



January 23, 2001

Mr. Therold I. Farmer  
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.  
P.O. Box 2156  
Austin, Texas 78768

OR2001-0230

Dear Mr. Farmer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 143454.

The China Spring Independent School District (the "district"), which you represent, received a written request from an attorney for "all correspondence, notes, files, records and/or reports regarding" a named student who is the child of the requestor's client. You have submitted to this office three documents as being responsive to the request: an inter-office memorandum dated November 6, 2000, one page of handwritten notes, and a "School Accident Report." You contend that these records excepted from disclosure under sections 552.026 of the Government Code in conjunction with the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, and section 552.107(1) of the Government Code.<sup>1</sup>

We note at the outset that you represent that the district received the records request on October 30, 2000. Consequently, the November 6 memorandum was created after the district received the request. A document that did not exist on the date a governmental body receives a records request does not come within the purview of the Public Information Act. Open Records Decision Nos. 476 (1987), 452 (1986). Accordingly, we do not address the public nature of this document except to conclude that the district need not release the memorandum at this time.

You describe the page of handwritten notes as being created by the district's superintendent during one or more telephone conversations with the district's legal counsel. You contend that this document is excepted from public disclosure pursuant to section 552.107(a) of the

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<sup>1</sup>Because we resolve your request under FERPA and section 552.107(1), we need not address the applicability of the other exceptions you raised.

Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. *See* Open Records Decision No. 574 (1990). In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice or opinion and client confidences. *Id.* After reviewing the information at issue, we agree that the handwritten notes constitute attorney-client privileged communications and thus come within the protection of section 552.107(1). The district may withhold the notes in their entirety.

Finally, you contend that the "School Accident Report" constitutes an "education record" under FERPA. 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 [FERPA].

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). "Education records" are 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. *Id.* § 1232g(a)(4)(A).

For purposes of FERPA, the "School Accident Report" constitutes an "education record" in that it contains information about an identifiable student. Consequently, the department must withhold this record until such time that it receives an authorization from the student's parent that comports with the requirements of FERPA. *See id.* § 1232g(b)(2)(A) (requiring specification of records to be released and the reasons for such release).

In summary, the district need not release the November 6 memorandum at this time because it did not exist when the district received the current records request. The district may withhold the page of handwritten notes pursuant to section 552.107(1) of the Government Code, and is required to release the "School Accident Report" only upon receipt of a proper authorization that comports with the requirements of FERPA.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by

filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

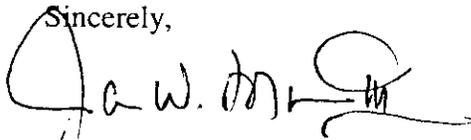
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J. W. Morris, III". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/RWP/seg

Ref: ID# 143454

Encl. Submitted documents

cc: Mr. P. James Rainey  
Attorney at Law  
2003 Washington Avenue  
Waco, Texas 76701  
(w/o enclosures)