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Rep. Carol Alvarado, Co-Chair
Rep. Dan Flynn, Co-Chair
House Select Committee on Transparency
in State Agency Operations
Texas House of Representatives
John H. Reagan Building, Room 310
Austin, Texas 78768

**RE: REPORT TO THE COMMITTEE REGARDING CRIMINAL REFERRAL
OF ALLEGED VIOLATIONS BY REGENT WALLACE L. HALL, JR.
UNDER THE TEXAS GOVERNMENT CODE, SECTION 552.352**

Dear Co-Chairs Alvarado and Flynn:

This report is submitted by outside counsel to The University of Texas System ("U.T. System") in response to a request, made by Rep. Trey Martinez Fischer, a member of the House Select Committee on Transparency in State Agency Operations ("Committee"), during the November 12, 2013, hearing. Rep. Martinez Fischer requested U.T. System review for possible violations of § 552.352 of the Texas Government Code ("Statute") Regent Wallace L. Hall, Jr.'s requests for, and use of, information that may be confidential under the Family Educational Rights and Privacy Act ("FERPA"). (*Tr.*, November 12, 2013, *Hearing* at 96 ("*Tr.*"))

Committee Members also expressed concerns that Regent Hall potentially violated federal law, and perhaps state criminal law, because he may have distributed alleged FERPA information to his lawyer or the press. (*Tr.* at 185-186) Committee Members specifically suggested that Regent Hall may have violated the law by disclosing the contents of e-mail(s) related to a student applicant to a U. T. Austin graduate program. (*Tr.* at 79) By unanimous vote of those present, the Committee referred the issue to Special Counsel, Rusty Hardin, for analysis and possible referral to law enforcement. (*Tr.* at 100-101)

As requested, we have examined whether Regent Hall's conduct violated § 552.352 of the Texas Government Code and find no credible evidence of a violation of § 552.352 or of any other state or federal law.

I. FACTUAL AND LEGAL BACKGROUND

A. FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT

There are no criminal penalties for disclosing confidential student educational records under FERPA. *See* 20 U.S.C. § 1232g. FERPA does not create rights that individuals can vindicate. As the Supreme Court held in *Gonzaga v. John Doe*, 536 U.S. 273 (2002), FERPA has an “aggregate focus” and does not address “the needs of any particular person.” *Id.* Enforcement is left to the U. S. Department of Education (“DOE”) which may terminate federal funding to an institution, but DOE may not pursue individuals for perceived infractions. *Id.* at 278.

Before DOE can take action against an institution, it must demonstrate that the institution has a policy or practice of disclosing FERPA protected information. *Id.* at 276. Furthermore, if an offending policy or practice is limited, such that the institution is still in substantial compliance with FERPA, defunding is not permitted. *Id.* at 288. Finally, even if DOE determines that an institution’s patterns or practices of handling FERPA information do not substantially comply with the law, defunding cannot occur, unless the institution refuses to take remedial action. *Id.*

Although FERPA does not criminalize disclosures disclosing FERPA protected information may, under certain circumstances, be a § 552.352 crime. Under § 552.352, it is a criminal misdemeanor offense if an official with confidential information obtained for a legislative purpose under § 552.008 of the Texas Public Information Act (“TPIA”): (i) uses that information for a purpose other than the one used to justify access to the confidential information, (ii) permits an unauthorized person to inspect the information, or (iii) discloses the confidential information to an unauthorized person. *See* TEX. GOV’T CODE § 552.352(a-1)(1-b).

The e-mail or e-mail thread in question may not even be subject to FERPA given the purpose and content of the communication. Nonetheless, for this analysis, we have treated the document as FERPA protected consistent with U.T Austin and U.T. System’s previous treatment of the information.

B. AS SCHOOL OFFICIALS, UNIVERSITY OF TEXAS REGENTS CAN REVIEW FERPA INFORMATION PROVIDED THEY HAVE A LEGITIMATE EDUCATIONAL PURPOSE.

Committee Members’ questions and comments indicated concern that Regent Hall may have criminal exposure because he obtained or retained material potentially protected by FERPA from The University of Texas at Austin (“U.T. Austin”) without pre-determining that he had a legitimate educational purpose. (*Tr.* at 70) A reason for this concern seems to be the belief that requests from a Regent of the U.T. System originate from a governmental body outside of the educational institution. However, FERPA clearly allows for disclosure to “school officials.” U.T. System Regents, including Regent Hall, are “school officials” for FERPA’s purposes.

U.T. Austin is one of fifteen institutions that comprise the U.T. System and are subject to the Board of Regents' "governance, control, jurisdiction or management." TEX. ED. CODE § 65.02(b). U.T. Austin's own publications describe Regents as University representatives. U.T. Austin's catalogue, Appendix C, Subchapter 10-300, Sec. 10-301 (b), states that "an 'institutional representative' is any *regent*, executive officer, administrative officer, attorney, peace officer, or security officer of the University or The University of Texas." (emphasis added) U.T. Austin's rules also expressly state "all of the Regents' Rules and Regulations have full force and effect as concerns the University of Texas at Austin." *Id.* Chapter 1. Since Regent Hall is a school official and U.T. Austin representative, he is entitled to obtain and retain FERPA information provided he has a legitimate educational purpose for doing so. Because of their broad oversight responsibilities, Regents review and have access to a multitude of non-public information. Regents' supervisory authority includes topic areas (such as student safety, incident reports and admission standards) which may extend into FERPA-related issues.

Regent Hall had a legitimate educational purpose for possessing the alleged FERPA e-mail(s) because it/they raise concerns about possible favoritism in the U.T. Austin admissions process. Regent Hall did not request documents that might be protected by FERPA. Rather, Regent Hall specifically asked that documents with potential FERPA information be withheld. However, when potential FERPA documents were provided by U.T. Austin, in response to a Regental information request, issues surrounding U.T. Austin's admissions processes came to Regent Hall's attention. In this situation, Regent Hall would have an educational purpose since oversight of "campus admissions standards [are] consistent with the role and mission of U.T. System institutions." See TEX. ED. CODE § 51.352(d)(4). Moreover, U.T. System's subsequent inquiry at the direction of Chancellor Cigarroa is focused on potential favoritism in U.T. Austin's admissions process. See August 15, 2013, Letter from McDermott Will & Emery to the Committee, pages 4-5. See also, August 25, 2013, Letter from McDermott Will & Emery to the Committee.

C. PRODUCTION, RETENTION AND ALLEGED DISCLOSURE OF POTENTIAL FERPA E-MAIL(S) AT ISSUE.

U.T. Austin produced documents to Regent Hall pursuant to Regental and TPIA requests. The Special Counsel's timeline, and U.T. System's own inquiry, show that Regent Hall obtained the e-mails at issue through a Regental document request, not through his June 2013 TPIA requests. (*Tr.* at 46) U.T. Austin produced the "e-mail thread" to Regent Hall sometime in mid-January 2013. In contrast, Regent Hall did not make TPIA requests until June 2013. (*Tr.* at 63)

The e-mail(s) that this Committee appears to be concerned about came into Regent Hall's possession as a result of his Regental request for information from U.T. Austin regarding its TPIA requests and corresponding responses. Regent Hall sought copies of U.T. Austin's TPIA source documents and resulting public disclosures from January 1, 2011, through September 21, 2012. Regent Hall's rolling requests for TPIA materials later extended into other time frames. In response, Regent Hall obtained responsive documents U.T. Austin publicly produced pursuant

to the respective TPIA requests as well as documents that were responsive, but not produced because of applicable disclosure exceptions. On or about January 16, 2013, U.T. Austin delivered copies of its January 2012 TPIA responses to the Board of Regents' Office.

U.T. Austin's January 2012 TPIA responses included a December 9, 2011, request from Morgan Smith, a Texas Tribune reporter who sought copies of "all mailed and electronic correspondence between Bill Powers and Larry Sager." U.T. Austin's responsive documents to Ms. Smith's request were reviewed by U.T. Austin's Office of Legal Affairs and U.T. System's Offices of General Counsel. Thereafter, U.T. System submitted TPIA briefs on U.T. Austin's behalf to the Texas Attorney General's office. While the e-mail(s) may have been responsive to Ms. Smith's request, they were not released after the multi-tiered review. On or about January 16, 2013, Regent Hall received U.T. Austin's "Morgan Smith" file which included an unredacted version of the e-mail document.

Questions about how and when Regent Hall obtained the e-mail(s) may arise from the fact that Regent Hall instructed U.T. Austin to withhold potential FERPA (as well as Health Insurance Portability and Accountability Act, or "HIPAA") information from documents produced in response to his ongoing Regental requests. (*Tr.* at 158) At Regent Hall's request, U.T. Austin attempted to screen and withhold potential FERPA and other protected information from documents produced in response to the Regental requests; however, U.T. Austin never determined that Regent Hall did not have a legitimate educational interest.

The incidental or accidental disclosure of the e-mail(s) does not violate FERPA or § 552.352 since U.T. Austin did not intend to disclose and Regent Hall did not intend to receive the e-mail thread. Similarly, Regent Hall's retention of the e-mail(s) after he realized they might be potentially confidential under FERPA also did not violate FERPA or give rise to criminal liability under the TPIA. FERPA requires neither antecedent justifications nor written expositions of an original, educational purpose. Further, a school official's original purpose for obtaining FERPA documents is similarly nondispositive. A school official's educational purpose may expand due to information discovered through a request for student information. In the instant matter, the e-mail(s) gave rise to an educational purpose, namely, a concern related to U.T. Austin's admission practices, which justified retaining the documents.

II. DISCUSSION OF SECTION 552.352 LIABILITY.

Section 552.352 of the Government Code states that,

- (a) A person commits an offense if the person distributes information considered confidential under the terms of this chapter.
 - (a-1) An officer or employee of a governmental body who obtains access to confidential information under Section 552.008 commits an offense if the officer or employee knowingly:
 - (1) uses the confidential information for a purpose other than the purpose for which the information was received or for a purpose unrelated

to the law that permitted the officer or employee to obtain access to the information, including solicitation of political contributions or solicitation of clients;

(2) permits inspection of the confidential information by a person who is not authorized to inspect the information; or

(3) discloses the confidential information to a person who is not authorized to receive the information.

(a-2) For purposes of Subsection (a-1), a member of an advisory committee to a governmental body who obtains access to confidential information in that capacity is considered to be an officer or employee of the governmental body.

(b) An offense under this section is a misdemeanor punishable by:

(1) a fine of not more than \$1,000;

(2) confinement in the county jail for not more than six months; or

(3) both the fine and confinement.

(c) A violation under this section constitutes official misconduct.

A. THE TEXAS PUBLIC INFORMATION ACT DOES NOT CRIMINALIZE DISCLOSURE OF STUDENT INFORMATION BECAUSE CHAPTER 552 DOES NOT MAKE FERPA INFORMATION CONFIDENTIAL AND "STUDENT RECORDS," AS DEFINED IN SECTION 552.114, ARE SIMPLY EXCEPTED FROM DISCLOSURE.

Chapter 552 explicitly addresses FERPA information in a single sentence, stating that "[t]his chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974." TEX. GOV'T CODE § 552.026. Section 552.026, by its terms, does not prohibit disclosure of student information that may be protected under FERPA. Instead, Chapter 552 defines "student records" distinctly and regulates disclosure differently, for purposes of the Public Information Act,¹ in a separate section as follows:

(a) Information is **excepted** from the requirements of Section 552.021 if it is information in a student record at an educational institution funded wholly or partly by state revenue.

¹ Among the notable differences between the treatment of identical information under FERPA and Texas law are the following: under the later Texas law there is no equivalent to FERPA's "educational purpose" requirement limiting distribution of student records to educational institution personnel; and, student records must be disclosed to a person conducting a child abuse investigation, whereas under FERPA there is no such provision and the disclosure violates FERPA privacy rules, unless an emergency that poses a present threat to another exists. See *Letter to University of New Mexico re: Applicability of FERPA to Health and Other State Reporting Requirements*, Nov. 20, 2004, FERPA Online Library (available at <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/baiseunmslc.html>).

- (b) A record under Subsection (a) shall be made available on the request of:
- (1) educational institution personnel;
 - (2) the student involved or the student's parent, legal guardian, or spouse; or
 - (3) a person conducting a child abuse investigation required by Subchapter D, Chapter 261, Family Code.

TEX. GOV'T CODE § 552.114 (emphasis added).

Review of published cases indicates that no one has ever been prosecuted for violating Section 552.352, and no appellate court has held that release of student records excepted from disclosure under § 552.114 violates § 552.352. However, *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336 (Tex. 2010) (Wainwright, J., Johnson, J. dissenting in part and concurring in part), contains a persuasive analysis of the issue of liability for disclosing information considered a "student record" under the Public Information Act. After carefully considering the legislative purpose evident in the text of Chapter 552, Justice Wainwright reasoned that disclosure of student records would **not** be a crime. Justice Wainwright explained:

The text of the PIA indicates that the Legislature intended the word "confidential" to have a specific meaning in the PIA, separating highly sensitive information that is prohibited from disclosure (such as the home address of a peace officer) from sensitive information that is merely **excepted** from disclosure (**such as information in a student record**). The PIA thus creates three distinct categories of public information: information required to be disclosed, information excepted from mandatory (but not voluntary) disclosure, and confidential information that is prohibited from disclosure and subject to criminal penalties.

Id. at 269 (emphasis added).

B. DISCLOSURE OF STUDENT RECORDS TO A PRIVATE ATTORNEY IN PREPARATION FOR LITIGATION GOVERNED BY RULES OF CIVIL PROCEDURE SHOULD BE TREATED AS AN AUTHORIZED DISCLOSURE UNDER CHAPTER 552 IN ORDER TO AVOID ABSURD RESULTS.

Section 552.005 states that (a) "[t]his chapter does not affect the scope of civil discovery under the Texas Rules of Civil Procedure," and that (b) "[e]xceptions from disclosure under this chapter do not create new privileges from discovery." If student records are responsive and relevant, they must be disclosed in response to proper discovery requests under Rule 192 of the Texas Code of Civil Procedure. Pursuant to House Rule 4, Section 13, committees must follow rules of evidence and civil procedure to the extent applicable. The Civil Rule's applicability is heightened in impeachment proceedings which are entirely "judicial in character." *Ferguson v. Maddox*, 114 Tex. 85, 94, 263 S.W. 888, 890 (Tex. 1924).

In compliance with the Rules of Civil Procedure, parties involved in Chapter 665 proceedings who are subpoenaed to produce documents must disclose responsive documents "relevant to the subject matter of the action." Tex. R. Civ. P. 192.3(b). Whether a document is responsive and relevant is a legal determination made in light of Rule 401 of the Texas Rules of Evidence. Retained counsel typically discharge this obligation once litigation commences and often find it necessary to review records beforehand to evaluate the matter and advise their client(s) accordingly. In light of the fundamental role attorneys play, it would lead to an absurd result were it criminal for an official to provide student records to his or her attorney in the face of litigation, or anticipated litigation, involving those very records. Under § 552.005, the official would have to respond to discovery in accordance with the law, but under § 552.352 he could not provide the underlying document(s) to legal counsel.

Statutory schemes are interpreted to avoid absurd results. *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991); *Jose Carreras, M.D., P.A. v. Marroquin*, 339 S.W.3d 68, 73 (Tex. 2011) (recognizing that this Court "interpret[s] statutes to avoid an absurd result"). The Texas Attorney General has been compelled to address what clearly would be absurd results following from the literal application of § 552.352(a). Literal application of this Section would criminalize the distribution of confidential information within the very agency that collected it. To avoid this absurdity, the Attorney General has issued opinions instructing that "a member of a governmental body, acting in her official capacity, is not a member of the public for purposes of access to information in the governmental body's possession." See Tex. Atty. Gen. Op. OR2001-2154 (2001). Thus, "an authorized official or employee may review records of the governmental body without implicating the Act's prohibition against selective disclosure." See Attorney General Opinion JM-119 at 2 (1983); see also Open Records Decision No. 468 at 4 (1987).

For similar reasons, an attorney representing a governmental official in legal proceedings that impact the official, both personally and in his official capacity, should not be treated as a member of the public. Rather the attorney is acting as the governmental official's authorized agent. The Parliamentarian of the House of Representatives recently characterized impeachment proceedings as "pending litigation."² Regent Hall appears to have retained counsel in response to the initiation of impeachment proceedings and appears to have disclosed potentially FERPA protected documents, if any, to his attorneys because he is the defendant in this litigation. U.T. System, therefore, concludes that Regent Hall's presumed disclosure of student records to his attorney for the purpose of preparing for or defending himself in the instant impeachment litigation was not criminal under § 552.352. Regent Hall's presumed disclosure of the potential FERPA documents to his defense counsel would be equally warranted as providing potentially confidential student information to the Committee in accordance with the Rules of Civil Procedure that House Rule 4, Section 13 imposes on respondents in this situation.

² Letter Briefing from Chris Greisel, House Parliamentarian, to the Honorable Greg Abbott, re: RQ-1163-GA (dated December 5, 2013).

CONCLUSION

Based upon the facts known to U.T. System as of this writing, we find no credible evidence of a violation of § 552.352 that would warrant a referral for criminal prosecution.

With regards,
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