



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 3, 2005

Ms. Karen L. Johnson
Powell & Leon, L.L.P.
1706 West Sixth Street
Austin, Texas 78703-4703

OR2005-09939

Dear Ms. Johnson:

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# 235645.

The Liberty County Cooperative for Special Education ("LCCSE"), which you represent, received a request for information pertaining to the requestor's client, the director of LCCSE, and named LCCSE employees. You state that some of the requested information has been released, and LCCSE does not maintain some requested information.¹ You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note that the submitted information consists of the handwritten notes of the LCCSE director. You assert that these "notes were not maintained as a government record

¹We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

²You also state that "[s]ome of this information is already the subject of a [public information] request before the [attorney general submitted on behalf of the] Liberty Independent School District[.]" We note that related information was the subject of both (1) a previous request for information, in response to which this office issued Open Records Letter No. 2005-08393 (2005), and (2) a pending request for information, which has been assigned ID# 235692. Upon review, however, we find that the information at issue in these other two requests is not the same as the information at issue here.

but rather for [the director's] own personal use and recollection." Thus, we understand you to assert that these notes are not "public information" under the Act. See Gov't Code § 552.021.

Section 552.002 defines public information as information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body or for a governmental body, and the governmental body owns the information or has a right of access to it. Although in Open Records Decision No. 77 (1975) this office determined that personal notes made by individual faculty members for their own use as memory aids were not subject to the Act, in Open Records Decision No. 327 (1982) this office found that notes made by a school principal and athletic director relating to a teacher "were made in their capacities as supervisors of the employee" and thus constituted public information. Open Records Decision No. 327 at 2 (1982) (construing predecessor statute); see also Open Records Decision Nos. 635 (1995) (public official's or employee's appointment calendar, including personal entries, may be subject to Act), 626 (1994) (handwritten notes taken during oral interview by Texas Department of Public Safety promotion board members are public information), 120 (1976) (faculty members' written evaluations of doctoral student's qualifying exam subject to predecessor of Act).

The notes at issue were written by the director of the LCCSE while the requestor's client was an employee of the Liberty Independent School District. These notes appear to relate to personnel issues involving LCCSE employees and Liberty Independent School District employees. Based on your representations and our review of the information at issue, we believe that these handwritten notes constitute "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business." See Gov't Code § 552.002. Therefore, we conclude that these notes are subject to the Act and may only be withheld if an exception under the Act applies.

You further claim that the handwritten notes are subject to section 552.101 of the Government Code. Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. In this regard, we understand you to assert that this information is confidential under the doctrine of common-law privacy, which is encompassed by section 552.101. Common-law privacy protects information if 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. *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. 540 S.W.2d at 683. Upon review, however, we conclude that none of the information at issue is protected under common-law privacy, and LCCSE may therefore not withhold any of it under section 552.101 on that basis.

You also assert that the submitted information is excepted under section 552.111 of the Government Code, which 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 examined 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. See *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). 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. ORD 615 at 5-6. After review of your arguments and the submitted information, we conclude that the information at issue consists of personnel matters, and not internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body; therefore, it is not excepted from release under section 552.111.

We note, however, that some of the submitted information may be excepted under section 552.101 of the Government Code, which also encompasses information protected by other statutes. The Family Educational Rights and Privacy Act of 1974 (“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). “Education records” means 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). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990).

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 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 the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov’t Code § 552.206. In Open Records Decision No. 634 (1995), this office concluded that (1) 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 552.101 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 public disclosure information that is excepted from required public disclosure by section 552.114 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. Information must be withheld from required public disclosure under FERPA only to the extent “reasonable and necessary to avoid personally identifying a particular student.” See Open Records Decision Nos. 332 (1982), 206 (1978).

We have marked information in the submitted documents that may identify students; therefore, to the extent that this marked information identifies a student, LCCSE must withhold it under section 552.101 in conjunction with FERPA. To the extent it does not identify a student, you must release it to the requestor. LCCSE must also release the remaining information at issue.

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 ten 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); *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 Office of the Attorney General 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 ten calendar days of the date of this ruling.

Sincerely,



Robert B. Rapfogel
Assistant Attorney General
Open Records Division

RBR/krl

Ref: ID# 235645

Enc. Submitted documents

c: Ms. Jeralynn L. Jackee Cox
Tunnell & Cox, L.L.P.
P. O. Box 414
Lufkin, Texas 75902
(w/o enclosures)