



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 18, 2005

Mr. Stephen D. Broyles
Dean of Administrative Services
North Central Texas College
1525 West California Street
Gainesville, Texas 76240-4699

OR2005-06341

Dear Mr. Broyles:

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# 228158.

North Texas Central College (the "college") received a request for the following: (1) correspondence between the college and a former college president related to the former president's job performance; (2) correspondence between the college and a current employee "related to [the employee's] performance/job work environment[;]" (3) documents related to the former president's directive that another former college employee be supervised by a named administrator; and (4) copies of all complaints made against the college by former employees while the former president was in office, as a result of adverse actions taken against them by the former president.¹ You state, and the submitted information reflects, that the college has released some information to the requestor.² You also state that the college

¹As you have failed to submit a copy of the request for information, we take our description from your brief.

²Specifically, you state that the college is providing the requestor with a "representative sample" of the current employee's job performance evaluations from 2000-2004. We note that you have not submitted any other responsive job performance evaluations pertaining to the current employee to this office for review. Further, you have not indicated that such information does not exist or that you wish to withhold any such information from disclosure. Therefore, to the extent they existed on the date the college received the instant request, the college must immediately release all of the current employee's job performance evaluations to the requestor if it has not already done so. See Gov't Code §§ 552.006, .301(a), .302; see also Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

does not possess some of the requested information.³ You argue that portions of the submitted information are not subject to disclosure under the Act. Additionally, you claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.111, and 552.117 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.⁴

As a preliminary matter, we note that you have asked the requestor to clarify and narrow his request. A governmental body may ask a requestor to clarify or narrow a request.⁵ Gov't Code § 552.222(b); *see also* Open Records Decision Nos. 561 at 8 (1990), 333 (1982). However, a governmental body is required to make a good-faith effort to relate a request for information to any responsive information that is within its custody or control. *See* Open Records Decision No. 561 at 8-9 (1990). If the college holds information from which the requested information can be obtained, the college must provide that information to the requestor unless it is otherwise excepted from disclosure. In response to the request at issue here, you are required to make a good-faith effort to relate the request to information within the college's possession or control.

In this instance, you state that the college has made a good-faith attempt to locate documents that are responsive to each item of the request, and you have determined that the college does not possess information that is responsive to item numbers 1 and 3 of the request. Further, you have released information that you believe to be responsive to item number 2 of the request, and you have submitted information that you believe to be responsive to item number 4 of the request for our review. As such, we will consider your arguments regarding the submitted information.

Next, we address your contention that the Act is not applicable to a portion of the submitted information. The Act is applicable to "public information." *See* Gov't Code § 552.021. "Public information" is defined as information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

³The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

⁴We 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.

⁵Section 552.222(b) provides that "[i]f a large amount of information has been requested, the governmental body may discuss with the requestor how the scope of a request might be narrowed[.]"

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Id. § 552.002(a). Thus, virtually all information that is in the physical possession of a governmental body is public information that is encompassed by the Act. *Id.* § 552.022(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). In this instance, you assert that the e-mails at issue, identified as Exhibits B, C, and D, are not subject to the Act because they “deal with strategic planning issues, and are not documents collected, assembled, or maintained under a law or ordinance or in connection with the transaction of the college’s official business.” You further assert that, because the information labeled as Exhibit E, which consists of letters from staff and students concerning the job performance of a college employee, were not written as part of a college-sponsored evaluation of the employee, they are not subject to the Act. We disagree with these assertions. The e-mail messages at issue pertain to an employee’s attendance of training sessions and to the strategic planning of college programs and curriculum. Further, while the letters from staff and students may not have been written as part of an official evaluation conducted by the college, they relate directly to the identified employee’s job performance and it appears that they were submitted to the college by the authors. We therefore determine the submitted information is held by the college “in connection with the transaction of official business.” Gov’t Code § 552.002(a). Thus, the submitted information at issue is subject to the Act and must be released, unless an exception to disclosure is shown to be applicable. Accordingly, we will address your other arguments against disclosure for this information along with the remaining submitted information.

Next, we must address the college’s obligations under the Act. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You did not submit a copy of the written request within the fifteen-business-day deadline as required under section 552.301(e). Therefore, we find that you have failed to comply with the fifteen-business-day deadline mandated by section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body’s failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See* Gov’t Code § 552.302; *Hancock*

v. State Bd. of Ins., 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing that the information is made confidential by another source of law or affects third party interests. *See* Open Records Decision No. 630 (1994). Although the college claims that portions of the submitted information are excepted from disclosure pursuant to section 552.111 of the Government Code, this exception to disclosure is a discretionary exception that protects a governmental body's interests and may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under Gov't Code § 552.111 may be waived), 665 at 2 n.5 (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 may be waived). Therefore, the college may not withhold any of the submitted information under section 552.111 of the Government Code. However, as sections 552.101 and 552.117 can provide compelling reasons to withhold information, we will address your arguments under these exceptions.

You assert that portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses the doctrine of common-law privacy. Common-law privacy protects information that (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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. *Id.* at 683. This office has found that the following types of information are excepted from required public disclosure under common-law privacy: personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

Additionally, in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the

person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public does not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

When there is an adequate summary of a sexual harassment investigation, the summary must be released along with the statement of the accused, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure. However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of witnesses and victims must still be redacted from the statements.

In this case, because there is no adequate summary of the investigation, the submitted documents concerning the sexual harassment allegations generally must be released. However, based on *Ellen*, the college must withhold the identity of the victim of sexual harassment, which we have marked, under section 552.101 and common-law privacy. We have also marked a small amount of other information that is confidential under common-law privacy and that must be withheld under section 552.101. Upon review, however, we find that the remaining information you seek to withhold under section 552.101 is not highly intimate or embarrassing for the purpose of common-law privacy. Additionally, the public has a legitimate interest in this information. *See* Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and the circumstances of resignation or termination), 405 at 2-3 (1983) (public has interest in manner in which public employee performs job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101 or 552.102), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under either the constitutional or common-law right of privacy).

We note that the submitted documents contain information that must be withheld pursuant to the Family Education Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. *See* Gov't Code § 552.026 (incorporating provisions of FERPA into the Act).⁶ Under FERPA, "education records" are those records, files, documents, and other materials that

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

⁶The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Id. § 1232g(a)(4)(A). We believe that the information at issue constitutes “education records” for purposes of FERPA. *See* Open Records Decision No. 462 at 15 (1987). 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).

In Open Records Decision No. 634 (1995), this office concluded that an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.114 of the Government Code without the necessity of requesting an attorney general decision as to those exceptions. Information must be withheld from required public disclosure under FERPA only to the extent “reasonable and necessary to avoid personally identifying a particular student” or “one or both parents of such a student.” *See* Open Records Decision Nos. 332 (1982), 206 (1978). We have marked information identifying college students that must be withheld under FERPA.

You also raise section 552.117 of the Government Code as applicable to portions of the submitted information. Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the college may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. If the employees made timely elections under section 552.024 of the Government Code to keep the information we have marked confidential, the college must withhold this information under section 552.117(a)(1). The college may not withhold this information under section 552.117(a)(1) for any employee who did not make a timely election to keep his or her information confidential.

Finally, we note that the submitted information contains an e-mail address to which section 552.137 of the Government Code is applicable. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). The e-mail address at issue does not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that any member of the public has affirmatively consented to the release of the e-mail address at issue. Therefore, the college must withhold the e-mail address we have marked under section 552.137.

In summary, the college must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the common-law right to privacy. The marked information identifying college students must be withheld under FERPA. If the employees made timely elections under section 552.024 of the Government Code to keep the information we have marked confidential, the college must withhold this information under section 552.117(a)(1) of the Government Code. The college may not withhold this information under section 552.117(a)(1) for any employee who did not make a timely election to keep his or her information confidential. The college must withhold the marked e-mail address under section 552.137 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).

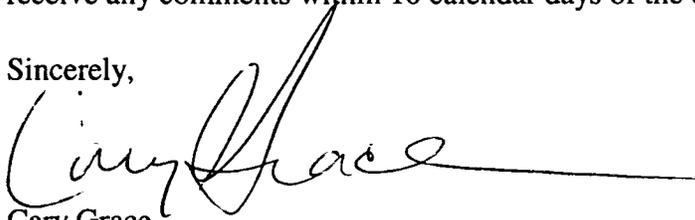
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 black ink, appearing to read "Cary Grace", with a long horizontal line extending to the right.

Cary Grace
Assistant Attorney General
Open Records Division

ECG/jev

Ref: ID# 228158

Enc. Submitted documents

c: Mr. Chang Wije
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Justin, Texas 76247
(w/o enclosures)