



April 20, 2001

Ms. Sue M. Lee
Henslee, Fowler, Hepworth & Schwartz
800 Frost Bank Plaza
816 Congress Avenue
Austin, Texas 78701

OR2001-1581

Dear Ms. Lee:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 145738.

The Forney Independent School District (the "district"), which you represent, received a written request from the parent of two district students for the portions of a tape recording of the district's meeting in executive session in which the requestor's children were discussed. You contend that the requested information is made confidential under the Texas Open Meetings Act, chapter 551 of the Government Code, and therefore must be withheld from the public pursuant to section 552.101 of the Government Code.¹

Section 551.022 of the Government Code specifically provides:

The minutes and tape recordings of *an open meeting* are public records and shall be available for public inspection and copying on request to the governmental body's chief administrative officer or the officer's designee.
[Emphasis added.]

On the other hand, the certified agenda or tape recording of an executive session of the district's school board generally must be withheld in its entirety. Section 551.104(c) of the

¹Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

Government Code provides that the certified agenda and tape recording of an executive session is available for public inspection only under a court order requiring such a release. *See also* Open Records Decision No. 495 (1988) (Open Meetings Act removes certified agendas and tape recordings of executive sessions from review by attorney general under Government Code chapter 552).

We note, however, that section 551.104(c), a state statute, may be preempted by federal law to the extent it conflicts with that federal law. *See, e.g., Equal Employment Opportunity Comm'n v. City of Orange, Texas*, 905 F. Supp 381, 382 (E.D. Tex. 1995); *see also* Open Records Decision No. 431 (1985) (FERPA prevails in conflict with state law). In this instance, the tape recording you submitted to this office constitutes an "education record" for purposes of the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. "Education records" are defined as 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. 20 U.S.C. § 1232g(a)(4)(A).

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). FERPA also provides to parents an affirmative right of access to their child's education records:

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. . . . Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

20 U.S.C. § 1232g(a)(1)(A) (emphasis added).

This office consulted with the Family Policy & Regulations Office of the United States Department of Education ("DOE") regarding your request. The DOE advised as follows:

FERPA does not require that education records relate exclusively to a student or be created for any particular purpose, only that they contain information that is directly related to the student. Furthermore, the definition of "education records" is "records, files, documents and other materials" that contain information directly related to a student and there is no support in the

statute that the term "education records" is limited to those that have been placed in a designated file. This was reinforced in *Belanger v. Nashua, New Hampshire School District*, 856 F. Supp. 40, 48-50 (D.N.H. 1994), where a federal court held that records pertaining to a student's juvenile court proceedings that were maintained by the school district's attorney were "education records" under FERPA. In so holding, the *Belanger* court stated that both the plain language of the statutory definition of "education records" and the legislative history of the Buckley-Pell amendment made clear that "education records" included any documents pertaining to a student that are maintained by the institution.

....

In sum, and to more specifically answer your question, under FERPA, the recording you referenced is an "education record" under FERPA.

....

We are not familiar with the state law you noted and, therefore, do not know if the law conflict[s] with FERPA. However, if the state law prohibited the school district from providing a parent with access to the education records of his or her child, that would constitute a conflict. If an educational agency or institution wishes to continue to receive federal education funds, they must comply with FERPA.

Because the requestor is the parent of the district students who are the subjects of the tape recording before us, we conclude, pursuant to FERPA, that the tape recording is not excepted from disclosure in this instance. The district must provide the requestor a copy of the requested information. *See Open Records Decision No. 152 (1977)* (educational institution must provide copy of education record to qualified individuals).²

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.

²If you have questions as to the applicability of FERPA to the information at issue, you may wish to consult with the DOE at 202-260-3887.

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).

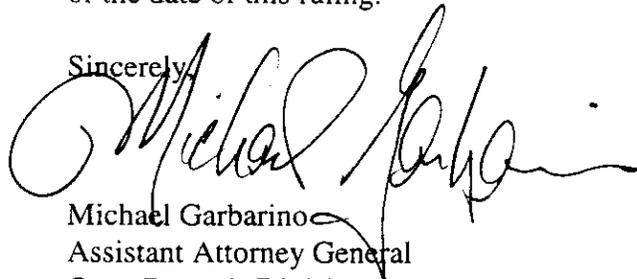
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Hadassah Schloss at 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,



Michael Garbarino
Assistant Attorney General
Open Records Division

MG/RWP/seg

Ref: ID# 145738

Encl. Submitted audiotape

cc: Ms .Mary Penn
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(w/o enclosures)