



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 7, 2004

Ms. Karen L. Johnson
Powell & Leon, L.L.P.
1706 West Sixth Street
Austin, Texas 78703-4703

OR2004-3761

Dear Ms. Johnson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 202357.

The Austin Independent School District (the "district"), which you represent, received a request for all records and reports related to a named student, including a specific incident report. You state that you have released some of the requested information to the requestor. You claim, however, that the remaining requested information is excepted from disclosure under sections 552.101, 552.108, 552.111 and 552.135 of the Government Code, and under the federal 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.

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). "Education records" 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). This office generally applies the same analysis under section 552.114 of the Government Code and FERPA. Open Records Decision No. 539 (1990).

Section 552.114 exempts from disclosure student records at an educational institution funded completely or in part by state revenue. 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.

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 without the necessity of requesting an attorney general decision as to those exceptions, 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 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. Information must be withheld from required public disclosure under FERPA to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978).

In this instance, the district clearly maintains some of the submitted information, which directly relates to a district student. However, we note that the submitted information also contains a record created by the Austin Independent School District Police Department (the "department") for purposes of law enforcement. The department's record does not constitute an "education record" for purposes of FERPA. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8(b)(1) (2003) (defining law enforcement records); Open Records Decision No. 612 (1992) (term "education records" does not include records maintained by law enforcement unit of educational agency or institution created by that law enforcement unit for purpose of law enforcement). However, a record created by a law enforcement unit for a law enforcement purpose that is maintained by a component of the educational agency or institution other than the law enforcement unit is not a record of a law enforcement unit. *See* 34 C.F.R. § 99.8(b)(2) (2003). Therefore, if the department record is maintained by a district component other than the department, then the record falls within the purview of FERPA.¹

¹ If you have questions as to the applicability of FERPA to information that is the subject of an open records request, you may consult with the United States Department of Education Family Policy Compliance Office, whose contact information follows:

Family Policy Compliance Office
United States Department of Education
600 Independence Avenue S.W.
Washington, D.C. 20202-4605
(202) 260-3887

Under FERPA, a student's parents or guardians have an affirmative right of access to the education records of that student. 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3 ("parent" includes legal guardian of student). Furthermore, under FERPA, the district must release a student's education records to a third party requestor upon receipt of the proper written consent of the student's parents or guardians. 20 U.S.C. § 1232g(b). The requestor in this case is the attorney representing the stepfather of the district student. Because we are unable to determine from the information submitted whether the requestor's client is the legal guardian of the student at issue, or whether the student's parents have provided the proper written consent authorizing the district to release the student's education records to the requestor, we make the following determination: if the district determines that the requestor's client is not the legal guardian of the student at issue, and the district does not have the written authorization of the student's parents to release the requested information to the requestor, the district must withhold the submitted documents in their entirety pursuant to FERPA because the requestor knows the identity of the student who is the subject of the records. *See* 20 U.S.C. § 1232g(a)(1)(A), (b)(1).

In the event the district determines that the requestor's client is the legal guardian of the student at issue, or in the event the district has received written authorization from the student's parents for release of the information to the requestor, then the requestor has a right of access to the education records at issue pursuant to FERPA. *See id.* Consequently, if the requestor has a right of access, the district must release the education records pursuant to FERPA, including the law enforcement record, if it is held by a component of the district other than the department. Assuming that the exceptions you raise were to otherwise apply to the information subject to FERPA, we note that sections 552.101, 552.111 and 552.135 are state statutes that are preempted by federal law to the extent the state laws conflict with that federal law. *See, e.g.,* Equal Employment Opp. 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).

However, we note that if the department maintains the submitted law enforcement record, then FERPA does not apply to this information. Thus, we address your arguments for this record. Section 552.108(a)(1) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime." Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(a); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that this record relates to a pending investigation. Based on your assertion and a review of this information, we believe that release of this information "would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1).

However, section 552.108 is inapplicable to basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App. —Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, to the extent the submitted law enforcement record is not subject to FERPA, and with the exception of the basic front page offense and arrest information, you may withhold the law enforcement record from disclosure based on section 552.108(a)(1). We note that you have the discretion to release all or part of the law enforcement record that is not otherwise confidential by law. Gov't Code § 552.007.

The basic information that must be released under section 552.108(c) includes the identity of the complainant. You assert that the identity of the student informer, who is the complainant here, is protected by section 552.135. This section provides in part:

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

Gov't Code § 552.135(a)-(b). Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under this exception to disclosure must clearly identify the specific civil, criminal, or regulatory law that is alleged to have been violated. *See* Gov't Code § 552.301(e)(1)(A). Section 552.135 requires the informer to report a violation of law to the school district. The department is part of the school district. *See* Educ. Code §37.081. Therefore, based on our review of your arguments and the submitted law enforcement record, we find that the conduct reported to the department pertaining to this matter concerns a possible violation of criminal, civil, or regulatory law under section 552.135. Accordingly, we conclude that if FERPA does not apply to the law enforcement record, the district must withhold the information that we have marked pursuant to section 552.135.

In summary, we agree most of the records are education records subject to FERPA. As for the law enforcement record, it is an education record under FERPA only if it is held by a component of the district other than the department. All of the education records are confidential in their entirety and must be released only to the student's legal guardian or upon written authorization from the student's parents. If the department maintains the submitted law enforcement record, then it is not an education record made confidential by FERPA. However, with the exception of some basic front page offense information, the district may withhold it pursuant to sections 552.108 and 552.135 of the Government Code.

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,



Lauren E. Kleine
Assistant Attorney General
Open Records Division

LEK/seg

Ref: ID# 202357

Enc. Submitted documents

c: Ms. Jamy May
Smith & Carlson, P.C.
3410 Far West Boulevard, Suite 235
Austin, Texas 78731
(w/o enclosures)