ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 23, 2012

Mr. Scott McDonald
For Edinburg Consolidated Independent School District
O'Hanlon, McCollom & Demerath
808 West Avenue
Austin, Texas 78701

OR2012-04323

Dear Mr. McDonald:

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# 448445.

The Edinburg Consolidated Independent School District (the "district"), which you represent, received a request for information related to a specified investigation. You claim the submitted information is excepted from disclosure under sections 552.108 and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you state you have redacted some information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. 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.[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

[1]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.

"personally identifiable information"). However, FERPA is not applicable to law enforcement records maintained by the district's police department for law enforcement purposes. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3, .8. Upon review, we find, and you acknowledge, the submitted information constitutes law enforcement records created and maintained by the district's police department for law enforcement purposes. Thus, these records are not subject to FERPA, and no portion of the records at issue may be withheld on that basis. However, we will address the district's remaining arguments with respect to the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."[2] Gov't Code § 552.101. This section encompasses information made confidential by other statutes, such as section 58.007 of the Family Code. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997, are confidential under section 58.007(c), which reads as follows:

> (c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:
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> > (1) if maintained on paper or microfilm, kept separate from adult files and records;
> >
> > (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
> >
> > (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

Fam. Code § 58.007(c). For purposes of section 58.007(c), "child" means a person who is ten years of age or older and under seventeen years of age. *See id.* § 51.02(2). The information at issue involves delinquent conduct that occurred after September 1, 1997. *See id.* § 51.03 (defining "delinquent conduct" for purposes of Fam. Code § 58.007). However, we are unable to determine the age of the offender at issue. Thus, we must rule conditionally. It does not appear any of the exceptions in section 58.007 apply to the submitted information. Thus, to the extent the submitted information constitutes a record

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

of a juvenile engaged in delinquent conduct who was ten years of age or older and under seventeen years of age at the time of the commission of the crime, the submitted information is confidential pursuant to section 58.007(c) of the Family Code and must generally be withheld from this requestor under section 552.101 of the Government Code. However, to the extent the submitted information pertains to an offender who was not ten years of age or older and under seventeen years of age at the time of the commission of the crime, the submitted information is not confidential pursuant to section 58.007(c) and may not be withheld from this requestor under section 552.101 on that basis.

We note the submitted information contains the medical records of the requestor's child, which are governed by the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code §§ 151.001-165.160. Section 552.101 of the Government Code also encompasses the MPA. Section 159.002 of the MPA provides in 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.

Id. § 159.002(b)-(c). This office has concluded 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). We note medical records involving a minor may be released under the MPA with the parent's or legal guardian's signed, written consent, provided the consent specifies (1) the information to be covered by the release, (2) the reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We note a specific statutory right of access provision prevails over general exceptions to disclosure under the Act. *See* Open Records Decision No. 451 at 4 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under statutory predecessor to Act). Thus, the marked medical records are subject to the MPA.

Although the submitted information may be generally confidential under section 58.007 of the Family Code, the MPA may provide the requestor with a right of access to the portion of the information consisting of her child's medical records, which we have marked. Therefore, there is a conflict between the confidentiality provisions of section 58.007(c) of the Family Code and the access provisions of the MPA. Where general and specific statutes

are in irreconcilable conflict, the specific provision typically prevails as an exception to the general provision unless the general provision was enacted later and there is clear evidence the legislature intended the general provision to prevail. *See* Gov't Code § 311.026(b); *City of Lake Dallas v. Lake Cities Mun. Util. Auth.*, 555 S.W.2d 163, 168 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.). In this instance, although section 58.007(c) generally makes juvenile law enforcement records confidential, the MPA specifically permits release of medical records to certain parties and in certain circumstances. Therefore, we conclude, notwithstanding the provisions of section 58.007 of the Family Code, the district must release the marked medical records if it receives consent from the requestor that complies with the MPA. To the extent the remaining information constitutes a record of a juvenile engaged in delinquent conduct who was ten years of age or older and under seventeen years of age at the time of the commission of the crime, the district must withhold the remaining information under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code. If the submitted information constitutes a record of a juvenile engaged in delinquent conduct who was ten years of age or older and under seventeen years of age at the time of the commission of the crime and the district does not receive consent that complies with the MPA, the district must withhold the submitted information in its entirety under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code.[3] If the submitted information pertains to an offender who was not ten years of age or older and under seventeen years of age at the time of the commission of the crime and the district does not receive consent that complies with the MPA, the district must withhold the marked medical records under section 552.101 of the Government Code in conjunction with the MPA.

Next, we address section 552.108 of the Government Code to the extent the information at issue is not confidential under section 58.007 of the Family Code. Section 552.108 provides, in relevant part:

> (a) Information 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:
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> . . .
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> (2) it is information that the deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

[3]As our ruling is dispositive, we need not address your argument against disclosure of this information.

Gov't Code § 552.108(a)(2). Section 552.108(a)(2) protects information that relates to a concluded criminal investigation or prosecution that did not result in conviction or deferred adjudication. A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why the exception it claims is applicable to the information the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

In your comments to this office, you quote the language from section 552.108(a)(2). As previously stated, this section pertains to concluded criminal investigations that did not result in conviction or deferred adjudication. You state, however, the remaining information pertains to a pending criminal investigation. Because you have provided this office with contradictory information, we find you have failed to sufficiently demonstrate the applicability of section 552.108(a)(2). *See* Gov't Code § 552.301(e)(1)(A) (governmental body must provide comments explaining why claimed exceptions to disclosure apply). Therefore, we conclude the district may not withhold the remaining information under section 552.108(a)(2) of the Government Code.

Section 552.135 of the Government Code provides in part:

> (a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.
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> (b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].
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> (c) Subsection (b) does not apply:
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>> (1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or
>>
>> (2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or
>>
>> (3) if the informer planned, initiated, or participated in the possible violation.

Id. § 552.135(a)-(c). We note the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of civil, criminal, or regulatory law. Thus, section 552.135 protects the identity of an informer but does not protect witness

information or statements. We note this section does not protect the identity of an individual who planned, initiated, or participated in a possible violation of law. *See id.* § 552.135(c)(3). In this instance, you claim the some of the remaining information reveals the identities of informers. Upon review, we find you have failed to demonstrate this information identifies individuals who reported possible violations of the law. Thus, the district may not withhold any of this information under section 552.135 of the Government Code.

We note a portion of the remaining information is subject to section 552.130 of the Government Code.[4] Section 552.130 of the Government Code excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country. *Id.*§ 552.130(a)(1). Upon review, we find the district must withhold the information we have marked under section 552.130 of the Government Code.

In summary, if the requestor provides proper consent in accordance with the MPA, the district must release the marked medical records. If the submitted information constitutes a record of a juvenile engaged in delinquent conduct who was ten years of age or older and under seventeen years of age at the time of the commission of the crime, the district must withhold the remaining information under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code. If the submitted information pertains to an offender who was not ten years of age or older and under seventeen years of age at the time of the commission of the crime and the district does not receive consent that complies with the MPA, the district must withhold the marked medical records under section 552.101 of the Government Code in conjunction with the MPA. If the submitted information pertains to an offender who was not ten years of age or older and under seventeen years of age at the time of the commission of the crime, the district must withhold the information we have marked under section 552.130 of the Government and release the remaining information.[5]

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[4]The 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).

[5]We note the requestor in this case has a right of access to some of the basic information being released in this case. *See* Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates or person's agent on ground that information is considered confidential by privacy principles); ORD 481 at 4 (privacy theories not implicated when individuals request information concerning themselves). Accordingly, if the city receives another request for this same information, it must again seek a ruling from this office. We further note the information being released contains a social security number. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147(b).

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, 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,

Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 448445

Enc. Submitted documents

c: Requestor
(w/o enclosures)