



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 8, 2016

Ms. Vanessa A. Gonzalez
Counsel for Baylor University
Bickerstaff, Heath Delgado Acosta, LLP
Building One, Suite 300
3711 South MoPac Expressway
Austin, Texas 78746

OR2016-02971

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# 597390.

The Baylor University Police Department (the "department"), which you represent, received a request for reports relating to five specified incidents. The department claims the submitted information is not subject to the Act. In the alternative, the department claims the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions the department claims and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note the 84th Legislature added section 51.212(f) of the Education Code, which reads as follows:

(f) A campus police department of a private institution of higher education is a law enforcement agency and a governmental body for purposes of [the Act], only with respect to information relating solely to law enforcement activities.

Educ. Code § 51.212(f). We understand the department is a campus police department of a private institution of higher education. *See id.* §§ 51.212(e), 61.003. Thus, the department is a governmental body for purposes of the Act, and information maintained by the department is subject to disclosure under the Act, to the extent such information relates solely to law enforcement activities. The department states the submitted police offense reports were created and are maintained by the department for law enforcement purposes. However, the department asserts the reports do not relate solely to law enforcement activities because the reports are also maintained in duplicate by Baylor University's Judicial Affairs Office (the "office"), and, thus, are not subject to release under the Act pursuant to section 51.212(f). Nevertheless, the submitted offense reports reflect they involve investigations of possible criminal violations. *See* Penal Code § 22.011 (sexual assault). Therefore, we find these reports relate "solely to law enforcement activities" for purposes of section 51.212(f) of the Education Code, and thus, are subject to the Act. Accordingly, this information must be released, unless it falls within an exception to public disclosure under the Act. *See* Gov't Code §§ 552.006, .021, .301, .302. Consequently, we will address the department's arguments against its disclosure under the Act.

Next, the department asserts the submitted offense reports in their entirety, or in the alternative, the information it has redacted, is excepted from disclosure under the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code. The United States Department of Education Family Policy Compliance Office has informed FERPA does not permit state and local educational authorities to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.¹ Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information").

The department states the submitted reports were created and are maintained by the department for a law enforcement purpose. We note FERPA is not applicable to records that were created by a law enforcement unit of an educational agency or institution for a law enforcement purpose and that are maintained by the law enforcement unit. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3, .8. The department informs us the submitted information is also maintained by the office, a component of an educational agency. Thus, the department contends this information is subject to FERPA because it is not maintained exclusively by the department. However, these law enforcement records are maintained separate and apart from the records of the office. Further, the request for information was made to the department, and the requestor seeks law enforcement records created and

¹A copy of this letter may be found on the Office of the Attorney General's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

maintained by the department, rather than student records maintained by the office.² Accordingly, the submitted information is not encompassed by FERPA and none of it may be withheld on that basis. Because we are able to discern the nature of the redacted information, we are not prevented from determining whether that information falls within the scope of the department's claimed exceptions to disclosure. Accordingly, we will address the department's arguments with respect to the information at issue, including the redacted information. Nevertheless, we caution the department that a failure to provide this office with requested information generally deprives us of the ability to determine whether information may be withheld and leaves this office with no alternative other than ordering the redacted information to be released. *See* Gov't Code § 552.301(e)(1)(D) (governmental body must provide this office with copy of specific information requested or representative sample if information is voluminous).

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which 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, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683.

In Open Records Decision No. 393 (1983), this office concluded generally, only information that either identifies or tends to identify a victim of sexual assault or other sex-related offense may be withheld under common-law privacy; however, because the identifying information was inextricably intertwined with other releasable information, the governmental body was required to withhold the entire report. ORD 393 at 2; *see* Open Records Decision No. 339 (1982); *see also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information); Open Records Decision No. 440 (1986) (detailed descriptions of serious sexual offenses must be withheld). The requestor in this case knows the identities of the alleged victims. We believe in this instance, withholding only identifying information from the requestor would not preserve the victims' common-law rights to privacy. Therefore, we conclude the department must withhold the submitted information in its entirety under section 552.101 of the Government Code in conjunction with common-law privacy.³

²We note this ruling does not address the public availability of any records maintained by the office, and the office is not required to release any information in response to this request.

³As our ruling is dispositive, we need not address the department's remaining argument against disclosure.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in blue ink, appearing to read 'D. Wheelus', is written over a horizontal line.

David L. Wheelus
Assistant Attorney General
Open Records Division

DLW/bhf

Ref: ID# 597390

Enc. Submitted documents

c: Requestor
(w/o enclosures)