



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 29, 2005

Ms. Sandra D. Carpenter  
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OR2005-10670

Dear Ms. Carpenter:

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# 237035.

The Plano Independent School District (the "district"), which you represent, received a request for information related to a "lawsuit settlement approved Tuesday by the board of trustees." You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.114 of the Government Code. 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 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note that a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 makes certain information public, unless it is expressly confidential under other law. *See* Gov't Code § 552.022(a). One category of public information under section 552.022 is "a settlement agreement to which a governmental body is a party[.]" *Id.* § 552.022(a)(18). The submitted information includes a settlement agreement to which the district is a party that must be released unless it is confidential under other law. Section 552.103 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *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 No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the district may not withhold the information subject to section 552.022(a)(18) pursuant to section 552.103. We will, however, consider your claims regarding sections 552.101 and 552.114, which do constitute other law for purposes of section 552.022.

You assert that the remaining information not subject to section 552.022 is excepted from public disclosure under section 552.103, which provides in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the request for information is received, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

In this instance, you advise that the lawsuit on the basis of which you claim the protection of section 552.103 was settled on August 18, 2005, prior to the date on which the district received the instant request for information. The applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Accordingly, the district may not withhold the information at issue under section 552.103.

We next address your claim that the requested information is excepted from disclosure under section 552.101 of the Government Code in conjunction with federal law. Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with the federal Individuals with Disabilities Education Act ("IDEA"). See 20 U.S.C. §§ 1400 *et seq.*

Section 1415 of IDEA provides in part:

(F) An agreement reached by the parties to the dispute in the mediation process shall be set forth in a written mediation agreement.

(G) Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings . . . .

20 U.S.C. § 1415(e)(2)(F), (G); *see also* 34 C.F.R. § 300.506(b)(5), (6). You state that the submitted information pertains to a Due Process Hearing proceeding that was referred to mediation in accordance with section 1415. You inform us that the district and the opposing party entered into a mediated settlement agreement. You assert that release of the requested information “would reveal the discussions which occurred during the mediation.” We note, however, that the submitted documents consist of the mediated settlement agreement and the education records of a district student. Section 1415(e) makes confidential “[d]iscussions that occur during the mediation process[.]”

Section 1415 does not define “discussions.” We will therefore consider the common and ordinary meaning of “discussion.” *See* Gov’t Code § 311.011 (concerning rule of construction that statutory words will be given their ordinary meaning). One dictionary defines discussion as “[c]onsideration of a subject by a group; an earnest conversation.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 4<sup>th</sup> ed. (2000). Another defines discussion as “a conversation or debate about a topic[.]” THE COMPACT OXFORD DICTIONARY (2003). In considering the legal meaning of “discussion,” Texas courts have characterized “[e]vidence of conduct or statements made in compromise negotiations” as settlement discussions. *See* Tex. R. Evid. 408; *see also Allison v. Fire Insurance Exchange*, 98 S.W.3d 227, 260 (Tex. 2002); *Vickery v. Vickery*, 999 S.W.2d 342, 343 (Tex. 1999). Thus, we believe that, as commonly used, “discussion” means a conversation about a subject. Upon review, we find that you have failed to establish that the information at issue consists of “discussions” for the purposes of section 1415. We conclude, therefore, that the information is not confidential under section 1415 of IDEA, and may not be withheld under section 552.101 of the Government Code on that basis. *Cf.* Open Records Decision No. 485 (1987) (fact that information was discussed in closed session does not make the information confidential for purposes of predecessor of section 552.101).

However, IDEA does address the confidentiality of information. Personally identifiable data of special education students is protected under section 1417 of IDEA, which provides as follows:

The Secretary [of Education] shall take appropriate action, in accordance with the provisions of [the Family Educational Rights and Privacy Act of 1974 (“FERPA”), section 1232g of title 20 of the United States Code], to assure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Secretary and by State and local educational agencies pursuant to the provisions of this subchapter.

20 U.S.C. § 1417(c); *see* C.F.R. § 300.500(b)(3) (defining personally identifiable information as including “[a] list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty”). FERPA limits federal educational funding to educational agencies and institutions that follow certain statutory mandates regarding release of information and educational records. *See* 20 U.S.C. § 1232g; *see also State of Connecticut v. Hartford Board of Education*, 355 F.Supp.2d 649, 660 (D. Conn. 2005). IDEA requires educational institutions and agencies that receive federal funds pursuant to that statute to follow FERPA’s mandates. *See* 20 U.S.C. § 1417(c); 355 F.Supp.2d at 660.

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. 20 U.S.C. § 1232g(b)(1). Section 552.114 of the Government Code provides a similar prohibition against public release of student records from an educational institution funded wholly or in part by state funds. “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. 20 U.S.C. § 1232g(a)(4)(A). This office generally applies the same analysis under section 552.114 of the Government Code, which exempts from disclosure student records at an educational institution funded completely or in part by state revenue, and FERPA. *See* Open Records Decision No. 539 (1990); *see also* Gov’t Code § 552.026 (providing that Act only requires release of information from education records in conformity with FERPA).

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* 34 C.F.R. § 99.3 (defining “personally identifiable information” as, among other things, “information that would make the student’s identity easily traceable.”); Open Records Decision Nos. 332 (1982), 206 (1978). This includes information that directly identifies a student or parent, 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). We also have concluded, however, that student records must be withheld in their entirety where the small number of students involved would tend to make identification of specific individuals a relatively simple task. *See* Open Records Decision No. 294 at 2 (1981). You inform us that the student to whom the submitted information pertains is a special education student. You do not inform us how many special education students are enrolled in the district or whether release of the requested information would allow the student’s identity easily traceable. We understand you to indicate that the parents of the student to whom the submitted information pertains have not given written permission for the disclosure of their child’s education records. Based on your representations and our review of the information at issue, we find that personally identifiable information of the student whose education

records are at issue is confidential under FERPA and IDEA, and must, therefore, be withheld to the extent reasonable and necessary to avoid personally identifying the student. *See* 20 U.S.C. §§ 1232g(h), 1417(a); 34 C.F.R. § 99.3. Information which does not personally identify the student is not confidential, and must be released. If, however, the requestor knows the identity of the special education student, or if the small number of students involved would tend to make identification of the specific individual easily traceable, the district must withhold the submitted information in its entirety under FERPA. *Id.*

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, 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); *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 Office of the Attorney General 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. 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,



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Assistant Attorney General  
Open Records Division

CN/jpa

Ref: ID# 237035

Enc. Submitted documents

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