



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 24, 2006

Mr. William C. Bednar
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Austin, Texas 78701-1708

OR2006-05419

Dear Mr. Bednar:

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# 250405.

The Three Rivers Independent School District (the "district"), which you represent, received a request for sixteen categories of information related to incidents of student misconduct in the middle school boys' locker room in the spring of 2005.¹ You state that the district does not maintain information responsive to portions of the request for information.² You state that the district has released some of the requested information to the requestor, but claim that the remaining requested information is excepted from disclosure under sections 552.114 and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first address the district's obligations under section 552.301 of the Government Code. Within fifteen business days of receiving a request for information, a governmental body that wishes to withhold information from public disclosure must submit to this office: (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld; (2) a copy of the written request for information; (3) a signed statement or sufficient evidence showing the date the governmental body received the written request; and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code

¹As you have not provided this office with a copy of the request for information, we take our description from your brief.

²We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamant*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed).

§552.301(e)(1)(A)-(D). The district failed to submit to this office a copy of the written request for information. We therefore find that the district failed to comply with the procedural requirements of section 552.301 in requesting a ruling from this office.

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 requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *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 pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). This office has held that a compelling reason exists to withhold information when third party interests are at stake or when information is made confidential by another source of law. *See* Open Records Decision No. 150 (1977) (construing predecessor statute). Because sections 552.114 and 552.135 can provide compelling reasons to withhold information, we will address your arguments concerning these exceptions.

Section 552.114 of the Government Code excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Gov't Code § 552.114. 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.

Gov't Code § 552.026. 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 and FERPA. Open Records Decision No. 539 (1990).

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,

however, you have submitted the requested information to this office for our review. 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." *See* 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).

Under FERPA, a student and student's parents generally have an affirmative right of access to the student's own 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) (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); 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").

Based on our review of the submitted information, we have marked the student-identifying information that must be withheld by the district under section 552.114 and FERPA.³ We note, however, that the requestor is an attorney representing four of the students at issue. Thus, the requestor has an affirmative right of access to the education records of his clients. The requestor represents two of the students whose hand-written statements are at issue. The hand-written statements concern an incident involving multiple students. The Family Policy Compliance Office of the U.S. Department of Education ("DOE") has recently informed this office that records pertaining to an incident involving multiple students are the education records of each student involved in the incident, as the records are directly related to each student involved in the incident. Thus, the requestor, as an attorney representing the students whose hand-written statements are at issue, has a right of access to these students' records even if the information also pertains to other students. Accordingly, the district must provide the requestor with access to information directly pertaining to the the requestor's clients. If the requestor seeks copies of the hand-written statements at issue, the DOE has stated that the district must redact the other students' identifying information from the copies.

We note that some of the remaining submitted information constitutes medical records, access to which is governed by the Medical Practice Act ("MPA"). Section 552.101 of the

³As our ruling on this issue is dispositive, we need not address your argument under section 552.135 of the Government Code.

Government Code⁴ excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information protected by other statutes. Gov't Code § 552.101. Section 159.002 of the Occupations Code provides in pertinent part:

(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.

(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). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Further, information that is subject to the MPA also includes information that was obtained from medical records. *See* Occ. Code § 159.002(a), (b), (c); *see also* Open Records Decision No. 598 (1991). The medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. *See* Open Records Decision No. 565 at 7 (1990). Upon review, we find that some of the information you have submitted are medical records subject to the MPA, and may only be released in accordance with that statute. We have marked these records accordingly.

Section 552.101 of the Government Code also encompasses section 39.030 of the Education Code, which provides in relevant part:

b) The results of individual student performance on academic skills assessment instruments administered under [subchapter B, Chapter 39 of the Education Code] are confidential and may be released only in accordance with [FERPA]. However, overall student performance data shall be aggregated by ethnicity, sex, grade level, subject area, campus, and district and made available to the public, with appropriate interpretations, at regularly scheduled meetings of the board of trustees of each school district. The information may not contain the names of individual students or teachers.

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Educ. Code § 39.030(b). Therefore, the portions of the submitted information that consist of individual results of student performance on the Texas Assessment of Knowledge and Skills (“TAKS”) and Texas Assessment of Academic Skills (“TAAS”) tests⁵ are confidential under section 39.030(b) of the Education Code and must be withheld under section 552.101 of the Government Code on that basis.

In summary, the district must withhold the student-identifying information we have marked under FERPA. The requestor has a right of access to the education records of his clients, including the submitted hand-written statements of two of his clients, and the district must provide the requestor with access to information directly pertaining to the incident involving the requestor’s clients. However, if the requestor seeks copies of his clients’ hand-written statements, the district must redact the other students’ identifying information from the copies under FERPA, which we have marked. The marked medical records may only be released in accordance with the MPA. The district must also withhold student TAKS and TAAS tests results pursuant to section 552.101 in conjunction with section 39.030 of the Education Code. All remaining information must be released.

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).

⁵The TAKS and TAAS tests are academic skills assessment instrument as contemplated by subchapter B, chapter 39 of the Education Code. See Educ. Code § 39.030(b).

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,



Lisa V. Cubriel
Assistant Attorney General
Open Records Division

LVC/krl

Ref: ID# 250405

Enc. Submitted documents

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