



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 4, 2006

Ms. Susan K. Bohn
Bracewell & Giuliani
111 Congress Avenue, Suite 2300
Austin, Texas 78701-4061

OR2006-03340

Dear Ms. Bohn:

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# 249841.

The Deer Park Independent School District (the "district"), which you represent, received a request for all documents pertaining to the requestor's child. You indicate that you will provide the requestor with the majority of the requested information upon payment. Furthermore, although you take no position with respect to the remaining information, you claim that it may contain proprietary information subject to exception under the Act. Pursuant to section 552.305(d) of the Government Code, the district notified the interested third parties, Harcourt Assessment, Inc. ("Harcourt"), Psychological Assessment Resources, Western Psychological Services, Pearson Assessments, and Multi-Health Systems of the district's receipt of the request and of their rights to submit arguments to us as to why any portion of the submitted information should not be released. *See Gov't Code §552.305(d); see also Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances).* We have considered arguments received from Harcourt and have reviewed the submitted information.

We note that the Family Educational Rights and Privacy Act of 1974 ("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). "Education records" are 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). The submitted documents constitute records maintained by the district that contain information directly related to a student and, thus, constitute education records that are subject to FERPA.

Under FERPA, a student and the student's parents have an affirmative right of access to the student's own education records, although this right does not extend to information in the student's records that identifies other students. See 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3; see also 34 C.F.R. § 99.12(a) ("If the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student."). As the requestor in this instance is the parent of the student whose information is at issue, the requestor has a right of access under FERPA to education records pertaining to her child. Thus, this information generally may not be withheld pursuant to an exception to disclosure under the Act. Although Harcourt raises section 552.110 of the Government Code for its information, we note that this section is a state statute that is preempted by federal law to the extent the state law conflicts with federal law. See *Equal Employment Opportunity Comm'n v. City of Orange, Texas*, 905 F. Supp 381, 382 (E.D. Tex. 1995) (federal law prevails over inconsistent provision of state law); see also Open Records No. 431 (1985) (when conflict arises between provisions of Act and FERPA, federal statute prevails). Accordingly, the district may not withhold any portion of the submitted information under section 552.110 of the Government Code.

Some of the information to which the requestor has a right of access under FERPA is subject to copyright law. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. See Open Records Decision No. 550 (1990). 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).

In summary, the requestor has a right of access to the submitted information under FERPA. Therefore, the submitted information must be released in accordance with applicable copyright law.

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,



Anne Prentice
Assistant Attorney General
Open Records Division

AP/sdk

Ref: ID# 249841

Enc. Submitted documents

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(w/o enclosures)

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Multi-Health Systems
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Pearson Assessments
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WPS Rights and Permission
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