



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 10, 2010

Ms. Margo Kaiser  
Staff Attorney  
Texas Workforce Commission  
101 East 15<sup>th</sup> Street  
Austin, Texas 78778-0001

OR2010-17082

Dear Ms. Kaiser:

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# 399839 (TWC No. 100824-032).

The Texas Workforce Commission (the "commission") received a request for annual enrollment and outcome reports for a specified period of time for named career schools and colleges. You state you have provided some of the requested information. You claim the remaining requested information is excepted from disclosure under sections 552.101, 552.116, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup> We have also received and considered comments submitted by the requestor's attorney. *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

Initially we note that, in the requestor's attorney's comments, he states the requestor does not object to the commission redacting any social security numbers and wage information from

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<sup>1</sup>This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

the requested information. Therefore, those types of information are not responsive to the present request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the commission need not release such information. Accordingly, we need not address your arguments against disclosure under section 552.147 and section 552.101 in conjunction with common-law privacy.

Next we must address the commission's obligations under section 552.301 of the Government Code, which prescribes the procedural obligations that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires that a governmental body ask for a decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. Gov't Code § 552.301(b). Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of the receipt of the request: (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *See id.* § 552.301(e)(1)(A)-(D). You indicate the commission received a previous request for information from the same requestor on August 12, 2010. You indicate the commission provided the requestor with the requested information on August 23, 2010, and state the commission received a clarification from the requestor on August 24, 2010. The commission requested a ruling from this office on September 8, 2010, and submitted written comments for the exceptions claimed for the information at issue on September 15, 2010. Upon review, however, we find the information at issue was responsive to the requestor's August 12, 2010 request. Thus, because the information was responsive to the requestor's August 12, 2010 request, but the commission did not request a ruling from this office until September 8, 2010, and did not submit information and comments until September 15, 2010, we find the commission failed to comply with the requirements of 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 unless the governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *Id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *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. 630 (1994). A compelling reason generally exists when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Although you raise section 552.116 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body's interests and may

be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). Thus, in failing to comply with section 552.301, the commission has waived its argument under section 552.116 and may not withhold the requested information on that basis.

Next we address the requestor's attorney's comments that the requested information has previously been released to the public. The requestor's attorney states and provides supporting documentation that the commission has already released the requested information "to other open records requestors." The Act does not permit the selective disclosure of information. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). If information has been voluntarily released to any member of the public, then that same information may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988). As discussed above, the commission's claim under section 552.116 of the Government Code is discretionary. Thus, none of the information at issue may be withheld on that basis. However, you also claim the requested information is confidential under the Family Educational and Privacy Rights Act ("FERPA"), 20 U.S.C. § 1232(g).

The commission seeks to withhold the requested information as education records under FERPA, 20 U.S.C. § 1232(g). These provisions only apply to student records in the custody of educational institutions and to records directly transferred from an educational institution to a third party. 34 C.F.R. § 99.33(a)(2). The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA does not permit a state educational agency or institution 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>2</sup> *See id.* § 99.3 (defining "personally identifiable information"). Although the commission is not an educational institution, you inform us that the commission obtained the education records at issue from educational institutions. *See id.* § 99.33(a)(2). Our office has previously informed the commission that determinations under FERPA must be made by the educational institution from which the education records were obtained, as well as the DOE. You state the commission contacted the institutions from which the reports were obtained and that the institutions informed the commission in writing that all information contained in the reports was confidential under FERPA and not subject to release by the commission. Because our office is prohibited from reviewing the information to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA

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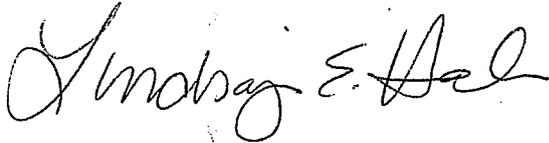
<sup>2</sup>A copy of this letter may be found on the Office of the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

to the records at issue. To the extent that the requested information is not confidential under FERPA, it must be released.

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, toll free at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script, appearing to read "Lindsay E. Hale".

Lindsay E. Hale  
Assistant Attorney General  
Open Records Division

LEH/em

Ref: ID# 399839

Enc. Submitted documents

c: Requestor  
(w/o enclosures)