



October 23, 2000

Mr. Scott A. Kelly
Deputy General Counsel
The Texas A&M University System
Office of General Counsel
John B. Connally Bldg, 6th Floor
301 Tarrow
College Station, Texas 77840-7896

OR2000-4102

Dear Mr. Kelly:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 140416.

Texas A&M University-Kingsville (the "university"), a component institution of the Texas A&M University System, received a request for the GRE scores for the past three years for individuals accepted into the Education Leadership doctoral program. The requestor specifies that he seeks only the GRE scores, not the individuals' names. You claim that the requested information is excepted from disclosure under Government Code sections 552.026, 552.101, 552.103, and 552.114, and pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(g). We have considered the exceptions you claim.

You claim that information in the GRE score material is protected as educational records. In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 of the Government Code without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 of the Government Code 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.

Section 552.114(a) of the Government Code requires that the district withhold "information in a student record at an educational institution funded wholly or partly by state revenue." Further, section 552.026 provides that "chapter [552] does not require the release of information contained in education records of an educational agency or institution, except in conformity with [FERPA]." This office generally applies the same analysis under section 552.114 and FERPA.

FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. See 20 U.S.C. § 1232g(b)(1). "Education records" are those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. See 20 U.S.C. § 1232g(a)(4)(A). Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." See Open Records Decision Nos. 332 (1982), 206 (1978). Unless the information personally identifies particular students, it is not protected from disclosure under FERPA. We reiterate that, in this instance, the requestor does not seek the names of the students. As a result, the GRE scores do not personally identify the particular students; therefore, the scores are not protected from disclosure under FERPA. See 34 C.F.R. § 99.3 (defining personally identifiable information).

You also claim that the information is excepted from public disclosure pursuant to Government Code section 552.103. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. See *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin, 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The university must meet both prongs of this test for the information to be excepted under section 552.103(a). Additionally, the university must demonstrate that the litigation was pending or reasonably anticipated as of the day it received the records request. Gov't Code § 552.103(c).

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). You explain that the requestor has brought suit against the university

following the denial of his acceptance into the doctoral program. You have submitted a copy of the Plaintiff's Original Complaint in *William P. Maher v. Texas A&M University Kingsville, Texas, and President of TAMUK University in his capacity of office*, which has been filed in a U.S. District Court. We agree that litigation is pending. We additionally find that the responsive information relates to the pending litigation. Therefore, we conclude that you may withhold the responsive information pursuant to section 552.103(a).

We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information and such information must be disclosed. See Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. In addition, the applicability of section 552.103(a) ends once the litigation has concluded. See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Julie Reagan Watson
Assistant Attorney General
Open Records Division

JRW/pr

Ref: ID# 140416

cc: Mr. William P. Maher
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