



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 16, 2008

Mr. Christopher B. Gilbert
Bracewell & Giuliani
711 Louisiana Street, Suite 2300
Houston, Texas 77002-2770

OR2008-08184

Dear Mr. Gilbert:

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# 314985.

The Houston Independent School District (the "district"), which you represent, received three requests for video recordings of the Westside High School natatorium on Thursday, April 10, 2008, including footage regarding the drowning of a student. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the attorney for the parents of the drowned student. *See* Gov't Code § 552.305.

You state that "the district has determined that the [submitted] video is a student education record of the five students who survived and as such the video is protected by the Family Education Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA')." The district also asserts that the "complete video" taken by the security camera in the pool contains an "entire day's worth of . . . regular classes and uses of the pool by Westside High School students" and argues that, as such, "it would be protected from disclosure by [FERPA]." The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purposes of our review in the open records ruling process under

the Act.¹ Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which “personally identifiable information” is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). You have submitted for our review the video without redactions. Because our office is prohibited from reviewing this education record to determine the applicability of FERPA, we will not address FERPA with respect to this record, other than to note that parents have a right of access to their own child’s education record, although this right does not extend to information in the student’s record 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.”); *see also* Open Records Decision No. 431 (1985) (right to record under FERPA prevails over conflicting exception to disclosure under state law). Determinations under FERPA must be made by the educational authority in possession of the education record. However, we will consider your claims under sections 552.101 and 552.108 of the Government Code.

Section 552.108 of the Government Code states that “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if release of the information would interfere with the detection, investigation, or prosecution of crime.” Gov’t Code § 552.108(a)(1). The district is neither a law enforcement agency nor a prosecutor. However, this exception may be asserted by a custodian of records on behalf of another governmental body which is a law enforcement agency or prosecutor. *See, e.g.*, Open Records Decision Nos. 474 (1987), 372 (1983) (where incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information which relates to incident).

You inform us that on May 7, 2008, the district’s Inspector General Robert Moore spoke with a sergeant at the Houston Police Department (“HPD”) who is involved in the investigation of the drowning. You state that the sergeant asked the district to not release the video because HPD believes that doing so would interfere with its ongoing investigation. Based on this representation and our review of the submitted information, we find that release of the requested video would interfere with the detection, investigation, and prosecution of crime. Thus, we conclude that the district may withhold this information under section 552.108(a)(1) of the Government Code.

In summary, this ruling does not address the applicability of FERPA to the submitted information. Should the district determine that all or portions of the submitted information consist of “education records” subject to FERPA, the district must dispose of that

¹A copy of this letter may be found on the Office of the Attorney General’s website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

information in accordance with FERPA, rather than the Act. With respect to your claimed exceptions, the district may withhold the submitted information pursuant to section 552.108(a)(1) of the Government Code.²

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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.

²As our ruling is dispositive, we need not address your remaining argument against disclosure.

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,



Jessica J. Maloney
Assistant Attorney General
Open Records Division

JJM/jh

Ref: ID# 314985

Enc. Submitted documents

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