



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 11, 2004

Mr. Marquette Maresh
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
P.O. Box 2156
Austin, Texas 78768

OR2004-6815

Dear Ms. Maresh:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 207024.

The Dripping Springs Independent School District (the "district"), which you represent, received a request for all records pertaining to a named student. You state that some of the requested information has been made available, but claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.135 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially we note that some of the submitted information, which we have marked, are notes written after the request for information was received. The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San

¹Although you raise section 552.111, you have not submitted any arguments regarding the applicability of this exception. See Gov't Code § 552.301(e). We presume the district no longer intends to assert section 552.111 as an exception to disclosure and we will not further address this exception in the present ruling.

Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). Accordingly, the information that did not exist when the district received the request is not responsive, and this ruling does not address the public availability of this information.

Next, we must address the district's obligations under section 552.301 of the Act, which provides as follows:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

You state that the district received the request for information on May 26, 2004. However, the district did not assert that the submitted information is excepted under section 552.107 until June 11, 2004, and it did not assert section 552.103 until June 16, 2004. Consequently, the district failed to request a decision regarding these sections within the ten business day period mandated by section 552.301(a) of the Government Code.

A governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *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). The presumption that information is public under section 552.302 can be overcome by demonstrating that the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Sections 552.103 and 552.107 are discretionary exceptions that may be waived by a governmental body and therefore do not provide compelling reasons to overcome the presumption of openness. *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); Open Records Decision 630 (1994) (governmental body may waive statutory predecessor to section 552.107). Therefore, none of the submitted information is excepted from release under section 552.103 or 552.107 of the Government Code.

We also note that the remaining information consists of student education records that fall within the purview of the Family Educational Rights and Privacy Act of 1974 ("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). Under FERPA, "education records" 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). The remaining information is both related to a student and maintained by the district; therefore, it is subject to FERPA.

Under FERPA, an education agency or institution is generally required to provide parents of minor students access to the student's education records. *Id.* § 1232g(a)(1)(B). Thus, in this case, the requestor, as a parent of the student whose education records are requested, would generally have a right to the remaining information under FERPA. Similarly, section 26.004 of the Education Code provides that "[a] parent is entitled to access to all written records of a school district concerning the parent's child, including . . . counseling records[.]" Thus, the requestor would also normally have a right to the information under section 26.004.

We note, however, that some of the submitted information is also subject to the federal Child Abuse Prevention and Treatment Act ("CAPTA"). CAPTA conditions federal grant funding for state child abuse prevention and treatment programs on the fulfillment of certain eligibility criteria and requires states to adopt methods to preserve the confidentiality of information concerning child abuse and neglect. *See* 42 U.S.C. §§ 5106a(b)(1)(A), 5106a(b)(2)(A)(viii). Chapter 261 of the Family Code was enacted in accordance with CAPTA. Section 261.201 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 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.

We note that a school district is not an agency authorized to conduct a chapter 261 investigation. *See* Fam. Code §§ 261.301, 261.406. However, you state that the information contained in Exhibits 4 and 5 was communicated to and used by CPS in a child abuse investigation. Based on this representation, we conclude that, because the information in Exhibits 4 and 5 consists of files, reports, records, communications, or working papers used or developed in an investigation under chapter 261, the information is within the scope of section 261.201 of the Family Code. You have not indicated that the district has adopted a rule that governs the release of this type of information. Therefore, we assume that no such regulation exists. Given that assumption, the information in these exhibits is generally confidential pursuant to section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute).

However, Exhibit 6 was created by the district, not by an agency authorized to conduct a chapter 261 investigation. Furthermore, you do not state, nor does Exhibit 6 reflect, that it is maintained by the district's law enforcement unit or was forwarded to another agency conducting an investigation under chapter 261. Therefore, the information in Exhibit 6 is not confidential under section 261.201 and may not be withheld under section 552.101 of the Government Code on that ground.

With respect to Exhibits 4 and 5, we are presented with a conflict between the confidentiality provisions of sections 261.201 and the requestor's right of access under FERPA. *Cf.* Gov't Code. § 552.114(b)(2) (granting right of access to the student's parent or legal guardian). To resolve the conflict between FERPA and chapter 261, we defer to the decision of the Family Compliance Office ("compliance office") of the United States Department of Education, the office responsible for interpreting and construing FERPA. The compliance office has found that the Texas statute was promulgated pursuant to CAPTA and that any statutory conflict would, thus, be between the two federal statutes rather than the Texas statute and FERPA. As the two federal statutes were in irreconcilable conflict, the compliance office concluded that CAPTA governs, being the later enacted statute. *See* Letter from Leroy S. Rooker, Director, Family Policy Compliance Office, U.S. Department of Education, to Stacy Ferguson, Attorney, Schulman, Walheim & Heidelberg (Oct. 10, 1997); *see also* *Watt v. Alaska*, 451 U.S. 259, 267 (1981). Thus, the compliance office concluded that the CAPTA-compliant Texas Family Code provision concerning reporting suspected incidents of abuse or neglect prevailed over FERPA. We agree with the compliance office's ruling that CAPTA prevails over FERPA.

We note that section 26.004 of the Education Code also conflicts with chapter 261 of the Family Code. However, because chapter 261 was enacted pursuant to CAPTA, we conclude that any statutory conflict would actually be between CAPTA and section 26.004, rather than between the two Texas statutes. Such conflicts are governed by the Supremacy Clause, which provides that the laws of the United States "shall be the supreme Law of the Land [,] . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. State law that conflicts with federal law is

preempted and “without effect.” *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (citing *M’Culloch v. Maryland*, 17 U.S. 316 (1819)). Therefore, we find in this instance that CAPTA also prevails over section 26.004.

Accordingly, the information in Exhibits 4 and 5 is confidential under section 261.201 of the Family Code. Therefore, the information in these exhibits is excepted from release under section 552.101.

You assert that the identifying information of the individuals who reported alleged violations of chapter 261 of the Family Code in Exhibit 6 is confidential under section 261.101. Section 261.101 provides as follows:

(a) A person having cause to believe that a child’s physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report as provided by this subchapter.

...

(d) Unless waived in writing by the person making the report, the identity of an individual making a report under this chapter is confidential and may be disclosed only:

- (1) as provided by Section 261.201; or
- (2) to a law enforcement officer for the purposes of conducting a criminal investigation of the report.

In addition, section 261.103(a) provides as follows:

(a) Except as provided by Subsection (b) and Section 261.405, a report shall be made to:

- (1) any local or state law enforcement agency;
- (2) the department if the alleged or suspected abuse involves a person responsible for the care, custody, or welfare of the child;
- (3) the state agency that operates, licenses, certifies, or registers the facility in which the alleged abuse or neglect occurred; or
- (4) the agency designated by the court to be responsible for the protection of children.

As noted above, the district is not an agency authorized to conduct a chapter 261 investigation. *See* Fam. Code §§ 261.301, 261.406. In addition, the information in Exhibit 6 was not reported to an agency listed in section 261.103(a). Therefore, none of the information in Exhibit 6 is confidential under section 261.101.

You also assert that the informers' identities in Exhibit 6 are excepted from release under section 552.135 of the Government Code. Section 552.135 provides as follows:

(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].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

(d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or prosecutor upon proper request made in compliance with applicable law and procedure.

(e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be constitutional, statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.

Gov't Code § 552.135. You assert that the remaining information contains identifying information of individuals who reported possible child abuse under chapter 261 of the Family Code. As noted above, however, Exhibit 6 is subject to FERPA. Where a state statute, such as section 552.135 of the Government Code, conflicts with FERPA, the federal law prevails.

See, e.g., Equal Employment Opportunity Comm'n v. City of Orange, 905 F.Supp. 381, 382 (E.D. Tex. 1995). Consequently, information in Exhibit 6 identifying informers may not be withheld from this requestor pursuant to section 552.135 of the Government Code.

To conclude, the information in Exhibits 4 and 5 is confidential under section 261.201 of the Family Code and excepted from release under section 552.101. The remaining information must be released to this 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).

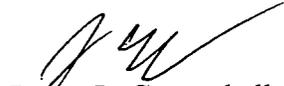
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/seg

Ref: ID# 207024

Enc. Submitted documents

c: Mr. Howard Fletcher
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(w/o enclosures)