



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 5, 2013

Mr. W. Montgomery Meitler
Assistant Counsel
Office of Legal Services
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2013-03756

Dear Mr. Meitler:

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# 481608 (TEA PIR# 18847).

The Texas Education Agency (the "agency") received a request for all complaints, and the corresponding responses, pertaining to two specified academies. You state you will release some of the requested information to the requestor, including final audit reports. You also state the agency has redacted student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You claim portions of the submitted information are excepted from disclosure under sections 552.101 and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

²We assume 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 those records contain substantially different types of information than that submitted to this office.

Initially, you state a portion of the requested information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2011-13763 (2011). In Open Records Letter No. 2011-13763, we determined the agency may withhold the information at issue pursuant to section 552.116 of the Government Code. You do not state, and we have no indication, there has been any change in the law, facts, or circumstances on which the prior ruling was based. Accordingly, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the agency may rely on Open Records Letter No. 2011-13763 as a previous determination and withhold the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. The type of information considered highly intimate or 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 some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find the information you have marked, and the additional information we have marked, constitutes information that is highly intimate or embarrassing and of no legitimate concern to the public. Accordingly, the agency must withhold this marked information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.116 of the Government Code provides the following:

- (a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper

is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You state some of the submitted information, which you have marked, constitutes audit working papers prepared or maintained by the agency's Division of Federal and State Education Policy in conjunction with investigations in response to complaints under the federal Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1482. You further state the audits are authorized by sections 300.151 through 300.153 of title 34 of the Code of Federal Regulations, which require the agency to conduct audits of school districts as part of the state complaint procedures under IDEA. You also state some of the submitted information, which you have marked, consists of "audit working papers prepared or maintained by [the agency's] Student Assessment Division Security Task Force in conducting an investigation of testing irregularities in the administration of statewide assessment instruments." You inform us the investigation was "authorized by section 39.057(a)(8) of the Education Code, which permits the [c]ommissioner of [e]ducation to authorize special accreditation investigations to be conducted in response to an allegation regarding or an analysis using a statistical method result indicating a possible violation of an assessment instrument security procedure." *See* Educ. Code § 39.057 (listing circumstances in which the commissioner of education shall authorize investigations). Based on your arguments and our review, we agree the information you have marked constitutes audit working papers. Therefore, the agency may withhold the information you have marked under section 552.116 of the Government Code.

In summary, for the requested information that is identical to the information previously requested and ruled upon by this office, the agency may rely on Open Records Letter No. 2011-13763 as a previous determination and withhold the identical information in

accordance with that ruling. The agency must withhold the information marked under section 552.101 of the Government Code in conjunction with common-law privacy and may withhold the information marked under section 552.116 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Kathryn R. Mattingly". The signature is fluid and cursive, with the first name being the most prominent.

Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/bhf

Ref: ID# 481608

Enc. Submitted documents

c: Requestor
(w/o enclosures)