OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

August 23, 2001

Mr. Jo Ann Collier
Feldman & Rogers, L.L.P.
5718 Westheimer, Suite 1200
Houston, Texas 77057

OR2001-3735

Dear Ms. Collier:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 151094.

The North East Independent School District (the "district"), which you represent, received a request for a copy of an audio/videotape recording of a hearing held by the school board on May 21, 2001. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 551.104 of the Government Code. We have considered the exception you claim.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 551.104(c) of the Government Code, a provision of the Open Meetings Act, provides that "[t]he 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)." Thus, such information cannot generally be released to a member of the public in response to an open records request. *See* Open Records Decision No. 495 (1988). As the responsive information consists of an audiotape of a closed session, it ordinarily would be confidential under section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code.[1]

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*

[1]This office lacks the authority to review a certified agenda in connection with the open records rulings process. *See* ORD 495 at 4 (1988). Thus, a governmental body is not required to comply with section 552.301(e)(1)(D) if the sole information responsive to an open records request is an audiotape under section 551.104(c) of the Government Code.

Comm'n v. City of Orange, Texas, 905 F. Supp 381, 382 (E.D. Tex. 1995); *see also* Open Records Decision No. 431 (1985) (the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, prevails when in conflict with state law). In this instance, you inform us that the tape at issue recorded a closed session of the board in which matters relating to the discipline of a student, the classification of the student, and allegations concerning the treatment of the student by district employees were discussed. We therefore conclude that the tape recording at issue constitutes an "education record" for purposes of FERPA. "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.
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> . . . .
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> In sum, and to more specifically answer your question, under FERPA, the recording you referenced is an "education record" under FERPA.
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> . . . .
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> 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 represents the parent of the district student who is the subject of the tape recording at issue,[2] we conclude that FERPA grants the requestor 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).[3]

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

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[2]We note that the requestor in her request letter to the district asserts that she is providing the district with a release signed by the parent of the student whose records are at issue.

[3] 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.

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).

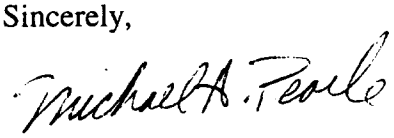
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



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MAP/seg

Ref: ID# 151094

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