



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 21, 1997

Ms. Ann Clarke Snell
Bickerstaff, Heath, Smiley, Pollan,
Kever & McDaniel, L.L.P.
1700 Frost Bank Plaza
816 Congress Avenue
Austin, Texas 78701-2443

OR97-1647

Dear Ms. Snell:

You seek reconsideration of Open Records Letter No. 97-0800 (1997), in which this office determined that the Texas Open Records Act, Government Code chapter 552, required the Austin Independent School District (the "AISD") to make certain information available to the requestor. We have assigned your request for reconsideration ID# 107110.

In Open Records Letter No. 97-0800 (1997), we addressed each of the exceptions -- sections 552.102, 552.103, and 552.108 of the Government Code -- which the previous attorney had raised on behalf of AISD. We concluded in Open Records Letter No. 97-0800 (1997) that some of the requested records could be withheld, but other responsive records relating to student allegations of sexual harassment against an AISD employee should be released.

In your request for reconsideration, you make certain new arguments based on alleged changed circumstances. First, you argue that the "the investigatory report must be withheld pursuant to Section 552.101," in conjunction with section 261.201 of the Family Code. Second, you claim that the original authorizations to release the requested information pursuant to the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g(a)(4)(A), have "expired by their own terms on December 31, 1994.¹ Third,

¹We note that at the time of the original request for a ruling the requestor apparently provided the appropriate authorization release forms for the requested "education records." Therefore, we advise you to follow the FERPA access provisions in determining whether release of the "education records" is appropriate at this time.

on behalf of the accused individual you make a claim of common-law privacy, in conjunction with section 552.101 of the Government Code. Finally, you also make an assertion that we should give some consideration to the fact that as a consequence of the passage of time AISD has since changed counsel and retained the services of your law firm.

We believe that in Open Records Letter No. 97-0800 (1997), we addressed the issues raised by the claims you have made in your request for reconsideration. Specifically, we addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment and the accused individual's privacy interest under *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied). As for your arguments regarding the application of section 261.201 of the Family Code to the requested information, we do believe further analysis is necessary, since FERPA's release provisions must be considered.²

In your letter requesting reconsideration of Open Records Letter No. 97-0800 (1997), you characterize the records you seek to withhold as "investigatory reports." We note that effective July 23, 1992, FERPA was amended to provide that the term "education records" does not include "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."³ 20 U.S.C. § 1232g)a)(4)(B)(ii); see Open Records Decision No. 612 (1992). We also note that in Open Records Letter No. 97-0800 (1997), we ruled that the school district's law enforcement records could be withheld under section 552.108. We agree that if AISD's law enforcement records are the files, reports, records, communications, and working papers used or developed in an investigation under Family Code chapter 261, then they must also be withheld as confidential records. Fam. Code § 261.201(a)(2). Since you have not submitted any of the records at issue we cannot determine whether section 261.201 is applicable. Finally, after having examined each one of the arguments that you have made in your request for reconsideration, we affirm our ruling in Open Records Letter No. 97-0800 (1997), and conclude that the student records should be released subject to the FERPA access provisions.

²We note that AISD's counsel in the original request for a ruling never inferred that an investigation under chapter 261 of the Family Code was initiated, nor indicated that the "the files, reports, records, communications, and working papers [were] used or developed in an investigation under this chapter or in providing services as a result of an investigation," pursuant to section 261.201(a) of the Family Code. Furthermore, we cannot conclude from your request for reconsideration that the requested information at issue was forwarded to the Child Protective Services.

³FERPA does not govern the public release of AISD police department records.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Sam Haddad". The signature is written in a cursive style with a large, looping initial "S".

Sam Haddad
Assistant Attorney General
Open Records Division

SH/rho

Ref.: ID# 107110

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