



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 15, 2004

Ms. Laura C. Rodriguez
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OR2004-10631

Dear Ms. Rodriguez:

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# 214948.

The Schertz-Cibolo-Universal Independent School District (the "district"), which you represent, received an open records request for "all appropriate information (police/incident reports, statements, pictures, medication, ARD meetings, etc.) as related to [a named student]." You state that the district has released some information to the requestor. Subsequent to the district's receipt of the open records request, the district received a subpoena for information related to the same named student.¹ You claim that the submitted information is excepted from disclosure under sections 552.026, 552.101, 552.114, 552.117, 552.1175 and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the Guadalupe County Attorney's Office (the "county attorney"). *See* § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

¹We note that a subpoena is not considered a request for information under the Act. *See* Gov't Code § 552.0055. Therefore, this decision only addresses the open records request that the district received and not the district's compliance with the subpoena.

We begin by noting that you have not fully complied 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. In this instance, you did not submit to this office the documents you have labeled AG-0804 through AG-0856 within fifteen business days of receiving the request for information.

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). The district argues that the submitted information at issue is excepted under section 552.101 of the Government Code. The applicability of section 552.101 can provide a compelling reason to overcome the presumption of openness. *See Open Records Decision No. 150 (1977)* (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). Because the assertion of section 552.101 can provide a compelling reason to overcome the presumption of openness, we will address the documents labeled AG-0804 through AG-0856 along with the remaining information that you timely submitted.

You assert that the documents you have labeled AG-0773 through AG-0803 are records subject to the Family Educational Rights and Privacy Act of 1974 ("FERPA"). *See* 20 U.S.C. § 1232g. You explain that these are records of the district's police department (the "department") and that these documents, which consist of police reports, witness affidavits and witness statements, were created by the department. You indicate that these documents were maintained by the department prior to the date that the district received this request. We note that FERPA excludes from its statutory definition of education records "records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement." *See* 20 U.S.C. § 1232g(a)(4)(B)(ii). Section 99.8 of title 34 of the Code of Federal Regulations provides in part:

(b)(1) Records of a law enforcement unit means those records, files, documents, and other materials that are –

(i) Created by a law enforcement unit;

- (ii) Created for a law enforcement purpose; and
- (iii) Maintained by the law enforcement unit.

34 C.F.R. § 99.8(b)(1); *see also id.* § 99.3 (defining “education records” as not including “[r]ecords of the law enforcement unit of an educational agency or institution, subject to the provisions of § 99.8); Open Records Decision No. 612 (1992) (FERPA and statutory predecessor to Gov’t Code § 552.114 not applicable to incident and arrest reports of the state university campus police departments). You state that, in response to the instant request for information, the department transferred documents AG-0773 through AG-0803 to a district official. You indicate that, as a result of this transfer to the district, documents AG-0773 through AG-0803 become “education records” for purposes of FERPA. However, the district has not demonstrated that transfer of the documents in question removes them from the scope of section 1232g(a)(4)(B)(ii). *See* Open Records Decision No. 612 (1992). As such, documents AG-0773 through AG-0803 do not constitute “education records” as contemplated by FERPA. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8(b)(1). Therefore, the district may not withhold any information contained in such documents under FERPA or under section 552.114 of the Government Code.

You also claim that documents AG-0773 through AG-0803 are confidential under section 552.101 in conjunction with sections 58.005 and 58.007 of the Family Code. Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov’t Code § 552.101. Section 58.005 provides that “[i]nformation obtained for the purpose of diagnosis, examination, evaluation, or treatment or for making a referral for treatment of a child by a public or private agency or institution providing supervision of a child by arrangement of the juvenile court or having custody of the child under order of the juvenile court may be disclosed only to [certain listed individuals].” Fam. Code § 58.005(a). You do not inform us, and the submitted information at issue does not itself reflect, that any of this information was “obtained for the purpose of diagnosis, examination, evaluation, or treatment or for making a referral for treatment of a child.” *Id.* We therefore conclude that none of this information at issue is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 58.005 of the Family Code.

Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. The relevant language of section 58.007(c) reads as follows:

- (c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Fam. Code § 58.007(c). Section 58.007(c) is not applicable to information that relates to a juvenile as a complainant, victim, witness, or other involved party and not as a suspect or offender. We have reviewed documents AG-0773 through AG-0803 and conclude that a portion of this information involves juvenile conduct that occurred after September 1, 1997. We agree that documents AG-0792 through AG-0803, which we have marked, are confidential under section 58.007(c) of the Family Code. We therefore conclude that the documents that we have marked are excepted from public disclosure under section 552.101 of the Government Code as information made confidential by law.

We note, however, that the requestor may have a right of access to documents AG-0792 through AG-0803. Section 58.007(e) of the Family Code provides that “[l]aw enforcement records and files concerning a child may be inspected by a juvenile justice agency as that term is defined by Section 58.101 [of the Family Code] and a criminal justice agency as that term is defined by Section 411.082, Government Code.” Fam. Code § 58.007(e). Section 58.101 of the Family Code provides that “‘juvenile justice agency’ means an agency that has custody or control over juvenile offenders.” *Id.* § 58.101(5). Section 411.082 of the Government Code defines a “criminal justice agency” as including “a federal or state agency that is engaged in the administration of criminal justice under a statute or executive order and that allocates a substantial portion of its annual budget to the administration of criminal justice” and “a nongovernmental railroad or campus police department that has obtained an originating agency identifier from the Federal Bureau of Investigation.” Gov’t Code § 411.082(3).

As noted, the requestor is a juvenile probation officer with the Guadalupe County Juvenile Supervision and Detention office. Further, the county attorney states that the county attorney prosecutes juvenile cases in Guadalupe County, in which the district resides, and that the requestor has requested all of the submitted information in anticipation of prosecuting the student at issue for assault of a public servant. You do not state, however, and we are not otherwise informed whether the Guadalupe County Juvenile Supervision and Detention office is a juvenile justice agency or a criminal justice agency for purposes of section 58.007(e) of the Family Code. Nevertheless, if the district is able to determine that this particular requestor represents a juvenile justice agency or a criminal justice agency, as provided by section 58.007(e) of the Family Code, then the requestor has a right of access

under section 58.007(e) to the submitted information that is confidential under section 58.007(c). Otherwise, the requestor has no right of access to that information.

We note that although documents AG-0773 through AG-0791 reveal the identity of a juvenile, this individual is not listed as a juvenile offender in these remaining law enforcement records. We therefore find that section 58.007(c) is not applicable to documents AG-0773 through AG-0791. *See id.* § 51.04 (title 3 of Family Code covers proceedings in all cases involving delinquent conduct or conduct indicating need for supervision engaged in by person who was child at time of conduct). Therefore, these documents may not be withheld under section 552.101 in conjunction with section 58.007 of the Family Code and they must be released to the requestor.

You also argue that section 552.117 is applicable to the information you have marked in documents AG-0773 through AG-0791. We note, however, that the protections of section 552.117 only apply to information that a governmental body holds in its capacity as an employer. *See Gov't Code* § 552.117 (providing that employees of governmental entities may protect certain personal information in the hands of their employer); *see also Gov't Code* § 552.024 (establishing election process for section 552.117). The submitted information consists of law enforcement records. Because the department holds this information in its capacity as a law enforcement agency rather than as an employer, none of it may be withheld on the basis of section 552.117.

You also argue that section 552.1175 is applicable to the information you have marked in documents AG-0773 through AG-0791. We note, however, that section 552.1175 applies only to peace officers as those are defined by Article 2.12 of the Code of Criminal Procedure, county jailers, employees of the Texas Department of Criminal Justice and commissioned security officers. *See Gov't Code* § 552.1175(a). You do not suggest, nor does the information contained in documents AG-0773 through AG-0791 reflect, that the information at issue relates to any of these specified classifications. Thus, you may not withhold the information you have marked under section 552.1175 of the Government Code.

Documents AG-0773 through AG-0791 contain social security numbers. 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 any of the social security numbers in the file are 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 Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained

or is maintained by the district pursuant to any provision of law, enacted on or after October 1, 1990.

Finally, you claim that section 552.130 is applicable to information that you have marked in documents AG-0773 through AG-0791. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

Gov't Code § 552.130. You must withhold the Texas driver's license numbers that you have marked under section 552.130.

Section 552.101 encompasses information that is protected from disclosure by other statutes, such as 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 id.* § 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). You also raise section 552.114 of the Government Code for the information for which you raise FERPA. Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990).

Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). Such information includes information that directly identifies a student as well as information that, if released, would allow the student's identity to be easily traced. *See* Open Records Decision No. 224 (1979) (finding student's handwritten comments protected under FERPA because they make identity of student easily traceable through handwriting, style of expression, or particular incidents related).

Upon review, we conclude that the documents you have labeled AG-0001 through AG-0772 and AG-0804 through AG-0856 consist entirely of records maintained by the district that directly relate to a student of the district. Thus, this information constitutes education

records for purposes of FERPA. *See e.g., Belanger v. Nashua, New Hampshire School District*, 856 F. Supp. 40, 48-50 (D.N.H. 1994) (broadly construing FERPA definition of "education records"). Further, in this case the request for information reflects that the requestor knows the identity of the student. We therefore find that withholding only the name of this student would not suffice to avoid the release of personally identifiable information contained in student education records as mandated by FERPA. Accordingly, the documents labeled AG-0001 through AG-0772 and AG-0804 through AG-0856 are generally confidential in their entirety under FERPA.

As noted above, however, section 1232g(b)(1) provides access to education records such as those at issue in this case to certain enumerated federal, state, and local officials and institutions. *See* § 1232g(b)(1). Subsection J of section 1232g(b)(1) provides access to student records to "[an] entity or persons designated in any . . . subpoena issued for a law enforcement purpose[.]" *See id.* § 1232g(b)(1)(J)(ii). You state that, since you initially requested a ruling from this office, the district has been served with a subpoena for information that is also the subject of the instant request for information. You have provided a copy of the subpoena for our review.

In this instance, the requestor is a juvenile probation officer with the Guadalupe County Juvenile Supervision and Detention office. Further, the subpoena reflects that the Guadalupe County Juvenile Probation Department is the entity designated to have access to the subpoenaed information. Finally, the county attorney states that the county attorney prosecutes juvenile cases in Guadalupe County, in which the district resides, and that he anticipates prosecuting the student at issue for assault of a public servant. As such, the information has been subpoenaed for a law enforcement purpose. Consequently, if the district determines that the FERPA documents labeled AG-0001 through AG-0772 and AG-0804 through AG-0856 are responsive to the subpoena, the district must release the student record information.² However, to the extent that any of the documents labeled AG-0001 through AG-0772 and AG-0804 through AG-0856 have not been subpoenaed, the district must withhold this information in its entirety as confidential under FERPA.

In summary, documents AG-0792 through AG-0803 are confidential under section 552.101 in conjunction with section 58.007(c) of the Family Code. However, this particular requestor has a right of access to the information that is confidential under section 58.007(c) if the district determines that the requestor is authorized to inspect that information under section 58.007(e) of the Family Code. The social security numbers contained in documents AG-0773 through AG-0791 may be confidential under federal law. The district must withhold the Texas driver's license numbers that you have marked in documents AG-0773 through AG-0791 under section 552.130. Documents AG-0001 through AG-0772 and AG-0804 through AG-0856 are generally confidential under section 552.101 in conjunction with

² We note that because the requestor has a special right of access to this information in this instance, the district must again seek a decision from this office if it receives another request for the same information from another requestor.

FERPA. However, to the extent that this information is responsive to the subpoena at issue, the district must release the information. The remaining 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,

A handwritten signature in black ink, appearing to read "Cary Grace", written over a printed name.

Cary Grace
Assistant Attorney General
Open Records Division

ECG/jev

Ref: ID# 214948

Enc. Submitted documents

c: Mr. Jesus Mendoza
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(w/o enclosures)