



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 30, 2005

Mr. John A. Kazen  
Kazen, Meurer & Pérez, L.L.P.  
P.O. Box 6237  
Laredo, Texas 78040

OR2005-11764

Dear Mr. Kazen:

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# 239226.

The Laredo Independent School District (the "district") received a request for information related to a former district employee. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code.<sup>1</sup> We have also received comments from the former employee's attorney asserting that the requested information is excepted from disclosure under section 552.102 of the Government Code and articles 55.03 and 55.04 of the Texas Code of Criminal Procedure.<sup>2</sup> We have considered all of the claimed exceptions and reviewed the submitted information.

We first address the issue of whether the Order of Expunction submitted for review applies to the requested records. Articles 55.01 through 55.05 of the Code of Criminal Procedure provide for the expunction of criminal records in certain limited circumstances. Article 55.03 prescribes the effect of an expunction order and provides:

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<sup>1</sup>Although the district initially raised section 552.107 of the Government Code as an exception to disclosure, the district failed to submit arguments in support of its claim. See Gov't Code §§ 552.301, .302. Therefore, we assume you no longer assert this exception.

<sup>2</sup>See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

When the order of expunction is final:

- (1) the release, dissemination, or use of the expunged records and files for any purpose other than a purpose described by Section 411.083(a) or (b)(1), (2), or (3), Government Code, is prohibited;
- (2) except as provided in Subdivision 3 of the article, the person arrested may deny the occurrence of the arrest and the existence of the expunction order; and
- (3) the person arrested or any other person, when questioned under oath in a criminal proceeding about an arrest for which the records have been expunged, may state only that the matter in question has been expunged.

Act of May 31, 2003, 78<sup>th</sup> Leg., R.S., ch. 1236, 2003 Tex. Sess. Law Serv. 3500 (Vernon) (to be codified as an amendment to Code Crim. Proc. art. 55.03). Article 55.04 imposes sanctions for violations of an expunction order, and provides in pertinent part:

Sec. 1. A person who acquires knowledge of an arrest while an officer or employee of the state or of any agency or other entity of the state ... and who knows of an order expunging the records and files relating to that arrest commits an offense if he knowingly releases, disseminates, or otherwise uses the records or files.

*Id.* Art. 55.04 § 1.

This office has previously determined that the expunction statute prevails over the Act. Open Records Decision No. 457 at 2 (1987) (governmental body prohibited from releasing or disseminating arrest records subject to expunction order, as “those records are not subject to public disclosure under the [Act]”). Based upon the submitted representations and our review of the submitted information, we find that a portion of the information at issue pertains to expunged arrest records that are subject to article 55.03 of the Code of Criminal Procedure. Thus, article 55.03 prohibits the district from releasing these records. We have marked the information accordingly.

Next, we note that a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 makes certain information public, unless it is expressly confidential under other law. *See* Gov’t Code § 552.022(a). One category of public information under section 552.022 is “a settlement agreement to which a governmental body is a party[.]” *Id.* § 552.022(a)(18). The submitted information includes a settlement agreement to which the district is a party that must be released unless it is confidential under

other law. Section 552.101 does constitute other law for the purposes of section 552.022. We will, therefore, consider your claims regarding section 552.101 for this and the remaining information.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” and encompasses information made confidential by other statutes. Gov’t Code § 552.101. 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); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). “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). FERPA is incorporated into the Act under section 552.026. *See* Gov’t Code § 552.026 (Act does not require release of information contained in education records of educational agency or institution except in conformity with [FERPA]).

In Open Records Decision No. 634 (1995), this office concluded that: (1) an educational agency or institution may withhold from the public information that is protected by FERPA and excepted from public disclosure under sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to the applicability of those sections; and (2) a state-funded educational agency or institution may withhold information that is excepted from disclosure under 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 section 552.114.<sup>3</sup> *See* Open Records Decision No. 634 at 6-8 (1995). In this instance, however, you have submitted some of the requested information to this office for consideration. Therefore, we will consider whether the information is protected by FERPA.

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). This includes information that directly identifies a student or parent, as well as information that, if released, would allow the student’s identity to be easily traced. *See* Open Records Decision No. 224 (1979) (finding student’s handwritten comments protected under FERPA because they make identity

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<sup>3</sup>Section 552.114 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 under FERPA.

of student easily traceable through handwriting, style of expression, or particular incidents related). To the extent that the submitted documents identify students of the district, all such information is confidential under FERPA. The district must not release any student's identifying information in this instance unless it has authorization under FERPA to do so.

Section 552.101 also encompasses the doctrine of common-law privacy. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). 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 protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). Accordingly, we will consider section 552.101 and section 552.102 together.

The doctrine of 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. *Industrial Foundation*, 540 S.W.2d at 685. 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. In addition, 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). We note, however, that the work conduct, job performance, and salary information of public employees is subject to a legitimate public interest and therefore generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow). We have reviewed the submitted information and marked the private information that must be withheld pursuant to section 552.101 in conjunction with common-law privacy. None of the remaining submitted information is confidential under common-law privacy and may not be withheld under sections 552.101 or 552.102 on that basis.

We note that some of the remaining submitted information, which we have marked, may be confidential under 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 request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117. We are unable to determine from the information provided whether the information we have marked belongs to an employee of the district who made such an election. If the information pertains to an employee of the district who elected to keep personal information confidential pursuant to section 552.024 prior to the date of the present request, then the district must withhold the marked information under section 552.117(a)(1). If, however, the employee did not make a timely election pursuant to section 552.024, the district may not withhold this information under section 552.117.

We further note that some of the remaining information, which we have marked, is subject to section 552.130 of the Government Code. Section 552.130 of the Government Code 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. You must withhold the Texas driver's license number we have marked under section 552.130 of the Government Code.

We note that some of the remaining submitted information, which we have marked, may be confidential under section 552.137 of the Government Code. Section 552.137 of the Government Code 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 excepts certain e-mail addresses of members of the public that are not within the scope of section 552.137(c), unless the relevant members of the public have affirmatively consented to the release of the e-mail addresses. We note, however, that section 552.137 does not apply to the work e-mail addresses of officers or employees of a governmental body, a website address, or the general e-mail address of a business. The district must withhold the e-mail address we have marked under section 552.137 unless the individual affirmatively consented to the release of the e-mail address.

Finally, we note that the remaining submitted information contains social security numbers. Section 552.147 of the Government Code provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. Therefore, the district must withhold the social security numbers we have marked under section 552.147.<sup>4</sup>

In summary, the information we have marked as subject to article 55.03 must be withheld. To the extent that the submitted documents identify students of the district, all such

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<sup>4</sup>We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

information is confidential under FERPA and must be withheld pursuant to section 552.101 of the Government Code. We have marked the information that you must withhold under section 552.101 in conjunction with common-law privacy. If the information we have marked pertains to an employee of the district who elected to keep personal information confidential pursuant to section 552.024 prior to the date of the present request, then the district must withhold the marked information under section 552.117(a)(1). You must withhold the Texas driver's license number we have marked under section 552.130 of the Government Code. The district must withhold the e-mail address we have marked under section 552.137 unless the individual affirmatively consented to the release of the e-mail address. The district must withhold the social security numbers we have marked in the submitted information under section 552.147. The remaining submitted 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); *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 10 calendar days of the date of this ruling.

Sincerely,



James Forrest  
Assistant Attorney General  
Open Records Division

JF/sdk

Ref: ID# 239226

Enc. Submitted documents

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