



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 14, 2017

Mr. Spencer Walker
Public Information Coordinator
State Bar of Texas
1414 Colorado Street
Austin, Texas 78701

OR2017-28372

Dear Mr. Walker:

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# 687795.

The State Bar of Texas (the "state bar") received a request for 35 categories of information concerning the Texas Opportunity and Justice Incubator ("TOJI") program. You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code and protected by copyright. Additionally, you state release of the submitted information may implicate the privacy interests of TOJI participants. Accordingly, you state, and provide documentation showing, you notified these individuals of their right to submit comments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from some of the notified individuals (the "interested parties"). We have considered the submitted arguments and reviewed the submitted information.

Section 552.114(b) of the Government Code excepts from disclosure student records "at an educational institution funded wholly or partly by state revenue." *See* Gov't Code § 552.114(b). This office has determined the same analysis applies under section 552.114 and the Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of title 20 of the United States Code. FERPA governs the availability of student records held by educational institutions or agencies receiving federal funds. We note section 552.114 and

FERPA apply only to student records in the custody of an educational institution and records directly transferred from an educational institution to a third party. *See* 34 C.F.R. § 99.33(a)(2). The interested parties assert some of the submitted information is confidential under section 552.114. We note the information at issue consists of materials submitted by applicants seeking to participate in the TOJI program. Upon review, we find the interested parties have failed to demonstrate the TOJI is an “educational institution” for purposes of section 552.114. We also note the state bar is not an educational institution for purposes of section 552.114. *See* Open Records Decision No. 309 at 3 (1983) (City of Fort Worth not an “educational agency” for purposes of FERPA). Further, we have no indication any portion of the information at issue was transferred directly to the state bar from an educational institution. We therefore conclude the state bar may not withhold any of the information at issue on the basis of section 552.114 of the Government Code.

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 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. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we conclude the information we marked meets the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the state bar must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find no portion of the remaining information is highly intimate or embarrassing and of no legitimate public concern, and the state bar may not withhold any of the remaining information under section 552.101 of the Government Code on the basis of common-law privacy.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c).¹ Gov’t Code § 552.137(a)-(c). The e-mail addresses at issue are not a type specifically excluded by section 552.137(c) of the Government Code. Accordingly, the state bar must withhold the e-mail addresses we

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure.

You state some of the remaining information is protected by copyright. However, we note copyright law does not make information confidential under the Act. *See generally* Open Records Decision No. 660 at 5 (1999) (Federal Copyright Act does not make information confidential, but rather gives copyright holder exclusive right to reproduce his work, subject to another person's right to make fair use of it). Nevertheless, a custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the state bar must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The state bar must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure. The state bar must release the remaining information; however, the state bar may only release any information subject to copyright in accordance with copyright law.

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,



Kieran Hillis
Assistant Attorney General
Open Records Division

KH/sb

Ref: ID# 687795

Enc. Submitted documents

c: Requestor
(w/o enclosures)

20 Third Parties
(w/o enclosures)