



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 11, 2005

Mr. Mike Atkins
Atkins & Peacock, L.L.P.
P.O. Box 111
Odessa, Texas 79760

OR2005-01290

Dear Mr. Atkins:

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# 221559.

The Ector County Independent School District (the "district"), which you represent, received a request for a recording of a particular closed meeting. You claim that some of the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim.

Initially, we note that the Act expressly incorporates the provisions of the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g ("FERPA"). Gov't Code § 552.026.

Under FERPA, "education records" are those records, files, documents, and other materials that

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

Id. § 1232g(a)(4)(A). We believe that the information at issue may constitute "education records" for purposes of FERPA. See Open Records Decision No. 462 at 15 (1987). 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). Therefore, generally, the district must withhold student-identifying information contained in the information at issue under FERPA. However, we note the requestor is a parent of a student to whom the district provides education services. FERPA gives parents the right to inspect education records to the extent they relate to their own children. *See* 20 U.S.C. § 1232g(a)(1)(A) (granting parents affirmative right of access to their child's education records). Thus, we specifically address the applicability of FERPA to the closed-session recording you seek to withhold.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information protected by other statutes, such as section 551.104 of the Government Code. Section 551.104(c), a provision of the Open Meetings Act, provides that "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3)." Gov't Code § 551.104(c).¹ Thus, generally, such information cannot be released to a member of the public in response to an open records request. *See* ORD 495 (1988). However, if the responsive recording pertains to matters involving a district student, FERPA requires that the student's parents be given a right of access to those portions of the recording pertaining to the student. In support, we note that this office consulted with the Family Policy & Regulations Office of the United States Department of Education (the "DOE") regarding a similar request. The DOE advised as follows:

FERPA does not require that education records relate exclusively to a student or be created for any particular purpose, only that they contain information that is directly related to the student. Furthermore, the definition of "education records" is "records, files, documents and other materials" that contain information directly related to a student and there is no support in the statute that the term "education records" is limited to those that have been placed in a designated file. This was reinforced in *Belanger v. Nashua, New Hampshire School District*, 856 F. Supp. 40, 48-50 (D.N.H. 1994), where a federal court held that records pertaining to a student's juvenile court proceedings that were maintained by the school district's attorney were "education records" under FERPA. In so holding, the *Belanger* court stated that both the plain language of the statutory definition of "education records" and the legislative history of the Buckley-Pell amendment made clear that "education records" included any documents pertaining to a student that are maintained by the institution.

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¹ This office lacks the authority to review a certified agenda or executive session tape in connection with the open records rulings process. *See* Open Records Decision No. 495 at 4 (1988).

We are not familiar with the state law you noted and, therefore, do not know if the law conflict[s] with FERPA. However, if the state law prohibited the school district from providing a parent with access to the education records of his or her child, that would constitute a conflict. If an educational agency or institution wishes to continue to receive federal education funds, they must comply with FERPA.

Letter advisement from Ellen Campbell, Family Compliance Office, U.S. Department of Education to Robert Patterson, Open Records Division, Office of the Texas Attorney General (April 9, 2001). In this case, if the requestor is the parent of a district student mentioned in the information at issue, we conclude that FERPA grants the requestor a right of access to responsive portions of the closed-session recording that concern the requestor's child. As a state statute, section 551.104 of the Government Code cannot abrogate that right. *See, e.g., Equal Employment Opportunity Comm'n v. City of Orange*, 905 F. Supp 381, 382 (E.D. Tex. 1995); *see also* Open Records Decision No. 431 (1985) (FERPA prevails when in conflict with state law). Consequently, to comply with FERPA, the district must provide the requestor with access to the responsive portions of the closed-session recording to the extent they concern the child of the requestor. *See* Open Records Decision No. 152 (1977) (educational institution must provide copy of education record to qualified individuals).² You inform us that the district has already made those portions of the closed-session recording related to the requestor's child available to the requestor. Because FERPA grants a special right of access to parents only in regards to their own children, any remaining information not relating to the requestor's child must be withheld under section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code. We note that FERPA does not entitle a parent to copy an education record to which the parent has a right of access, unless "circumstances effectively prevent the parent . . . from exercising the right to inspect and review the student's education records[.]" *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.10(d).

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.

² If you have questions as to the applicability of FERPA to the information at issue, you may wish to consult with the DOE at 202-260-3887.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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,



Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/jev

Ref: ID# 221559

c: Ms. Chris Brokaw
4001 Stillwood Lane
Odessa, Texas 79762