



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 24, 1995

Ms. Annette Cavazos-Hewgley
Administrative Assistant
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR95-1129

Dear Ms. Hewgley:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 36136.

The Texas Education Agency (the "TEA") received an open records request for various records pertaining to the TEA's audit of the Somerville Independent School District (the "district"). You state that the request seeks in part records that this office has previously determined are excepted from required public disclosure under section 552.103 of the Government Code. *See* Open Records Letter No. 95-913 (1995). To the extent that the records currently being requested were addressed in that ruling, this office need not further address their public availability. *See* Gov't Code § 552.301(a).

However, with regard to the remaining documents at issue, we note that the TEA received the open records request on September 5, 1995, but did not request a decision from this office until September 28, 1995. Consequently, the TEA failed to request a decision within the ten days required by section 552.301(a) of the Government Code.

Section 552.301(a) requires a governmental body to release requested information or to request a decision from the attorney general within ten days of receiving a request for information the governmental body wishes to withhold. When a governmental body fails to request a decision within ten days of receiving a request for information, the information at issue is presumed public. Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston*

Chronicle Publishing Co., 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this presumption. See *Hancock* at 381.

Although you contend that sections 552.103 and 552.111 of the Government Code except the requested information from required public disclosure, you have not presented compelling reasons for withholding the records under these exceptions. We therefore conclude that the TEA has waived the protection of these two exceptions.

You also contend that the requested information not otherwise excepted from disclosure in accordance with Open Records Letter No. 95-913 (1995) is confidential under section 39.076(b) of the Education Code and thus must be withheld from the public pursuant to section 552.101 of the Government Code.¹ Subchapter D of chapter 39 of the Education Code provides standards and procedures for, among other things, on-site investigations of public schools for the purpose of determining accreditation status. Section 39.076 provides:

(a) The agency shall adopt written procedures for conducting on-site investigations under this subchapter. The agency shall make the procedures available to the complainant, the alleged violator, and the public. Agency staff must be trained in the procedures and must follow the procedures in conducting the investigation.

(b) After completing an investigation, the agency shall present preliminary findings to any person the agency finds has violated a law, rule, or policy. Before issuing *a report with its final findings*, the agency must provide a person the agency finds has violated a law, rule, or policy an opportunity for an informal review by the commissioner or a designated hearing examiner. [Emphasis added.]

None of the information at issue is made confidential under section 39.076(b), which merely provides certain procedural prerequisites that must be met before the TEA may disseminate the "report" of its findings to the public. The records at issue do not consist of the TEA's "report with its final findings," but could only be considered at most a part of the raw data underlying the TEA's conclusions contained in the report. For information to be withheld because of statutory confidentiality under section 552.101 of the Government Code, the relevant statute must *explicitly* state the confidentiality of the information at issue -- confidentiality cannot be implied from the statute's structure.

¹Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

Open Records Decision No. 465 (1987). Section 39.076(b) does not apply to the requested information.

Finally, we address your claim that some of the requested information is within section 552.026 of the Government Code, which provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

The Family Educational Rights and Privacy Act of 1974 ("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 numerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. See 20 U.S.C. § 1232g(b)(1). "Education records" are those records, files, documents, and other materials which

- (i) contain information directly related to a *student*; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A) (emphasis added). A "student"

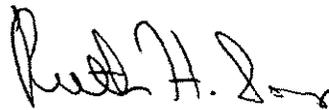
includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

Id. § 1232g(a)(6) (emphasis added). Although the TEA may be an "educational institution" for some purposes, it is not an institution attended by students. The records you seek to withhold under section 552.026 of the Government Code were never "education records" maintained by the Somerville ISD and thus cannot now be deemed "education records" in the hands of the TEA.

You have not presented compelling reasons why the requested information should be withheld.² We therefore conclude that the TEA must release the requested information, except as discussed above.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/RWP/rho

Ref.: ID# 36136

Enclosures: Submitted documents

cc: Ms. Linda Bachmeier
1616 Avenue M, Suite 101
Hondo, Texas 78861
(w/o enclosures)

²We note, however, that to the extent that the requested telephone records reveal the home telephone numbers of any TEA or district employee, those telephone numbers must be withheld in compliance with sections 552.024 and 552.117 of the Government Code.