



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 15, 2006

Ms. Bernadette Gonzalez
Staff Attorney
Fort Bend Independent School District
16431 Lexington Boulevard
Sugar Land, Texas 77479

OR2006-04965

Dear Ms. Gonzalez:

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# 248910.

The Fort Bend Independent School District (the "district") received a request for information pertaining to a specified internal affairs investigation conducted by the district's police department. You inform us that the district is providing the requestor with some of the responsive information but claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.108, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes, including the Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of title 20 of the United States Code. Section 552.026 of the Government Code incorporates FERPA into the Act. *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).

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); Open Records Decision No. 224 (1979) (release of document in student's handwriting would make student's identity easily traceable). "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). However, 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).

Section 552.114 of the Government Code exempts from public 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. *See* Open Records Decision No. 634 at 5 (1995).

You assert that FERPA protects the identifying information of district students contained in the submitted information. However, you inform us that the submitted information consists of an internal affairs investigation created by the district's police department. The district's police department's primary function is to investigate crimes and enforce criminal laws. As such, this information was created by a law enforcement unit for a law enforcement purpose. We therefore conclude that the submitted information is not subject to FERPA, and none of it may be withheld on that basis. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii).

You also claim that the submitted information includes medical records that are subject to the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. The MPA provides in relevant part as follows:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b)-(c). Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any

subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the medical records that are subject to the MPA.

Next, you claim that some of the remaining submitted information is subject to section 58.007 of the Family Code. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. This section reads in pertinent part as follows:

(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). Upon review, we find that some of the information at issue consists of juvenile law enforcement records relating to allegations that occurred after September 1, 1997. See Fam. Code § 51.02(2) (providing that in title 3 of Family Code, "child" means person who is ten years of age or older and under seventeen years of age). This information is subject to section 58.007, and it does not appear that any of the exceptions in section 58.007 apply. As such, the district must withhold this information, which we have marked, pursuant to section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code. However, we find that none of the remaining information at issue consists of juvenile law enforcement records, and thus none of it may be withheld under section 552.101 on that basis.

You also raise common-law privacy for some of the remaining information at issue. Common-law privacy is also encompassed by section 552.101 of the Government Code and protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (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. In addition, common-law privacy protects the identifying information of a juvenile offender. Therefore, this information, which we have marked, is protected under common-law privacy and must be withheld under section 552.101 on that basis. *See* Open Records Decision No. 394 (1983); *cf.* Fam. Code § 58.007.

Next, we address your claim under section 552.108 of the Government Code. Section 552.108(a)(1) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime.” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov’t Code §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). This exception is generally not applicable to the records of an internal affairs investigation that is purely administrative in nature. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.), *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution).

In this instance, the information you seek to withhold under section 552.108 is contained in a district police department’s internal affairs investigation. You inform us that the internal affairs investigation relates to an incident involving the arrest by the requestor of a middle school student. You further explain that, although the district’s police department has completed its investigation, “the Fort Bend County District Attorney is evaluating whether to dismiss or modify the charges against the student . . . based upon a review of the District’s internal investigation report” and that release of the information at this time “could potentially interfere with a pending criminal investigation or prosecution by the Fort Bend County District Attorney.” Based on your representations that this information pertains to an active criminal investigation or prosecution, we conclude that the district may withhold the remaining information for which you claim section 552.108. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

Lastly, we note that the remaining information includes a social security number. 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 number that we have marked under section 552.147.¹

In summary, (1) the medical records we have marked may only be released in accordance with the MPA; (2) the juvenile law enforcement records that we have marked must be withheld under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code; (3) the juvenile's identifying information must be withheld under section 552.101 and common-law privacy; (4) the remaining information for which the district claims section 552.108 of the Government Code may be withheld under that exception; and (5) the social security number we have marked must be withheld under section 552.147 of the Government Code.² The district must release the remaining submitted information.³

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

¹We 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.

²As we reach these conclusions, we need not address your remaining arguments against disclosure.

³We note that the requestor has a special right of access under section 552.023 of the Government Code to some of this information that would otherwise be protected under section 552.101 of the Government Code in conjunction with common-law privacy. *See* Gov't Code § 552.023 (person has a special right of access to information that is excepted from public disclosure under laws intended to protect that person's privacy interest). Because this information would not be releasable with respect to the general public, the district should again seek our decision if it receives another request for this information from a person other than the requestor or her authorized representative.

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 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# 248910

Enc. Submitted documents

c: Ms. Vicki Ruhmann
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Houston, Texas 77008
(w/o enclosures)