



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 10, 2004

Mr. Joe R. Tanguma
Gary, Thomasson, Hall & Marks
P. O. Box 2888
Corpus Christi, Texas 78403-2888

OR2004-3784

Dear Mr. Tanguma:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 201283.

The Del Mar College District (the "district"), which you represent, received a request for information pertaining to grievances filed against a specified district employee for a specified period of time. You claim that the requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.026, 552.101, 552.102, 552.103, 552.114, and 552.135 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted representative sample documents.¹

You claim that the submitted information is excepted from disclosure pursuant to sections 552.026 and 552.114 of the Government Code. Section 552.026 incorporates the federal 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 the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

¹ 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 Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

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.² *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 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.³

You also claim that the remaining submitted information is excepted from disclosure pursuant to section 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly

² We note that in Open Records Decision No. 634 (1995), this office concluded that: (1) an educational agency or institution may withhold from disclosure information that is protected by 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, and (2) an educational agency or institution that is state-funded may withhold from disclosure 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. *See* Open Records Decision No. 634 at 6-8 (1995). However, since in this instance you have requested our decision on the public availability of the submitted information under sections 552.026 and 552.114 of the Government Code, as well as under FERPA, we address those claims.

³ Because we base our ruling regarding this particular marked information on section 552.114 of the Government Code and FERPA, we need not address your claim regarding section 552.135 of the Government Code.

unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). Section 552.102(a) is generally applicable to information relating to a public official or employee. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee’s employment and its terms constitutes information relevant to person’s employment relationship and is part of employee’s personnel file). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled that the test to be applied to information claimed to be excepted from disclosure under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected from disclosure by the common-law right to privacy as incorporated by section 552.101 of the Government Code.⁴ *See also Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Accordingly, we address the district’s sections 552.101 and 552.102 claims together.

Information is protected from disclosure by the common-law right to 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.

See id. 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. This office has since concluded that other types of information also are protected from disclosure by the common-law right to privacy. *See* Open Records Decision Nos. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to a drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress). Prior decisions of this office have also found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See, e.g.*, Open Records Decision No. 600 (1992) (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure).

After carefully reviewing your arguments and the remaining submitted information, we find that no portion of this information is protected from disclosure by the common-law right to privacy. Accordingly, we conclude that the district may not withhold any portion of the remaining submitted information under sections 552.101 and 552.102 of the Government Code in conjunction with the common-law right to privacy. *See* Open Records Decision Nos. 470 (1987) (public employee’s job performance does not generally constitute his

⁴ 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.

private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (statutory predecessor applicable when information would reveal intimate details of highly personal nature), 405 at 2 (1983) (manner in which employee performed his job cannot be said to be of minimal public interest), 400 at 5 (1983) (statutory predecessor protected information only if its release would lead to clearly unwarranted invasion of privacy).

In addition, you claim that the remaining submitted information must be withheld on privacy grounds because the release of the information may place someone in a false light. We note that the false-light invasion of privacy was discussed at length in Open Records Decision No. 579 (1990). As noted in that decision, the gravamen of a false-light privacy complaint is not that the information revealed is confidential, but that it is false. Therefore, an exception to the Public Information Act (the "Act") focused on the confidentiality of information does not embrace this particular tort doctrine. We further note that the Texas Supreme Court has held that false-light privacy is not an actionable tort in Texas. *See Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex. 1994). Accordingly, we conclude that the district may not withhold any portion of the remaining submitted information on this basis.

Further, you claim that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The district maintains the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold from disclosure. In order to meet this burden, the district must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request and (2) that the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *see also Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. –

Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The district must meet both elements of this test in order for information to be excepted from disclosure under section 552.103. *See id.*

In demonstrating that litigation is reasonably anticipated, the district must furnish concrete evidence that litigation is realistically contemplated and is more than mere conjecture. *See* Open Records Decision No. 518 at 5 (1989). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.⁵ *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). Conversely, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Whether litigation is reasonably anticipated must be determined on case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986).

After carefully reviewing your arguments and the remaining submitted information at issue, we find that the district has failed to adequately demonstrate that it reasonably anticipated litigation with regard to this matter on the date that it received this request for information. Accordingly, we conclude that the district may not withhold any portion of the remaining submitted information at issue under section 552.103 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. The district must release the remaining submitted information 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.

⁵ In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

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/krl

Ref: ID# 201283

Enc. Marked documents

c: Mr. Icess Fernandez
Reporter
Corpus Christi Caller-Times
820 N. Lower Broadway
Corpus Christi, Texas 78401
(w/o enclosures)