



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 24, 1994

Mr. James W. Deatherage
Power & Deatherage
1311 West Irving Boulevard
Irving, Texas 75061-7220

OR94-671

Dear Mr. Deatherage:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 26592.

The Irving Independent School District (the "school district"), which you represent, has received a request for the following information:

All correspondence between attorney James Deatherage and the school superintendent's office within the past 60 days.

All correspondence between attorney James Deatherage and members of the school board within the past 60 days.

We understand that the school district has made some of the requested information available to the requestor. You seek to withhold the remaining information, however, and claim that sections 552.101, 552.103, and 552.107 of the Government Code except it from required public disclosure.¹

Section 552.301(a) of the Government Code provides:

¹You assert section 552.101 of the Government Code in conjunction with the attorney-client privilege. However, information protected by the attorney-client privilege is protected under section 552.107, not made confidential under section 552.101. See Open Records Decision Nos. 630 (1994), 575 (1990).

A governmental body that receives a written request for information 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. The governmental body must ask for the attorney general's decision within a reasonable time but not later than the 10th calendar day after the date of receiving the written request.

Section 552.302 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.

The school district received the request for information on April 29, 1994. You requested a determination of this office by a letter dated May 18, 1994. On the basis of these facts, we conclude that you failed to request a decision within the 10 day period mandated by section 552.301(a) of the Government Code.

When a governmental body fails to request a decision within 10 days of receiving a request for information, the information at issue is presumed public. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982) at 1-2. The governmental body must show a compelling reason to withhold the information to overcome this presumption. *Hancock*, 797 S.W.2d at 381. Compelling reasons exist when some other source of law makes the information confidential or when the privacy or property interests of third parties are at stake. Open Records Decision No. 150 (1977) at 2.

Some of the submitted information is governed by federal law. Although you do not assert the federal Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, we note that some of the submitted information falls within its scope. FERPA provides the following:

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 . . .) of students without the written consent of their parents to any individual, agency, or organization

20 U.S.C. § 1232g(b)(1). "Education records" are records that

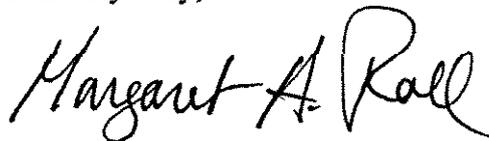
- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

Id. § 1232g(a)(4)(A); *see also* Open Records Decision Nos. 462 (1987) at 14-15; 447 (1986). Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982); 206 (1978). Some of the submitted information, if released, would reveal the identity of students or would make the students' identities "easily traceable." *See* 34 C.F.R. § 99.3 (providing that nondisclosure may be required if disclosure would make a student's identity "easily traceable"). This information has been marked and may be released only as FERPA permits.²

With respect to the remaining information, however, you have not shown compelling reasons why it should be withheld. The fact that information might be excepted from disclosure by section 552.103 or by section 552.107 if you had made a timely request for a ruling does not alone constitute a compelling reason to withhold the information. *See* Open Records Decision Nos. 630 (1994) (concluding that section 552.107(1) is waived if not raised in a timely fashion) (copy enclosed); 542 (1990) at 4 (stating that the litigation exception is waivable).³ We conclude, therefore, that you may not withhold the submitted information under sections 552.103 and 552.107 of the Government Code. Except as noted above, the school district must release the requested information in its entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Margaret A. Roll
Assistant Attorney General
Open Government Section

²Our markings reflect only the information that we understand identifies or tends to identify students. The school district should carefully review the submitted information before releasing it to the public to ensure that information that identifies or tends to identify students is not released.

³In fact, nothing in the Open Records Act or any other law requires a governmental body to withhold information protected by section 552.103 or by section 552.107(1). Therefore, a governmental body may always choose to release information that might be protected by any of these two exceptions.

MAR/GCK/rho

Ref.: ID# 26592

Enclosures: Marked documents
Open Records Decision No. 630

cc: Mr. Scott Williams
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(w/o enclosures)