



June 26, 2001

Ms. Marquette Maresh  
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.  
P.O. Box 2156  
Austin, Texas 78768

OR2001-2727

Dear Ms. Maresh:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 148838.

The Simms Independent School District (the "district"), which you represent, received a written request from the parent of a district student for the tape recording of the district's meeting in executive session in which the requestor's child was discussed. You contend that the requested information is excepted from required public disclosure under section 552.101 of the Government Code in conjunction with section 551.104 of the Government Code.

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 551.103(a) of the Government Code provides that a governmental body that is subject to the provisions of the Open Meetings Act "shall either keep a certified agenda or make a tape recording of the proceedings of each closed meeting, except for a private consultation permitted under Section 551.071." Section 551.104 of the Government Code addresses the preservation and the conditions under which the certified agenda or tape recording of an executive session may be released to the public. Section 551.104 provides in pertinent part:

(a) A governmental body shall preserve the certified agenda or *tape recording of a closed meeting* for at least two years after the date of the meeting. . . .

(b) In litigation in a district court involving an alleged violation of this chapter, the court:

....

(3) may grant legal or equitable relief it considers appropriate, including an order that the governmental body make available to the public the certified agenda or tape of any part of a meeting that was required to be open under this chapter.

(c) The certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3).

As you point out, this office has previously addressed issues similar to that raised in the instant request. In Open Records Letter No. 99-1036 (1999), the Attorney General assumed that the tape recording of that part of an executive session relating to an employee grievance did not comply with the procedural requirements of section 551.103(d), and thus found that release of such a tape did not violate the Open Meetings Act. In Open Records Letter No. 99-3130 (1999), the Attorney General reviewed a situation where a certified agenda was made, as well as a tape of an entire executive session. In that ruling, this office stated:

[a]lthough you represent that the tape recording in question was not made pursuant to 551.103, we do not believe that a failure to satisfy the requirements of section 551.103(d) is dispositive of the inapplicability of sections 551.104 and 551.146. Furthermore . . . neither section 551.103 nor section 551.104 limit confidentiality to one choice between a certified agenda or a tape recording. Therefore, under the Open Meetings Act both a certified agenda and a tape recording of a lawfully closed meeting can be confidential pursuant to sections 551.103, 551.104, or 551.146 of the Government Code.

*Id.*

In contrast to the situation present in OR99-3130, but similar to the situation present in OR99-1036, the information at issue in Open Records Letter No. 2000-1080 (2000) was not a tape recording of an entire executive session, but rather only of a portion of an executive session. In that ruling, this office concluded,

[a]fter much consideration, this office re-affirms its conclusion in Open Records Letter No. 99-3130 that the purpose for which a governmental body creates a tape recording during an executive session is not a factor in determining whether the recording is confidential under the Open Meetings Act. We also now believe that the fact that a tape recording of an executive session fails to meet the procedural requirements as set out in section 551.103(c) of the Government Code does not affect the restrictions on its release to the public as established under section 551.104(c).

*Id.*

Here, you inform us that the school board kept a certified agenda of the entire closed session, but tape recorded only the portion of the closed session pertaining to the requestor's complaint. You further state that the district "did not make the tape recording for purposes of section 551.103 [of the Government Code], but, instead, created the recording as required by the district's "local policy FNG." We conclude that the tape recording at issue in fact constitutes "a tape recording of a closed meeting."

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 reference in your request for ruling 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 a similar 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.

Letter advisement from Ellen Campbell, Family Compliance Office, U.S. Department of Education to Robert Patterson, Open Records Division, Office of the Texas Attorney General (April 9, 2001). Because the requestor here is the parent of the district student who is the subject of the tape recording at issue, we conclude that FERPA grants the parent a right of access to the tape recording. The state statute cannot abrogate that right. Consequently, in order to comply with FERPA, 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).<sup>1</sup>

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

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<sup>1</sup> If 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.

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 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,



Kay H. Hastings  
Assistant Attorney General  
Open Records Division

KHH/DKB/seg

Ref: ID# 148838

cc: Mr. Jackie Love  
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