



March 27, 2002

Mr. Kevin W. Cole
Wickliff & Hall
Wells Fargo Tower
400 West 15th Street, Suite 800
Austin, Texas 78701

OR2002-1515

Dear Mr. Cole:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 160370.

The San Marcos Consolidated Independent School District (the "school district"), which you represent, received a request for the following information:

- (1) the amount girls pay to participate in cheerleading, dance, soccer, softball, and tennis;
- (2) the amount boys pay to participate in baseball, football, basketball, and wrestling; and
- (3) the budgets for these high school sports programs.

The school district also received questions concerning the reason the school district eliminated the swim team, the reason why girls pay \$1000 to participate in cheerleading and several hundred dollars to participate in dance, and what measures the school district is taking to ensure that girls are not disproportionately affected by budget cuts. You indicate that the school district does not have a wrestling program and therefore does not have information responsive to the request for information concerning the amount of money boys pay to participate in such a program. We note that the Public Information Act (the "Act") does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). Next, you state that the school district has released the requested budget information. However, you claim that the remainder of the requested information is excepted from disclosure under sections 552.103 and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by noting that the Act does not require a governmental body to answer factual questions. Open Records Decision No. 555 (1990). However, a governmental body must make a good faith effort to relate a request to information which it holds. Open Records Decision No. 561 (1990). Some of the submitted information may relate to the requestor's question concerning why girls are required to pay \$1000 to participate in cheerleading. To the extent the school district, in good faith, determines that it possesses any other information relating to the requestor's questions, it must release that information. See Gov't Code §§ 552.021, .221, .301, .302; ORD 561. Likewise, we note that you have not submitted any information responsive to the request for the amounts paid to participate in girls' dance, soccer, softball, or tennis, or boys' baseball, football, or basketball. We assume the school district has released any information responsive to these portions of the request. To the extent it has not released this information, it must do so now. See Gov't Code §§ 552.021, .221, .301, .302.

With respect to the submitted information, we note that portions of the information are subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body

Gov't Code § 552.022(a)(3). The submitted documents contain information in accounts and vouchers that must be released unless it is confidential under other law. Section 552.103 is a discretionary exception and is not "other law" for the purpose of section 552.022. Open Records Decision No. 663 (1999) (governmental body may waive section 552.103). Therefore, the school district may not withhold the account and voucher information under section 552.103. Nevertheless, we will address whether the account and voucher information is excepted from disclosure under section 552.114 of the Government Code.

First, we address your section 552.103 argument with respect to the information that is not subject to section 552.022. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or

employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The school district has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The school district must meet both prongs of this test for information to be excepted under 552.103(a).

You indicate that the school district is currently involved in a lawsuit in federal district court concerning the school district's funding of girls' sports and extracurricular activities. In support of this contention, you have submitted pleadings from the case of *Salmon v. San Marcos Consolidated Independent School District*, No. A01CA883SS (W.D. Tex. Dec. 27, 2001). Based on your arguments and our review of the submitted information, we agree that the submitted information relates to pending litigation involving the school district. Therefore, the school district may withhold the information that is not otherwise subject to section 552.022(a)(3) under section 552.103 of the Government Code. We have marked the information that may be withheld under section 552.103.

We note that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

With respect to the account and voucher information, we address your argument under section 552.114 of the Government Code. 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 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" 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. *Id.* § 1232g(a)(4)(A). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990).

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 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.

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception.

Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). The information at issue directly relates to students. Therefore, the school district must withhold the student identifying information pursuant to FERPA. We have marked the types of student identifying information that must be withheld. All other information must be released.

In summary, you may withhold some of the submitted information, which we have marked, under section 552.103 of the Government Code. You must release the remainder of the submitted information except for the student identifying information.

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).

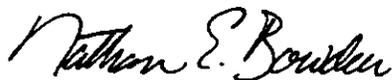
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Hadassah Schloss at the Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 160370

Enc: Submitted documents

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