



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 15, 2004

Ms. Lisa D. Patterson  
Acting General  
State Board of Educator Certification  
4616 West Howard Lane, Suite 120  
Austin, Texas 78728

OR2004-1947

Dear Ms. Patterson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 197577.

The State Board for Educator Certification (the "board") received a request for all records relating to a named individual.<sup>1</sup> You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.111 of the Government Code and Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted information.

Initially, we note that the board has failed to comply with the requirements of section 552.301 of the Government Code. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You did not, however, submit to this office a copy of the written request for information.

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<sup>1</sup> We take our description of the request from your brief as you have failed to submit a copy of the actual written request for information as required by section 552.301(e) of the Government Code. See Gov't Code § 552.301(e).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Our office has previously concluded that sections 552.103 and 552.111 are discretionary exceptions. A governmental body thus waives these exceptions by failing to timely invoke them. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision Nos. 677 at 10 (2002) (claim of attorney work-product privilege under section 552.111 or Texas Rule of Civil Procedure 192.5 does not provide compelling reason for purposes of section 552.302 if it does implicate third party rights), 665 at 2 n.5 (2000) (discretionary exceptions in general), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation, and does not itself make information confidential), 470 (1987) (statutory predecessor to section 552.111 is discretionary exception). Therefore, we find the assertion of these exceptions does not constitute compelling reasons to overcome the presumption that the requested information is public. Thus, you may not withhold any of the submitted information pursuant to sections 552.103 or 552.111 of the Government Code or Texas Rule of Civil Procedure 192.5. Because you have not asserted any other exceptions to disclosure for Exhibit 1 and such information is not confidential by law, you must release Exhibit 1. However, because section 552.101 of the Government Code can constitute a compelling reason to overcome the presumption of openness, we address your argument under section 552.101 with respect to Exhibit 2, and we address the applicability of section 552.101 to a portion of the information in Exhibit 3A.

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. You indicate that Exhibit 2 is an investigation of alleged child abuse conducted by the Texas Department of Family and Protective Services (the "department").<sup>2</sup> Information relating to child abuse investigations is subject to Chapter 261 of the Family Code. Section 261.201(a) of the Family Code provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for

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<sup>2</sup> *See* Act of June 2, 2003, 78th Leg., R.S., ch. 198, § 1.27, 2003 Tex. Sess. Law Serv. 611, 641 ("A reference in law to the Department of Protective and Regulatory Service means the Department of Family and Protective Services.").

purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

After reviewing the information, we agree that Exhibit 2 falls within the scope of section 261.201. We note that, under section 261.406 of the Family Code, the board is authorized to receive these types of records. *See* Fam. Code § 261.406(b) (providing that department shall send written report of its investigation to agency responsible for teacher certification and release of such information is governed by section 261.201). Furthermore, an entity that is authorized to receive confidential information from the department is required to maintain the confidentiality of such records and prevent disclosure to any unauthorized person. *See* Hum. Res. Code § 40.005(d). It does not appear that the requestor is an entity authorized to receive the submitted documents. *See generally* Fam. Code § 261.201(a) (providing that records subject to section 261.201 may be disclosed only for purposes consistent with Family Code and applicable federal or state law or under rules adopted by investigating agency). Accordingly, the board must withhold Exhibit 2 pursuant to section 552.101 as information that is confidential by law.

We also note that Exhibit 3A contains a social security number. Social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security number in the file is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number, you should ensure that no such information was obtained or is maintained by the board pursuant to any provision of law, enacted on or after October 1, 1990.

In summary, you must withhold Exhibit 2 under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. The social security number in Exhibit 3A may be confidential under federal law. You must release the remaining information 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,

A handwritten signature in cursive script that reads "Jennifer E. Berry".

Jennifer E. Berry  
Assistant Attorney General  
Open Records Division

JEB/sdk

Ref: ID# 197577

Enc: Submitted documents

c: Mr. Donald Lindsay  
9801 Anderson Mill Road, Suite 230  
Austin, Texas 78750  
(w/o enclosures)