



August 2, 1999

Mr. Mark D. Cronenwett
Fannin, Harper & Martinson
Attorneys and Counselors
Third floor Preston Commons West
8117 Preston Road
Dallas, Texas 75225

OR99-2158

Dear Mr. Cronenwett:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 126349.

Maypearl High School (the "high school"), which you represent, received a written request from an attorney for all records pertaining to a named student. The requestor is an attorney with a law firm that is representing the student. You contend the requested records are excepted from required public disclosure pursuant to sections 552.103, 552.107, and 552.111 of the Government Code.

Section 552.107(1) of the Government Code excepts from required public disclosure information coming within the attorney-client privilege. Section 552.111 excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the policymaking process. Open Records Decision No. 615 at 5 (1993). After reviewing the documents at issue, we conclude that none of the information contained therein comes within either of these two exceptions.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 at 1 (1991). The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986) and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

In this instance, however, we need not determine whether you have met your burden of demonstrating the applicability of section 552.103 to the records at issue. Although the attorney general will not ordinarily raise an exception that might apply but that the governmental body has failed to claim, *see* Open Records Decision No. 325 at 1 (1982), we will raise other confidentiality provisions because the release of confidential information could impair the rights of third parties and because the improper release of confidential information constitutes a misdemeanor. *See* Government Code § 552.352.

All of the requested information constitutes “education records” made confidential under the federal Family Educational Rights and Privacy Act of 1974 (“FERPA”). 20 U.S.C. § 1232g. “Education records” means those records that contain information directly related to a student and 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). Section 552.026 of the Government Code 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. [Emphasis added.]

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 enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student’s parent. *See* 20 U.S.C. § 1232g(b)(1). When a student has attained the age of eighteen years or is attending an institution of post secondary education, the student holds the rights accorded by Congress to inspect these records. 20 U.S.C. § 1232g(d).

Because all of the records at issue constitute “education records,” the high school must withhold the information from the requestor unless the high school receives permission to release the information as specified above. However, because FERPA contains the specific release provisions discussed above, once proper authorization for release is received, the high school may not withhold any of the requested records pursuant to section 552.103 of the Government Code. Open Records Decision No. 431 (1985) (release provisions in FERPA not overcome where “litigation exception” otherwise applicable).

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

regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink, appearing to read "Yen-Ha Le". The signature is fluid and cursive, with a distinct loop at the end.

Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/RWP/nc

Ref.: ID# 126349

Encl. Submitted documents

cc: Ms. Lori Watson
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(w/o enclosures)