Accordingly, we conclude that to the extent that the current or former district employee with whom the section 552.117(a)(1) information that we have marked is associated elected confidentiality for this information prior to the date that the district received this request, the district must withhold this particular marked information pursuant to section 552.117(a)(1) of the Government Code.

In addition, we note that a portion of the remaining submitted information may be excepted from disclosure pursuant to section 552.137 of the Government Code. Section 552.137 provides:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the members of the public with whom the e-mail addresses are associated have affirmatively consented to their release. Section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or web address. E-mail addresses that are encompassed by subsection 552.137(c) are also not excepted from disclosure under section 552.137. We have marked the e-mail address that is excepted from disclosure under section 552.137(a). Unless the district has received the affirmative consent of the individual with whom this e-mail address is associated for its release, the district must withhold the address pursuant to section 552.137(a) of the Government Code.

In summary, the district must withhold the information that we have marked pursuant to section 552.114 of the Government Code and FERPA and section 552.101 of the Government Code in conjunction with the common-law right to privacy. The district may withhold the information that we have marked pursuant to section 552.111 of the Government Code. To the extent that the current or former district employee with whom the marked section 552.117(a)(1) information is associated elected confidentiality for this information prior to the date that the district received this request, the district must withhold this particular marked information pursuant to section 552.117(a)(1) of the Government Code. Unless the district has received the affirmative consent of the individual with whom the marked e-mail address is associated for its release, the district must withhold the address pursuant to section 552.137(a) of the Government Code. The district must release the remaining submitted information to the requestor to the extent that it has not already done so.

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 Dep't of Pub. 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 199626

Enc. Marked documents

c: Ms. Jennifer Arend
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(w/o enclosures)