



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 7, 2006

Mr. Phillip Marzec
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Attorneys and Counselors
P. O. Box 200
San Antonio, Texas 78291-0200

OR2006-03499

Dear Mr. Marzec:

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# 245711.

The San Antonio Independent School District (the "district"), which you represent, received a request for all information related to an incident at Lanier High School on or about November 30, 2005 involving a named district police officer and the requestor's client, a student at the high school. You claim that the submitted information is excepted from disclosure under sections 552.026, 552.101, 552.102, 552.103, 552.108, 552.111, 552.114 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the district's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. Gov't Code § 552.301(b). You assert the district received the present request for information on January 13, 2006. However, you explain that the requestor also made a request for information on January 11, 2006 for which the district sought a clarification. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that

request may be properly narrowed). Although you did not submit the district's request for clarification, you have submitted the communications received from the requestor on January 11 and January 13. You contend that the letter sent by the requestor on January 13 constituted a new request for information. Upon review of the letters at issue, we do not agree. Instead, we consider the requestor's communication on January 13 with the district to be a clarification of the original request, rather than a new request for information. Therefore, we find that the requestor did not make a new request for information on January 13, but instead clarified his request of January 11.

When a governmental body requests a clarification under section 552.222, the deadlines of section 552.301(b) are tolled until the governmental body receives a response to its clarification request. *See* Open Records Decision No. 663 at 5 (1999). You do not inform us when the district sought clarification of the request for information received on January 11. Thus, we are unable to determine exactly how long the district's deadlines under section 552.301 were tolled by its request for clarification. However, as we have described above, the requestor clarified the request on January 13. Regardless of when the district sought clarification from the requestor, the envelope containing the district's request for a decision bears a postmark of January 31, 2006, more than ten business days after the district's receipt of the requestor's clarification. *See* Gov't Code § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, the district failed to comply with section 552.301(b) of the Government Code.¹

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. Gov't Code § 552.302; *see also 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); Open Records Decision No. 319 (1982). Generally speaking, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Sections 552.103, 552.108, and 552.111 of the Government Code are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived by the governmental body. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 177 (1977) (governmental body

¹We note that were the January 13 letter from the requestor a new request for information, a conclusion we do not reach, the date of the district's request for a ruling from this office would still have been more than ten business days after the district's receipt of the request.

may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the district may not withhold any of the requested information under sections 552.103, 552.108, or 552.111. *But see* Open Records Decision No. 586 (1991) (need of another governmental body to withhold information may provide compelling reason for nondisclosure under section 552.108). However, sections 552.101, 552.102, 552.114, and 552.117 of the Government Code are mandatory exceptions and each may constitute a compelling reason that overcomes the presumption of openness caused by a failure to comply with section 552.301. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions). Therefore, we will consider whether sections 552.101, 552.102, 552.114, and 552.117 require the district to withhold 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." Gov't Code § 552.101. Section 552.101 encompasses information protected by other statutes. 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). "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).

This office generally applies the same analysis under section 552.114 of the Government Code 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. Furthermore, section 552.026 of the Government Code provides:

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.

Gov't Code § 552.026. 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. In this instance, you have submitted the information at issue; therefore, we will consider whether this information is protected by 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" or "one or both parents of such a 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) (student's handwritten comments that would make identity of student easily traceable through handwriting, style of expression, or particular incidents related in comments protected under FERPA). The submitted records identify, or were created by, district students and are "education records" for purposes of FERPA. Thus, the information at issue must be withheld to avoid personally identifying these students.

However, we note that under FERPA, a student's parents or guardians have an affirmative right of access to that student's education records. 20 U.S.C. § 1232g(a)(1)(A). Furthermore, whenever a student has attained eighteen years of age the right of access accorded to the parents of the student is only accorded to the student. *Id.* § 1232g(d). In this instance, the requestor is an attorney who represents a nineteen-year-old student to whom the district provides education services. Thus, you must allow the requestor access to this student's education records upon receipt of a proper written consent as required by section 1232g(b)(2).

If the district does not receive the student's written consent to release his information to the requestor pursuant to section 1232g, the district must withhold this information under FERPA from the requestor. In general, only information identifying the named student would be protected by FERPA. In this case, however, the requestor knows the identity of the subject of the records. Thus, only withholding the student's identifying information from the education records would not suffice to protect the student's privacy. Accordingly, if the district does not receive the proper written consent to release the student's education records to the requestor, the district must withhold the submitted records from the requestor in their entirety. If the district does receive the proper consent, we have marked the student-identifying information of other students that is protected by FERPA. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.12(a) (the right of access accorded a student's parent or a student does not extend to identifying information of other students).

Although you raise sections 552.102 and 552.117 of the Government Code for a portion of the submitted information, these exceptions cannot abrogate the right of access provided by FERPA. *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). Thus, we need not address your arguments under these exceptions.

In summary, unless the requestor provides the district with the proper written consent under FERPA, the district must withhold the submitted information in its entirety under FERPA. If the requestor provides the proper written consent from his client, the district must release the submitted information to the requestor except for the identifying information of other students that must be withheld under FERPA.

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,

A handwritten signature in black ink, appearing to read "Ramsey Abarca", with a long horizontal flourish extending to the right.

Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/krl

Ref: ID# 245711

Enc. Submitted documents

c: Mr. Jesus David Garza
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(w/o enclosures)