



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

December 4, 1995

Ms. JoAnn S. Wright
School Attorney
Arlington Independent School District
1203 West Pioneer Parkway
Arlington, Texas 76013-6246

Open Records Decision No. 634

Re: Whether a school district may deny a request for information that is protected as "education records" under the federal Family Educational Rights and Privacy Act without seeking a determination from the attorney general under section 552.301 of the Government Code (RQ-775)

Dear Ms. Wright:

The Arlington Independent School District ("AISD") received a request from a member of the public under the Texas Open Records Act (the "act"), chapter 552 of the Government Code, for records concerning disciplinary action taken against a certain student at an AISD junior high school. You inform us that AISD is funded in part by state revenue and federal funds. As a threshold matter, you first ask us whether an educational institution that receives federal and state funds is required to request a decision from this office under Government Code section 552.301 when it claims that information is excepted from required public disclosure by sections 552.026 and 552.114 in conjunction with section 552.101.¹ Subject to your contention that AISD has no obligation to request an attorney general decision as to information excepted by sections 552.026 and 552.114 in conjunction with section 552.101, you ask for such a decision "out of an abundance of caution and under the §552.302 presumption that the records are public if there is a failure to make a timely request for an Attorney General determination."

¹Although the open records laws were substantially amended by the Seventy-fourth Legislature, Act of May 29, 1995, 74th Leg., R.S., ch. 1035, 1995 Tex. Sess. Law Serv. 5127, sections 552.026 and 552.114 of the Government Code were not amended. The amendments to chapter 552, however, "affecting the availability of information, the inspection of information, or the copying of information, . . . apply only to a request for information that is received by a governmental body on or after September 1, 1995." *Id.* § 26(a), 1995 Tex. Sess. Law Serv. at 5142. A request for information that is received by a governmental body prior to September 1, 1995, is governed by the law in effect at the time the request is made. *Id.*

Section 552.026 provides: "This 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, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g." The Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, provides in part as follows:

(b) Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of federally-supported education programs; recordkeeping.

(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section)² of students without the written consent of their parents to any individual, agency, or organization, other than to the following—

[list of exceptions].

....

(2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally

²"Directory information" is defined as including

the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

20 U.S.C. § 1232g(a)(5)(A). Other examples of directory information include marital status and expected date of graduation, see Open Records Decision No. 96 (1975) at 1, student parking permit information, Open Records Decision No. 242 (1980) at 2, and student rosters for particular courses and names of students present at each class, Open Records Decision No. 244 (1980) at 2.

FERPA permits an educational agency or institution to release directory information in accordance with federal notice requirements, 20 U.S.C. § 1232g(a)(5)(B) (providing notice requirements that afford affected students right to object to release of directory information relating to them), without the sanction of loss of federal funds, *id.* § 1232g(b)(1). The Texas Open Records Act requires an educational agency or institution to give notice and an opportunity to object to the release of requested directory information as required by federal law and then to release the directory information if there is no objection. Open Records Decision Nos. 244 (1980) at 2, 242 (1980) at 2, 96 (1975) at 2.

identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection, unless—

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(B) except as provided in paragraph (1)(J), such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency. [Footnote added.]

See also 34 C.F.R. pt. 99 (Department of Education regulations under FERPA). For purposes of FERPA, "education records" generally include "records, files, documents, and other materials" 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," 20 U.S.C. § 1232g(a)(4)(A),³ and an "educational agency or institution"

³The FERPA definition of "education records" contains several exceptions:

(B) The term "education records" does not include—

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

(ii) 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;

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or

(iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

20 U.S.C. § 1232g(a)(4).

means any public or private agency or institution which is the recipient of funds under any . . . program," *id.* § 1232g(a)(3), "for which the Secretary [of Education] or the Department [of Education] has administrative responsibility as provided by law or by delegation of authority pursuant to law," *id.* § 1221(c)(1). We assume that AISD is an "educational agency or institution"⁴ for purposes of FERPA. Any permission or consent required of a student's parents under FERPA becomes required only of the student when the student reaches eighteen years of age or begins attending a postsecondary educational institution. *Id.* § 1232g(d).

Thus, FERPA generally requires consent of the student or the student's parents before an educational agency or institution discloses personally identifiable information⁵ in the student's education records,⁶ *Klein Indep. Sch. Dist. v. Mattox*, 830 F.2d 576, 579 (5th Cir. 1987), *cert. denied*, 485 U.S. 1008 (Tex. 1988), unless the disclosure is to any of certain federal, state, and local officials and institutions, *see* 20 U.S.C. § 1232g(b)(1). "An educational agency or institution that unlawfully releases a student's record may lose federal funding." *Klein Indep. Sch. Dist.*, 830 F.2d at 579 (citing 20 U.S.C. § 1232g(b)(1)). Loss of federal funding is the only sanction that FERPA expressly provides for a violation of its provisions. *Id.*

⁴Throughout this opinion, the phrase "educational agency or institution" means an educational agency or institution as defined by FERPA, *id.* § 1232g(a)(3).

⁵FERPA does not protect information other than "personally identifiable information in education records." *See id.* § 1232g(b)(2). Therefore, the exception in section 552.026 does not extend to *all* information in an education record but only to that information which identifies the student or the student's parents. Open Records Decision No. 332 (1982) at 3.

⁶FERPA also has a provision that protects parents' rights of access to the education records of their children. Subsection (a)(1)(A) provides in part:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. . . .

20 U.S.C. § 1232g(a)(1)(A). The foregoing right of access of the parents becomes the right of the student when the student reaches eighteen years of age or begins attending a postsecondary educational institution. *Id.* § 1232g(d). Parents and students denied access to education records may direct their inquiries or report violations to the Family Policy Compliance Office, whose address and telephone number follow:

Family Policy Compliance Office
United States Department of Education
600 Independence Avenue S.W.
Washington, D.C. 20202-4605
(202) 260-3887

Government Code section 552.114 excepts "information in a student record at an educational institution funded wholly or partly by state revenue." The phrase "student record" in section 552.114 is not statutorily defined, but in Attorney General Opinion H-447 (1974) this office defined the phrase as follows:

[A] "student record" would generally include information concerning the student himself and his individual relationship to the educational institution. A list of student records would include, but not necessarily be limited to, the following: applications for admission, standardized achievement test scores, attendance data, scores on standardized intelligence, aptitude, and psychological tests, interest inventory results, health data, family background information, teacher or counselor ratings and observations, and reports of behavioral patterns or disciplinary actions.

Attorney General Opinion H-447 (1974) at 2. This office has generally treated "student record" information as the equivalent of "education record" information that is protected by FERPA. See Open Records Decision Nos. 539 (1990), 477 (1987), 332 (1982).⁷

Government Code section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Your claim under section 552.101 is based solely on the status of the requested information as "education records" protected by FERPA.

You note that Government Code section 552.301(a) expressly requires a governmental body to ask for an attorney general decision when it "receives a written request for information that it considers to be within *one of the exceptions under Subchapter C*" of the act.⁸ You contend that information subject to section 552.026 is excepted from required public disclosure under the act without the need of a request for a decision because that section falls under subchapter B rather than subchapter C. We agree; since the addition of the FERPA provision, the act has never required a governmental body to request an attorney general decision regarding information subject to FERPA.

⁷See also Open Records Decision No. 612 (1992), which concluded that arrest and incident reports created and maintained by a state university campus police department are excepted from the definition of "education records," 20 U.S.C. § 1232g(a)(4)(B)(ii), and that such reports also are generally subject to required public disclosure under *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), writ *ref'd per curiam*, 536 S.W.2d 559 (Tex. 1976), and so are not student records under the predecessor to section 552.114.

⁸Act of May 4, 1993, 73d Leg., R.S., ch. 268, § 1, 1993 Tex. Gen. Laws 583, 605, amended by Act of May 29, 1995, 74th Leg., R.S., ch. 1035, § 18, 1995 Tex. Sess. Law Serv. 5127, 5139 (emphasis added).

This interpretation of the act is supported by the plain language of the act as it read prior to its nonsubstantive recodification in 1993 as chapter 552 of the Government Code, *see* Act of May 4, 1993, 73d Leg., R.S., ch. 268, §§ 1, 46-47, 1993 Tex. Gen. Laws 583, 986, *amended by* Act of May 29, 1995, 74th Leg., R.S., ch. 1035, 1995 Tex. Sess. Law Serv. 5127. In 1975, the content of section 552.026 was added to the former version of the act, V.T.C.S. article 6252-17a, as *section 14(e)*. *See* Act of May 17, 1975, 64th Leg., R.S., ch. 314, § 1, 1975 Tex. Gen. Laws 809. Until the legislature recodified the act in 1993, the portion of section 552.301(a) that requires the governmental body to request an attorney general decision was found in section 7(a) of article 6252-17a. Act of May 29, 1989, 71st Leg., R.S., ch. 1248, § 14, 1989 Tex. Gen. Laws 4996, 5027. That section provided in pertinent part:

If a governmental body receives a written request for information which it considers within *one of the exceptions stated in Section 3* of this Act, but there has been no previous determination that it falls within one of the exceptions, the governmental body within a reasonable time, no later than ten calendar days, after receiving a written request must request a decision from the attorney general to determine whether the information is within *that exception*.

Id. (emphasis added). Because the FERPA provision was placed in section 14 rather than section 3, the former act did not require a request for a decision.

Similarly, section 552.301(a), as amended by the Seventy-fourth Legislature, provides in pertinent part:

A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within *one of the exceptions under Subchapter C* must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within *one of the exceptions*.

Act of May 29, 1995, 74th Leg., R.S., ch. 1035, § 18, 1995 Tex. Sess. Law Serv. 5127, 5139. The FERPA provision, section 552.026, is located in subchapter B, not subchapter C. Therefore, consistently with the statutory predecessor that section 552.301(a) nonsubstantively recodified, the plain language of section 552.301(a) excludes the FERPA provision from the requirement that the governmental body request an attorney general decision.

In addition, the language of section 552.026 specifically overrides the presumption of openness in section 552.302 as it would apply to information protected by FERPA. The latter section provides: "If a governmental body does not request an attorney general decision as provided by Section 552.301(a), the information requested

in writing is presumed to be public information.” This provision means that if a governmental body does not request a decision within ten days of receipt of a written request for information, it may withhold the requested information only if it can demonstrate compelling reasons for doing so. Open Records Decision No. 452 (1986) at 2. Section 552.026, on the other hand, provides that no release of “information contained in education records of an educational agency or institution” is required “except in conformity with [FERPA].” FERPA does not provide a presumption in favor of required public disclosure if an educational agency or institution does not request an attorney general decision under section 552.301(a) after determining that information protected by FERPA should be withheld. Therefore, the required disclosure of information excepted by section 552.026 as a result of the application of the presumption of section 552.302 would not be in conformity with FERPA.

Section 552.026 also dictates a similar rationale regarding the exception for “student record” information in section 552.114 and the exception for “information considered to be confidential by law” in section 552.101, insofar as the information is protected by FERPA. The presumption of section 552.302, if applied to information protected by FERPA and excepted by section 552.114 as well as section 552.101, would not be in conformity with FERPA.

We accordingly conclude that the act does not require an educational agency or institution to request an attorney general decision as to personally identifiable nondirectory information in an “education record” as defined in FERPA. We also conclude that an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by section 552.101 as “information considered to be confidential by law,” without the necessity of requesting an attorney general decision as to that exception. We finally conclude that an educational agency or institution that is also state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a “student record,” insofar as the “student record” is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception.

We understand your request to be contingent upon conclusions contrary to those just stated. Therefore, we do not reach your request for a decision based on your claimed exceptions.

Of course, an educational agency or institution avoids the requirement of section 552.301(a) and the presumption of openness in section 552.302 only as to information that is in fact protected by FERPA. If the educational agency or institution makes an erroneous determination as to any of the requested information and does not make a timely request to this office for a decision, that information will be subject to the presumption of section 552.302. For example, if the information that is subject to an open records request is excepted from required public disclosure under the deliberative process privilege of section 552.111 and the educational agency or institution fails to request a decision from this office as required by the act because of an erroneous

determination that the information is protected by FERPA, the presumption of section 552.302 will attach to the information. Therefore, it is important, in cases of doubt about the applicability of FERPA to requested information,⁹ that the educational agency or institution timely request a decision from this office regarding any such information that the educational agency or institution claims to be excepted from required public disclosure by any exception in subchapter C of the act.

If an educational agency or institution chooses to request a decision from this office under section 552.301(a) regarding information that is protected by FERPA, we caution that a recent change in federal law apparently makes the parental consent requirement contained in subsection (b)(2)(A) of FERPA applicable to a disclosure to this office in such a request for a decision.

Before the enactment of the Improving America's Schools Act of 1994, Pub. L. No. 103-382, 1994 U.S.C.C.A.N. (108 Stat.) 3518, subsection (b)(1)(E) of FERPA provided an exception to the parental consent requirement for a disclosure to "State and local officials or authorities to whom such information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974." Pub. L. No. 93-568, § 438(b)(1)(E), 1974 U.S.C.C.A.N. (88 Stat. 1855) 2130, 2136 (amended 1994). The Texas Open Records Act was adopted prior to November 19, 1974, see Act of May 19, 1973, 63d Leg., R.S., ch. 424, 1973 Tex. Gen. Laws 1112, so this office had relied on the former language of subsection (b)(1)(E) as a grant of access to education records in a request for an attorney general decision under the act.

The Improving America's Schools Act of 1994 amended subsection (b)(1)(E) to read as follows:

State and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to State statute adopted—

(i) before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve the student whose records are released, or

(ii) after November 19, 1974, if—

(I) the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve, prior to adjudication, the student whose records are released; and

⁹The educational agency or institution may consult with the United States Department of Education's Family Policy Compliance Office on questions about the applicability of FERPA to information that is the subject of an open records request. The address and telephone number of that office are set forth in note 6 above.

(II) the officials and authorities to whom such information is disclosed certify in writing to the educational agency or institution that the information will not be disclosed to any other party except as provided under State law without the prior written consent of the parent of the student.

Pub. L. No. 103-382, § 249(2)(A)(ii), 1994 U.S.C.C.A.N. (108 Stat.) 3518, 3925 (emphasis added).¹⁰ This office, which does not deal with juvenile justice matters in a request for an attorney general decision under section 552.301(a), apparently no longer falls under subsection (b)(1)(E) or any of the other exceptions to the requirement of parental consent that are listed in subsection (b)(1). As of the effective date of the amendment to subsection (b)(1)(E), October 20, 1994, *see id.* § 3(a)(2), 1994 U.S.C.C.A.N. (108 stat.) at 3518, it appears that an educational agency or institution may

¹⁰All the other exceptions in subsection (b)(1) are set forth below:

(A) other school officials, including teachers within the educational institution or local educational agency, [under certain circumstances];

(B) officials of other schools or school systems in which the student seeks or intends to enroll, [under certain circumstances];

(C) authorized representatives of (i) the Comptroller General of the United States, (ii) the Secretary [of Education], or (iii) State educational authorities under the conditions set forth in paragraph (3) of this subsection;

(D) in connection with a student's application for, or receipt of, financial aid;

....

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for [various purposes, under certain circumstances];

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of Title 26;

(I) subject to the regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons; and

(J)(i) the entity or persons designated in a Federal grand jury subpoena . . . ; and

(ii) the entity or persons designated in any other subpoena issued for a law enforcement purpose

20 U.S.C. § 1232g(b)(1).

run afoul of FERPA by disclosing to this office in a request for an attorney general decision, without parental consent, personally identifiable nondirectory information in education records.

The Texas Education Agency has requested an advisory opinion from the Family Policy Compliance Office of the United States Department of Education on the question of whether FERPA permits an educational agency or institution to disclose personally identifiable nondirectory information in education records to this office in a submission for an attorney general decision under the Texas Open Records Act. See Letter from David Anderson, Chief Counsel, Texas Education Agency, to Leroy Rooker, Director, Family Policy Compliance Office, United States Department of Education (Oct. 3, 1995) (copy on file with this office). That request is pending as of the date of issuance of this opinion.

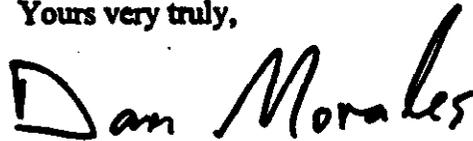
Until that request is answered or the matter is otherwise resolved, we caution that an educational agency or institution that submits to this office education records that are requested under the Texas Open Records Act may risk violating FERPA. An educational agency or institution that seeks an attorney general decision should, before submitting education records to this office, either obtain parental consent to the disclosure of personally identifiable nondirectory information in the records or edit the records to make sure that they contain no personally identifiable nondirectory information.

S U M M A R Y

An educational agency or institution may withhold from public disclosure personally identifiable nondirectory information in "education records" as defined in the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, which information is excepted from required public disclosure by Government Code section 552.026, without the necessity of requesting an attorney general decision as to that exception. Furthermore, an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by Government Code section 552.101 as "information considered to be confidential by law," without the necessity of requesting an attorney general decision as to that exception. Finally, an educational agency or institution that is also state-funded may withhold from public disclosure information that is excepted from required public disclosure by Government Code section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception.

An educational agency or institution that seeks an attorney general decision under the Texas Open Records Act should, before submitting "education records" to this office, either obtain parental consent to the disclosure of personally identifiable nondirectory information in the records or edit the records to make sure that they contain no personally identifiable nondirectory information.

Yours very truly,

A handwritten signature in black ink that reads "Dan Morales". The signature is written in a cursive style with a large, stylized "D" at the beginning.

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