



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 22, 2004

Mr. William O. Ashcroft
Ashcroft Law Firm, P.C.
325 North St. Paul Street, Suite 3900
Dallas, Texas 75201

OR2004-5075

Dear Mr. Ashcroft:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 203825.

North Central Texas College (the "college"), which you represent, received a request for any notes taken during interviews or meetings and copies of any documents relating to the decision to not renew the requestor's contract for the year 2004-2005. You state that you have released some information. You claim that the submitted information is excepted from disclosure under sections 552.026, 552.103, 552.107, 552.111, and 552.114 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the college failed to fully comply with 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 information at issue within the fifteen business day deadline.

¹Although you raise section 552.101, from the arguments provided, we understand you to assert section 552.107.

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 Gov't Code § 552.302); Open Records Decision No. 319 (1982). You claim that sections 552.103, 552.107, and 552.111 of the Government Code except some of the submitted information from disclosure. However, sections 552.103, 552.107, and 552.111 are discretionary exceptions that do not provide compelling reasons to overcome the presumption that information is public. *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. 665 at 2 n.5 (2000) (discretionary exceptions in general), 630 at 4 (1994) (governmental body may waive section 552.107), 473 (1987) (governmental body may waive section 552.111). Therefore, you may not withhold the submitted information under sections 552.103, 552.107, and 552.111 of the Government Code. However, you claim that portions of the submitted information are excepted under section 552.114 of the Government Code. Section 552.114 can provide a compelling reason to withhold information from disclosure. Therefore, we will address your arguments against disclosure under this exception.

Section 552.114 excepts 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 ("FERPA"), Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

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

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, 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). As you have submitted information that you contend is confidential under FERPA, we will address your claim.

You have submitted two investigations for our review. One investigation concerns a FERPA violation and the other investigation concerns another administrative issue. After review of the documents, we agree that the FERPA investigation consists of education records that contain identifying information of particular students. Generally, a student's identifying information is confidential under FERPA. In this case, however, the requestor knows the identities of the students identified in the documents. We therefore find that withholding only the identifying information of these students would not suffice to avoid the release of personally identifiable information contained in student education records as mandated by FERPA. Accordingly, the college must withhold the FERPA investigation documents in their entirety under section 552.114 of the Government Code and FERPA. Furthermore, the administrative investigation also contains student identifying information, which must be withheld under section 552.114 and FERPA. We have marked this information accordingly.

Next, we note that some of the remaining information may be subject to section 552.117 of the Government Code. Section 552.117 protects the home addresses and telephone numbers, social security numbers, and family member information of current or former employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected under section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). In this instance, you have not informed us whether the employee elected to keep his personal information confidential under section 552.024. Therefore, if the employee did in fact elect to keep his personal information confidential, we have marked the information that the college is required to withhold from disclosure under section 552.117(a)(1). If, however, the employee did not make such an election, the marked information may not be withheld pursuant to section 552.117(a)(1).

In summary, you must withhold the information we marked under FERPA. If the employee elected to withhold his personal information under section 552.024, you must withhold the marked information under section 552.117(a)(1). The remaining information must be released.

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 black ink that reads "Melissa Vela-Martinez". The signature is written in a cursive style with a large, looping flourish at the end.

Melissa Vela-Martinez
Assistant Attorney General
Open Records Division

MVM/sdk

Ref: ID# 203825

Enc. Submitted documents

c: Ms. Pat Ledbetter
5909 CR 135
Gainesville, Texas 76240
(w/o enclosures)