



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 7, 2005

Ms. Beverly West Stephens, Esq.
Gale, Wilson & Sanchez
115 East Travis, Suite 618
San Antonio, Texas 78205

OR2005-04967

Dear Ms. Stephens:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 225507.

The South San Antonio Independent School District (the "school district"), which you represent, received a request for information related to: 1) "steroid use, possession, or distribution among district athletes, employees or students since the 2000-2001 school year;" 2) "possession or distribution of controlled substances among district employees or students during the same period;" and 3) "possession or distribution of banned substances among district employees or students during the same period." You claim that the requested information is excepted from disclosure under sections 552.101, 552.108, 552.111, 552.114, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

As a preliminary matter, we note you have not submitted any information related to the first portion of the request, nor have you raised any exceptions to disclosure for such information. Therefore, we assume that, to the extent this information exists, it has been released to the requestor. If not, the school district must release it immediately. *See Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under the circumstances).*

Next, we note that the submitted records include complaint affidavits. Article 15.26 of the Code of Criminal Procedure states "[t]he arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information." Crim. Proc.

Code art. 15.26. Article 15.04 provides that “[t]he affidavit made before the magistrate or district or county attorney is called a ‘complaint’ if it charges the commission of an offense.” Crim. Proc. Code art. 15.04. Case law indicates that a complaint can support the issuance of an arrest warrant. *See Janecka v. State*, 739 S.W.2d 813, 822-23 (Tex. Crim. App. 1987); *Villegas v. State*, 791 S.W.2d 226, 235 (Tex. App.—Corpus Christi 1990, pet. ref’d); *Borsari v. State*, 919 S.W.2d 913, 918 (Tex. App.—Houston [14 Dist.] 1996, pet. ref’d) (discussing well-established principle that complaint in support of arrest warrant need not contain same particularity required of indictment). Therefore, to the extent any of the submitted complaint affidavits were presented to a magistrate in support of the issuance of an arrest warrant, it is public under article 15.26 of the Code of Criminal Procedure and must be released.

Next, we note that the submitted information includes a document that has been filed with the court. Section 552.022 of the Government Code provides in part:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

....

- (17) information that is also contained in the public court record[.]

Gov’t Code § 552.022(a)(17). Section 552.022(a)(17) makes information filed with a court expressly public. Therefore, the school district may withhold this information only to the extent it is made confidential under other law. Sections 552.108 and 552.111 are discretionary exceptions to disclosure designed to protect the governmental body’s interests; they are therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See Open Records Decision Nos. 586* (section 552.108 may be waived), 473 (1987) (section 552.111 may be waived); *see also 522 at 4* (1989) (discretionary exceptions generally). However, because the remaining exceptions you claim constitute other law making information expressly confidential, we will address their applicability to the information subject to section 552.022(a).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes and encompasses the Family Educational Rights and Privacy Act of 1974 (“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’s parent. *See 20 U.S.C. § 1232g(b)(1)*. The term “student” includes “any person with respect to whom

an agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution. *Id.* § 1232g(a)(6); see also 34 C.F.R. §99.3 "(a "student" is an individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records). "Education records" under FERPA 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). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990). The definition of "education records" under FERPA does not include "records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement." *See* 20 U.S.C. § 1232g(a)(4)(B)(ii). You state that, "[a]ll of the records requested are education records." However, we note that the submitted documents are records created by the South San Antonio Independent School District Police Department (the "department"), whose primary function is to investigate crimes and enforce criminal laws. Based on our review of the information at issue, we find that the information was created by a law enforcement unit of the South San Antonio Independent School District for a law enforcement purpose. Therefore, the submitted records are not subject to FERPA.

Section 552.101 also encompasses section 58.007 of the Family Code, which provides in pertinent part:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Fam. Code § 58.007(c). Section 58.007 is not applicable to information that relates to a child as a complainant, victim, witness, or other involved party and not as a suspect or offender. The submitted information consists of law enforcement records pertaining to school district students maintained by the department. Upon review, we find that a portion of the submitted

information, which we have marked, involves child suspects engaged in delinquent conduct that occurred after September 1, 1997. Accordingly, the school district must withhold these marked incident reports from disclosure under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code. However, other reports do not involve a juvenile. See Family Code § 51.02(2)(A) (defining “child” as person who is ten years of age or older and under seventeen years of age). Accordingly, the remaining information is not confidential under section 58.007 of the Family Code and may not be withheld on that basis.

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). When a law enforcement agency is asked to compile a particular individual’s criminal history information, the compiled information takes on a character that implicates the individual’s right to privacy in a manner that the same information in an uncompiled state does not. See *U. S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); see also Open Records Decision No. 616 at 2-3 (1993).

In this instance, you state that the requestor has asked for “any police reports, emails, records, etc. regarding steroid use and specified substance abuse involving controlled and banned substances” and you therefore contend that the submitted information constitutes a compilation of individuals’ criminal history that is protected by privacy. We note, however, that the requestor has not asked the school district to compile criminal history records of the individuals. Rather, the request asks for all information pertaining to specified types of offenses. We therefore determine that the present request does not implicate an individual’s common-law right of privacy as contemplated in *Reporters Committee*. Accordingly, the school district may not withhold the submitted information under section 552.101 of the Government Code in conjunction with the common-law right of privacy.

You also raise section 552.108 of the Government Code. Section 552.108 provides in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(2) it is information that the deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov’t Code § 552.108(a)(2). Section 552.108(a)(2) protects law-enforcement records that pertain to criminal investigations and prosecutions that have concluded in a final result other

than a criminal conviction or deferred adjudication. We note that a governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. See Gov't Code § 552.301(e)(1)(A); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

You state that “[t]hese police reports are clearly within [section 552.108(a)(2)].” However, you have not explained that these cases concluded and did not result in convictions or deferred adjudication. Consequently, you have failed to establish the applicability of section 552.108(a)(2) and none of the submitted information at issue may be withheld on that basis.

We next address your argument under 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.” 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, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152, 158 (Tex. App.—Austin 2001, no pet.). An agency’s policy making functions, however, 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. Open Records Decision No. 615 at 5-6 (1993).

Section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 158-161; ORD 615 at 4-5; ORD 615 at 4-5. Upon review, we find that the submitted documents consist of records of criminal investigations by department police and information created by department police and do not consist of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the school district. We therefore find that you have failed to establish that the submitted information is excepted from disclosure under section 552.111 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 pursuant to section 552.024 of the Government Code. Gov't Code § 552.117. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time that the request for it is received by a governmental body. See Open Records Decision No. 530 at 5 (1989). Although you raise section 552.117 for a portion of

the remaining submitted information, we note that the protections of section 552.117 apply only to information that a governmental body holds in its capacity as an employer. *See* Gov't Code § 552.117 (providing that employees of governmental entities may protect certain personal information in hands of their employer); *see also* Gov't Code § 552.024 (establishing election process for section 552.117). The information you seek to withhold pursuant to this exception is contained in police reports. Therefore, because the school district is holding this information in a law enforcement capacity, and not as an employer, we find that the information may not be withheld under section 552.117 of the Government Code.

We note that the submitted documents include other social security numbers. A social security number may be excepted from disclosure in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. *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 the social security numbers are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Government Code 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 by the school district pursuant to any provision of law enacted on or after October 1, 1990.

The submitted documents also contain Texas-issued motor vehicle registration information that is excepted from disclosure under section 552.130 of the Government Code, which provides in pertinent part:

(a) Information is excepted from the requirements of Section 552.021 if the information relates to:

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

(2) a motor vehicle title or registration issued by an agency of this state[.]

Gov't Code § 552.130. We have marked the Texas-issued motor vehicle registration information that must be withheld under section 552.130.

In summary, the school district must withhold the information we have marked under section 552.101 in conjunction with section 58.007(c) of the Family Code. The submitted

social security numbers may be confidential under federal law. The Texas-issued motor vehicle record information we have marked must be withheld under section 552.130 of the Government Code. The remaining information must be released 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,

A handwritten signature in cursive script that reads "L. Joseph James".

L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/krl

Ref: - ID# 225507

Enc. Submitted documents

c: Ms. Tanji Patton
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