



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 8, 2006

Mr. Sal Levatino
1524 South IH-35, Suite 234
Austin, Texas 78704

OR2006-06040

Dear Mr. Levatino:

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# 251707.

The Manor Independent School District (the "district"), which you represent, received a request for information regarding a specified incident involving the requestor's client. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We also understand you to claim that some of the submitted information is excepted from disclosure under the attorney work product aspect of section 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We note that the submitted information consists of student education records that fall within the purview of the Family Education Rights and Privacy Act of 1974 ("FERPA"). 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). Under FERPA, "education records" are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such an agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). Generally, FERPA requires that information be withheld only to the extent "reasonable and necessary to avoid personally identifying a particular

student.” See 34 C.F.R. § 99.3 (“personally identifiable information” under FERPA includes, among other things, “[o]ther information that would make the student’s identity easily traceable”). 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). The submitted information is both related to a student and maintained by the district; therefore, it is subject to FERPA.

Under FERPA, a student’s parents or guardians have an affirmative right of access to their child’s education records. See 20 U.S.C. § 1232g(a)(1)(A); see also 34 C.F.R. § 99.3 (“parent” includes legal guardian of student). Thus, in this case, the requestor, as the attorney representing the parent of the student whose education records are at issue, has a right of access to the submitted information under FERPA. Thus, this particular information generally may not be withheld pursuant to an exception to disclosure under the Act. 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) (information subject to right of access under FERPA may not be withheld pursuant to statutory predecessor to section 552.103). However, since the Family Policy Compliance Office of the United States Department of Education has informed this office that a student’s right of access under FERPA to information about the student does not prevail over an educational institution’s right to assert the work product privilege, we will address your claims that the submitted records are excepted from disclosure pursuant to the work product privilege as encompassed by section 552.111 of the Government Code.

Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Section 552.111 encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. TEX. R. CIV. P. 192.5; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation. *Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

Upon review of the district's arguments and the documents at issue, we find that the district has not demonstrated that this information constitutes materials prepared or mental impressions developed in anticipation of litigation or for trial by the district or its representatives. Therefore, the submitted information may not be withheld under section 552.111 and must be released to the requestor in this instance.

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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/eb

Ref: ID# 251707

Enc: Submitted documents

c: Ms. Caroline L. Badinelli
Rosenthal & Watson, P.C.
6601 Vaught Ranch Road, Suite 200
Austin, Texas 78730
(w/o enclosures)