



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 4, 2009

Mr. Robert Viña, III  
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.  
6521 N. 10<sup>th</sup> Street, Suite C  
McAllen, Texas 78504

OR2009-02860

Dear Mr. Viña:

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# 336183.

The Raymondville Independent School District (the "district"), which you represent, received a request for 20 categories of information related to the requestor's client. You state the district has released some responsive information to the requestor. You also state the district does not have information responsive to some of the requested categories of information.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.103, 552.108, 552.114, and 552.117 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information.<sup>3</sup>

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<sup>1</sup>We 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. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

<sup>2</sup>Although you also raise section 552.101 of the Government Code, you have provided no argument explaining how this exception is applicable to the submitted information. Therefore, we do not address the applicability of section 552.101 to the submitted information. See Gov't Code §§ 552.301(e)(1)(A), .302.

<sup>3</sup>Although you raise section 552.026 of the Government Code as an exception to disclosure, we note that section 552.026 is not an exception to disclosure. Rather, section 552.026 provides that the Act does not require the release of information contained in education records except in conformity with the Family Educational Rights and Privacy Act of 1974 ("FERPA"). Gov't Code § 552.026.

The United States Department of Education Family Policy Compliance Office has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.<sup>4</sup> 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, among other things, redacted education records for our review. Because our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records. Such determinations under FERPA must be made by the educational authority in possession of the education records.<sup>5</sup> Likewise, we do not address your arguments under section 552.114 of the Government Code. *See* Gov't Code §§ 552.026 (incorporating FERPA into the Act), 552.114 (excepting from disclosure "student records"); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 of the Government Code and FERPA). However, to the extent you determine the information you have submitted is not protected by FERPA, we will consider your other arguments against disclosure.

We next note pages AG-00085 through AG-00089 are not responsive to the request because they were created after the district received the request for information. This ruling does not address the public availability of any information that is not responsive to the request and the district is not required to release non-responsive information in response to the request.

Next, we must address the district's procedural obligations under section 552.301 of the Government Code. We understand you to contend that, because the district provided the requestor with an estimate of charges for responding to the request and the district required a deposit or bond in this instance, the district's deadlines under section 552.301 were tolled until the district received payment from the requestor. Thus, we understand you to argue that the district's deadlines under section 552.301 were tolled pursuant to section 552.263 of the Government Code. *See* Gov't Code § 552.263(e) (providing that for the purposes of subchapters F and G of the Act, a request for a copy of public information is considered to have been received by a governmental body on the date the governmental body receives the deposit or bond for payment of anticipated costs). However, we note that section 552.263(a)

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<sup>4</sup>A copy of this letter may be found on the Office of the Attorney General's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

<sup>5</sup>In the future, if the district does obtain parental or an adult student's consent to submit unredacted education records and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

provides in relevant part that a governmental body "may require a deposit or bond for payment of anticipated costs . . . if [the governmental body] has provided the requestor with the required *written itemized statement* detailing the estimated charge for providing the copy and if the charge" is estimated to exceed \$100 if the governmental body has more than 15 full-time employees, or \$50 if the governmental body has fewer than 16 full-time employees. *Id.* § 552.263(a) (emphasis added). Thus, a governmental body may require a deposit or bond only if it has provided the requestor with the required written itemized statement. The requirements of the written itemized statement referred to in section 552.263 are found in section 552.2165 of the Government Code.

Section 552.2615 requires a governmental body to provide a requestor with an estimate of charges when a request to inspect a paper record will result in the imposition of a charge that will exceed forty dollars. *See id.* § 552.2615. Under section 552.2615, a governmental body is required to inform the requestor of the duties imposed on the requestor by this section and provide the requestor with the information needed to respond. *Id.* Section 552.2615 provides in part:

(a) [T]he governmental body must inform the requestor of the responsibilities imposed on the requestor by this section and of the rights granted by this entire section and give the requestor the information needed to respond, including:

(1) that the requestor must provide the governmental body with a mailing, facsimile transmission, or electronic mail address to receive the itemized statement and that it is the requestor's choice which type of address to provide;

(2) that the request is considered automatically withdrawn if the requestor does not respond in writing to the itemized statement and any updated itemized statement in the time and manner required by this section; and

(3) that the requestor may respond to the statement by delivering the written response to the governmental body by mail, in person, by facsimile transmission if the governmental body is capable of receiving documents transmitted in that manner, or by electronic mail if the governmental body has an electronic mail address.

(b) A request . . . is considered to have been withdrawn by the requestor if the requestor does not respond in writing to the itemized statement by informing the governmental body within 10 days after the date the statement is sent to the requestor that

- (1) the requestor will accept the estimated charge;
- (2) the requestor is modifying the request in response to the itemized statement; or
- (3) the requestor has sent to the attorney general a complaint alleging that the requestor has been overcharged for being provided with a copy of public information.

*Id.* § 552.2615(a)-(b). Having examined the estimate of charges the district provided to the requestor, we note that in this instance the district did not inform the requestor of his rights and responsibilities under sections 552.2615(a) and (b). We therefore find the district failed to meet the requirements of section 552.2615 in providing the required written itemized statement. Because the required written itemized statement was defective under section 552.2615, the district may not require a deposit or a bond of the requestor. Therefore, the district's deadlines under section 552.301 were not tolled under section 552.263. Furthermore, the provision of an itemized estimate of charges to a requestor under section 552.2615 does not excuse a governmental body from complying with its deadlines under section 552.301. *See id.* § 552.2615(g) (deadlines imposed by section 552.2615 do not affect application of time deadline imposed on governmental body under subchapter G of the Government Code). Accordingly, the district's deadlines under section 552.301 were not tolled.

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. Additionally, under section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (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. *Id.* § 552.301(b), (e)(1)(A)-(D). You state the district received the request for information on November 7, 2008. Thus, the district was required to request a decision from this office no later than November 21, 2008, and to submit the required information by December 3, 2008. The district did not request a decision from this office until December 17, 2008. Consequently, the district failed to request a decision within the ten-business-day period mandated by section 552.301(b) of the Government Code. Additionally, the district did not provide this office with the required documents within the fifteen-business-day period mandated by section 552.301(e) of the Government Code. Based on the foregoing, we conclude that the district failed to comply with section 552.301.

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 and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See 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). The presumption that information is public under section 552.302 can generally be overcome by demonstrating that the information is confidential by law or third-party interests are at stake. *See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982)*. Although you raise sections 552.103 and 552.108 of the Government Code, these exceptions are discretionary in nature. They serve only to protect a governmental body's interests and may be waived; as such, they do not constitute compelling reasons to withhold information for purposes of section 552.302. *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 No. 665 at 2 n.5 (2000) (discretionary exceptions generally); 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions); 177 (1977) (statutory predecessor to section 552.108 subject to waiver). Accordingly, the district may not withhold the submitted information pursuant to section 552.103 or section 552.108. However, because section 552.117 of the Government Code can provide a compelling reason to withhold information, we will address the applicability of this exception.

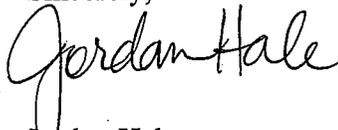
Section 552.117(a)(1) excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989)*. Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. We note, however, the requestor is the legal representative of the employee whose information is at issue. Because section 552.117 protects personal privacy, the requestor has a special right of access to private information concerning his client that would generally be excepted from public disclosure. Therefore, no portion of the submitted responsive information may be withheld from this requestor under section 552.117. *See Gov't Code § 552.023; Open Records Decision No. 481 at 4 (1987)* (privacy theories not implicated when individual requests information concerning

himself).<sup>6</sup> As the district raises no other arguments against disclosure, the submitted responsive information must be released to the requestor.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Jordan Hale  
Assistant Attorney General  
Open Records Division

JH/eeg

Ref: ID# 336183

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)

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<sup>6</sup>Section 552.023(a) provides that "[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests." Gov't Code § 552.023(a). Should the district receive another request for this particular information from a different requestor, then the district should again seek a decision from this office.