



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 20, 2004

Ms. Laura C. Rodriguez
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P.O. Box 460606
San Antonio, Texas 78246-060

OR2004-10738

Dear Ms. Rodriguez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 215326.

The Schertz-Cibolo-Universal City Independent School District (the "district"), which you represent, received a request for all information relating to alleged assaults committed on district employees by a named student. You state that the district has released some information to the requestor. Subsequent to the district's receipt of this 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.

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. This section encompasses information that is protected from disclosure by other statutes, including the Family Educational Rights and Privacy Act of 1974 ("FERPA"). *See* 20 U.S.C. § 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

¹ We note that a subpoena is not considered a request for information under the Public Information 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.

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).

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, 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 only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978).

- Upon review, we conclude that the documents you have labeled AG-0001 - AG-0018 and AG-0050 - AG-0093 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-0018 and AG-0050 - AG-0093 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* 20 U.S.C. § 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 police officer with the Schertz Police Department. Further, the subpoena reflects that the Guadalupe County Juvenile Probation Department is the entity designated to have access to the subpoenaed information. The request letter indicates that the requestor is acting on behalf of the Guadalupe County Attorney, who prosecutes juvenile cases in the county in which the district presides. Consequently, if the district determines that the FERPA documents labeled AG-0001 through AG-0018 and AG-0050 - AG-0093 are responsive to the subpoena, the district must release the student record information to the requestor.² However, to the extent that any of the documents labeled AG-0001 through AG-0018 and AG-0050 - AG-0093 have not been subpoenaed, the district must withhold this information in its entirety as confidential under FERPA.

You also assert that the records in AG-0019 - AG-0049 may be subject to FERPA. These documents, which consist of police reports, witness affidavits and witness statements, were created by the district police department (the “department”). 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

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.

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 the documents in AG-0019 - AG-0049, while "generated by the District's police department, were then placed in the District's possession." The district, however, 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-0019 - AG-0049 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 these documents under FERPA or under section 552.114 of the Government Code.

You also claim that documents AG-0019 - AG-0049 are confidential under section 552.101 in conjunction with sections 58.005 and 58.007 of the Family Code. 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). We have reviewed documents AG-0019 - AG-0049 and conclude that they involve juvenile conduct that occurred after September 1, 1997 and are confidential under section 58.007(c) of the Family Code. We therefore conclude that these documents are excepted from public disclosure under section 552.101 of the Government Code as information made confidential by law.³

We note, however, that the requestor may have a right of access to documents AG-0019 through AG-0049. 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 earlier, the requestor is a police officer with the Schertz Police Department. You do not state, however, and we are not otherwise informed whether the Schertz Police Department 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 now address your claim of section 552.101 of the Government Code in conjunction with section 402.083 of the Labor Code for the documents in AG-0094 - AG-0099. Section 402.083 pertains to records of the Texas Workers’ Compensation Commission (the “TWCC”) and provides in part:

- (a) Information in or derived from a claim file regarding an employee is confidential and may not be disclosed by the commission except as provided by this subtitle.

Labor Code § 402.083(a). Section 402.083(a) makes information held in TWCC’s claim files confidential. *See* Open Records Decision No. 619 (1993). Section 402.086 of the Labor

³ As we are able to make this determination, we need not address your remaining arguments against disclosure regarding this information.

Code essentially transfers this confidentiality to information that other parties obtain from TWCC files. Section 402.086(a) provides as follows:

- (a) Information relating to a claim that is confidential under this subtitle remains confidential when released to any person, except when used in court for the purposes of an appeal.

Labor Code § 402.086(a). In Open Records Decision No. 533 (1989), this office determined that the predecessor provision to sections 402.083 and 402.086 protected information received from the Industrial Accident Board (now the TWCC), but did not protect information regarding workers compensation claims that the governmental body did not receive from the TWCC. You inform us that the documents in AG-0094 - AG-0099 were obtained from TWCC claim files. Based on your representation and our review of the information, we agree that this information is confidential under sections 402.083 and 402.086 of the Labor Code. Therefore, documents AG-0094 - AG-0099 must be withheld under section 552.101 of the Government Code.⁴

Finally, you claim that documents AG-0100 through AG-0116 are confidential under the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.⁵

- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). Section 159.002(c) requires that any subsequent release of a medical record be consistent with the purposes for which the governmental body obtained the record. Open Records Decision No. 565 at 7 (1990). A medical record may be released only as provided under the MPA. Open Records Decision No. 598 (1991). Upon review,

⁴ As we are able to make this determination, we need not address your remaining arguments against disclosure regarding this information.

⁵ Physician is defined by the MPA "as a person licensed to practice medicine in this state" Occ. Code § 151.002(a)(12). Practicing medicine is defined as "the diagnosis, treatment or offer to treat a mental or physical disease or disorder or a physical deformity or injury by any system or method, or the attempt to effect cures of those conditions, by a person who: (A) publicly professes to be a physician or surgeon; or (B) directly or indirectly charges money or other compensation for those services." *Id.* § 151.002(a)(13).

we agree the information at issue consists of medical records; therefore, we conclude that documents AG-0100 - AG-0116 may be released only in accordance with the MPA.⁶

In summary, documents AG-0001 - AG-0018 and AG-0050 - AG-0093 are generally confidential under section 552.101 of the Government Code in conjunction with FERPA. However, to the extent that this information is responsive to the subpoena at issue, the district must release the information. Documents AG-0019 - AG-0049 are confidential under section 552.101 of the Government Code 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. Documents AG-0094 through AG-0099 must be withheld under section 552.101 of the Government Code in conjunction with sections 402.083 and 402.086 of the Labor Code. Documents AG-0100 - AG-0116 may only be released in accordance with the MPA.

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,

⁶ As we are able to make this determination, we need not address your remaining arguments against disclosure regarding this information.

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,



Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/sdk

Ref: ID# 215326

Enc: Submitted documents

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