



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 7, 2003

Ms. Lydia L. Perry
Law Offices of Robert E. Luna, P.C.
4411 North Central Expressway
Dallas, Texas 75205

OR2003-7102

Dear Ms. Perry:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 188944.

The Coppell Independent School District (the "district"), which you represent, received a request for information relating to the investigation of a grievance filed against a named district employee. You indicate that some responsive information will be provided to the requestor. You claim, however, that portions of the responsive information, including information you seek to redact from the documents you will provide to the requestor, are excepted from disclosure under sections 552.101, 552.102, 552.114, and 552.130 of the Government Code, and under the Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of title 20 of the United States Code. We have considered the exceptions you claim and reviewed the submitted information.

As a preliminary matter, we note that some of the submitted information appears to have been created after the date the district received the present requests. Information created after the date the district received the present requests is not responsive to the requests and need not be released. See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed) (Public Information Act does not require governmental body to disclose information that did not exist at the time the request was received); Open Records Decision No. 452 at 3 (1986). With respect to the remainder of the submitted information, we address your claimed exceptions to disclosure.

We begin by addressing your claim under 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); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). Section 552.026 of the Government Code incorporates FERPA into chapter 552 of the Government Code. *See* Open Records Decision No. 634 at 6-8 (1995). Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026. "Education records" under FERPA are those records that contain information directly related to a student and that 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).

Section 552.114(a) of the Government Code excepts from disclosure "information in a student record at an educational institution funded wholly or partly by state revenue." This office generally has treated "student record" information under section 552.114(a) as the equivalent of "education record" information that is protected by FERPA. *See* Open Records Decision No. 634 at 5 (1995). FERPA protects information to the extent "reasonable and necessary to avoid personally identifying a particular student," or "one or both parents of such a student." *See* Open Records Decision Nos. 332 (1982), 206 (1978).

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,¹ 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. *See* Open Records Decision No. 634 at 6-8 (1995). In this instance, you have submitted information that you contend is confidential under FERPA. Accordingly, we will address your claim.

¹Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that other statutes make confidential.

You indicate that the documents you have submitted as Exhibit 5 contain personally identifiable information of district students. Upon review, however, we note that some of the documents in Exhibit 5 are not education records of current or former district students. Accordingly, the information you have highlighted in these documents is not confidential under FERPA and may not be withheld on that basis. We have marked the information in Exhibit 5 that may not be withheld pursuant to FERPA. With respect to the remaining documents in Exhibit 5, we agree that these documents consist of education records of current or former district students. Thus, we next consider the applicability of FERPA to the information in these education records.

You have marked information that you claim reveals the identity of students and parents, which you seek to withhold under FERPA. However, while it appears that you do not seek to withhold information identifying students whose parents are the clients of the attorney making the present request, or information identifying these parents themselves, we note that this information is generally subject to FERPA and is therefore confidential unless certain conditions are met. Because you have not explained how this information would be releaseable to the requestor, we address the circumstances that must obtain for the requestor to have access to this information in this instance.

Under FERPA, a student's parents or guardians have an affirmative right of access to their child's education records, although this right does not extend to information in the student's records that identifies other students. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3; *see also* 34 C.F.R. § 99.12(a) ("If the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student."). Thus, we generally agree that the parents at issue would have the right under FERPA to inspect and review or be informed of information pertaining to their children in the education records at issue, and that information pertaining to other students in the records must be withheld under FERPA. In this case, however, the requestor is not a parent but rather the attorney representing several of the parents at issue. Accordingly, we must consider the third party requestor's right of access to education records under FERPA.

Under FERPA, an educational agency must release a student's education records to a third party requestor upon receipt of written consent from the student's parents or guardians specifying "the records to be released, the reasons for such release, and to whom, with a copy of the records to be released to the student's parent and the student if desired by the parents." 20 U.S.C. § 1232g(b). We therefore make the following determination concerning the district's claim under FERPA: with respect to the education records in Exhibit 5 that pertain solely to students other than the children of the requestor's clients, the district must withhold information identifying these students and their parents pursuant to FERPA.² With respect

²In addition to the information pertaining solely to other students that you have highlighted, we have marked a small amount of such information that you have not highlighted that is also confidential under FERPA.

to the remaining records in Exhibit 5, if the district receives the proper written consent of the parents of the students whose identifying information you seek to release, the district must release such information to the requestor. However, if the district does not receive the parents' consent to release this information to the requestor pursuant to section 1232g, the district must withhold the information in the remaining documents in Exhibit 5 that is confidential under FERPA. In general, only information identifying the students would be protected by FERPA. In this case, however, the attorney requestor knows the identities of the students who are the children of the requestor's clients. Thus, only withholding these students' identifying information from the education records in Exhibit 5 would not suffice to protect the students' privacy. Consequently, if the district does not receive the parents' proper written consent to release their children's education records to the attorney requestor, the district must withhold the submitted records pertaining to these students from the requestor in their entirety.

Next, with respect to the information in Exhibit 5 that does not consist of education records within the scope of FERPA, we note that e-mail addresses of individuals contained in Exhibit 5 may be excepted from disclosure under section 552.137 of the Government Code. Section 552.137 of the Government Code provides:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Act of June 2, 2003, 78th Leg., R.S., ch. 1089, § 1, 2003 Tex. Sess. Law Serv. 3124 (to be codified as amendment to Gov't Code § 552.137). Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the relevant members of the public have affirmatively consented to the release of the e-mail addresses. We note, however, that section 552.137 does not apply to the work e-mail addresses of officers or employees of a governmental body, a website address or Uniform Resource Locator, or the general e-mail address of a business. E-mail addresses that are within the scope of section 552.137(c) are also not excepted from disclosure under section 552.137. We have marked the e-mail addresses in Exhibit 5 that are within the scope of section 552.137(a). Unless the district has received affirmative consent to disclose these e-mail addresses, the department must withhold the marked e-mail addresses under section 552.137 of the Government Code.

With respect to the remaining information, you contend that portions of the transcripts you have submitted as Exhibit 1 are confidential under section 552.102 of the Government Code. Section 552.102 excepts most information on a transcript from an institution of higher education maintained in the personnel files of professional public school employees. Gov't Code § 552.102(b). Section 552.102 excepts from disclosure all information from transcripts other than the employee's name, the courses taken, and the degree obtained. Open Records Decision No. 526 (1989). Thus, with the exception of the employee's name, the courses taken, and the degree obtained, the district must withhold the information in the transcripts you have submitted as Exhibit 1 pursuant to section 552.102(b).

The document you have submitted as Exhibit 2 consists of the employee's Employment Eligibility Verification, Form I-9. The public availability of the I-9 form is governed by title 8, section 1324a of the United States Code, which provides that an I-9 form and "any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of the I-9 form in this instance would be "for purposes other than for enforcement" of the referenced federal statutes. We therefore determine that the I-9 form and the information attached thereto is confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

You also contend that evaluations of the employee, submitted as Exhibit 4, are confidential under section 21.355 of the Education Code. Section 21.355 provides, "A document evaluating the performance of a teacher or administrator is confidential." This office interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, this office also determined that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of the evaluation. *Id.* Similarly, an administrator is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is serving as an administrator at the time of the evaluation. *Id.* We have marked a portion of the information in Exhibit 4 that does not evaluate the performance of a teacher for purposes of section 21.355 and therefore is not confidential under that section. With respect to the remaining information in Exhibit 4, we make the following determination: if the employee at issue was teaching at the time the information in Exhibit 4 was created, and was required to hold and did hold a certificate or permit under chapter 21 of the Education Code, the remaining documents in Exhibit 4 are confidential under section 21.355 of the Education Code and must be withheld pursuant to section 552.101 of the Government Code.

We note that portions of the submitted information may be excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely elect to keep this information confidential pursuant to section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the district may only withhold information under section 552.117 on behalf of current or former officials or employees who elected to keep information confidential pursuant to section 552.024 prior to the date on which the request for this information was made.

The records in Exhibit 5 contain information revealing whether the named employee and other district employees have family members. Thus, if the employees timely elected to keep this information confidential, the district must withhold the information we have marked in Exhibit 5 pursuant to section 552.117(a)(1) of the Government Code. If the employees did not timely elect to keep the information confidential, however, the district may not withhold this information under section 552.117(a)(1) of the Government Code.

In summary, we have marked the information in Exhibit 5 that is not confidential under FERPA. With respect to the education records in Exhibit 5 that pertain solely to students other than the children of the requestor's clients, the district must withhold information identifying these students and their parents pursuant to FERPA. With respect to the remaining records in Exhibit 5, if the district receives the proper written consent of the parents who are the requestor's clients to release the information pertaining to their children, the district must release such information to the requestor. Otherwise, the district must

withhold the submitted records pertaining to these students from the requestor in their entirety. With respect to the information in Exhibit 5 that is not subject to FERPA, we have marked e-mail addresses that must be withheld under section 552.137 of the Government Code, unless the district has received affirmative consent to release them. With the exception of the employee's name, the courses taken, and the degree obtained, the district must withhold the transcripts in Exhibit 1 pursuant to section 552.102(b) of the Government Code. The submitted I-9 form and attachments thereto must be withheld pursuant to section 552.101 of the Government Code in conjunction with federal law. With the exception of the information we have marked, the district must withhold the documents in Exhibit 4 under section 552.101 in conjunction with section 21.355, provided the employee at issue was teaching at the time the information in Exhibit 4 was created and was required to hold and did hold a certificate or permit under chapter 20 of the Education Code. Otherwise, the district must release Exhibit 4 to the requestor. We have marked information in Exhibit 5 that must be withheld under section 552.117(a)(1) of the Government Code, provided the employees at issue timely elected to keep the information confidential. If the employees did not timely elect to keep this information confidential, the district may not withhold the information under section 552.117(a)(1) and must release the information to the requestor. The remainder of the submitted information must be released to the requestor.

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 Dep't of Pub. 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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 188944

Enc: Submitted documents

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