



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

January 7, 2003

Mr. Ryan Willett
Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, L.L.P.
816 Congress Avenue, Suite 1700
Austin, Texas 78701-2443

OR2003-0128

Dear Mr. Willett:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 177377.

Austin Community College ("ACC") received a request for any information, including correspondence, notes, and e-mails "regarding any incident, expressed concern, frustration, praise, update, or otherwise" between the requestor and any of seven named individuals, from May 20, 2002 through December 1, 2002. You indicate that the information in the submitted Exhibit B is responsive to this request. You assert that the requested information is excepted from disclosure under section 552.103 of the Government Code. The requestor has also submitted comments to this office. *See* Gov't Code § 552.304. We have considered the submitted comments and arguments and reviewed the submitted information.¹

Before addressing the claimed exception, we first note that the information in the submitted Exhibit B is subject to the Family Educational Rights and Privacy Act of 1974 ("FERPA"). *See* 20 U.S.C. § 1232g(b)(1). "Education records" under FERPA means 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. *Id.* § 1232g(a)(4)(A). The

¹The requestor essentially contends that he made an earlier open records request of ACC to which the information at issue here was responsive, and that in response to that earlier request, ACC did not timely request a ruling from this office to withhold the requested information. *See* Gov't Code § 552.301 (setting forth ten and fifteen business day deadlines for open records ruling requests); *see also id.* § 552.302 (requiring release of information, absent a compelling reason to withhold it, if governmental body does not request ruling as provided by section 552.301). In light of the conclusions herein, we need not address this assertion.

information in the submitted Exhibit B consists entirely of records maintained by ACC that directly relate to the requestor, a student of ACC. Accordingly, Exhibit B constitutes education records of the requestor for purposes of FERPA. *See, e.g., Belanger v. Nashua, New Hampshire School District*, 856 F. Supp. 40, 48-50 (D.N.H. 1994) (broadly construing the FERPA definition of "education records").

FERPA 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). In regard to this right of access, FERPA further states that whenever the student "has attained eighteen years of age, or is attending an institution of postsecondary education," the right of access "shall thereafter only be . . . accorded to the student." *Id.* § 1232g(d). In this case, the requestor thus has an affirmative right of access to the requested information under FERPA.

In regard to the claimed exception, we conclude in this instance that ACC may not withhold any of the requested information based on section 552.103 of the Government Code. Assuming that this exception were to otherwise apply to the information at issue, we note that section 552.103 is a state statute that is 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, 20 U.S.C. § 1232g, prevails when in conflict with state law). Accordingly, the requested information must be made available to the requestor in its entirety.

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 Hadassah Schloss at the Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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/seg

Ref: ID# 177377

Enc. Submitted documents

c: Mr. Spencer Nutting
3802 Stevenson Avenue
Austin, Texas 78703
(w/o enclosures)

Mr. Ed Osborn
Austin Community College
5930 Middle Fiskville Road
Austin, Texas 78752
(w/o enclosures)