



May 21, 2002

Ms. Jennifer Lehmann
Escamilla & Poneck, Inc.
P.O. Box 200
San Antonio, Texas 78291-0200

OR2002-2715

Dear Ms. Lehmann:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 163202.

The San Antonio Independent School District (the "district"), which you represent, received a request for copies of personnel records pertaining to a specified person and records pertaining to any investigation and/or complaints made against or otherwise involving the specified person. You state that you will provide some responsive information to the requestor. You claim, however, that the submitted information is excepted from disclosure pursuant to sections 552.026, 552.107, 552.111, 552.114, and 552.131 of the Government Code.¹ We have considered the exceptions you claim and have reviewed the submitted information.

You claim that Exhibits B, C, and D are excepted from disclosure pursuant to section 552.114 of the Government Code. Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. This office generally applies the same analysis under section 552.114 and the Family Educational Rights and Privacy Act ("FERPA"). *See* Open Records Decision No. 539 (1990). 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

¹ We note that former section 552.131, "Exception: Certain Information Held by School District," was renumbered as section 552.135 by the Seventy-seventh Legislature, effective September 1, 2001. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 2812, § 21.001(54) (to be codified at Gov't Code § 552.135). The revision was non-substantive.

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. *See id.* § 1232g(a)(4)(A).

Information must be withheld from 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). This includes information that directly identifies a student, as well as information that, if released, would allow the student's identity to be easily traced. *See* Open Records Decision No. 224 (1979) (finding student's handwritten comments making identity of student easily traceable through handwriting, style of expression, or particular incidents related in comments protected under FERPA). Based on our review of your arguments and Exhibits B, C, and D, we conclude that all of the information in Exhibit B and some of the information in Exhibits C and D, which we have marked, constitutes personally identifiable information contained in a student's education records. Accordingly, we conclude that the district must withhold from disclosure the handwritten notes in Exhibit B, as well as the student-identifying information in Exhibits C and D that we have marked as representative samples, pursuant to section 552.114 in conjunction with FERPA. *See* Open Records Decision Nos. 539 (1990), 332 (1982), 206 (1978). Because we base our ruling regarding Exhibits B, C, and D on section 552.114 of the Government Code in conjunction with FERPA, we need not address your claim regarding section 552.135 of the Government Code.

However, you also claim that the remaining information in Exhibit D is excepted from disclosure as attorney work product under section 552.111 of the Government Code. A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. *See* Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the documents at issue were created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery or release believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See id.* at 4. The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions and legal theories.

We note that contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, constitute litigation for purposes of the Public Information Act. *See* Open Records Decision No. 588 at 7 (1991). You indicate that the

information in Exhibit D concerns an investigation which may result in a contested case proceeding before the Commissioner of Education regarding termination of the employment of the specified person. You state that the information in Exhibit D was created by district attorneys for the purpose of evaluating this matter for trial and in anticipation of having to go to trial before the Commissioner of Education to effectuate the termination of the person's employment. Based on our review of your arguments and the remaining information in Exhibit D, we conclude that you have demonstrated that the remaining information constitutes attorney work product developed under a good faith belief that there was a substantial chance that litigation would ensue against the requestor's client. Accordingly, we conclude that the district may withhold the remaining information in Exhibit D from disclosure as attorney work product pursuant to section 552.111 of the Government Code. Because we base our ruling regarding the remaining information in Exhibit D on section 552.111, we need not address your remaining claimed exception to disclosure.

In summary, the district must withhold from disclosure the handwritten notes in Exhibit B, as well as the student-identifying information in Exhibits C and D that we have marked as representative samples, pursuant to section 552.114 in conjunction with FERPA. The district may withhold the remaining information in Exhibit D from disclosure pursuant to the attorney work product privilege in section 552.111 of the Government Code. The district must release the remaining information to the requestor.

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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 163202

Enc. Marked documents

cc: Mr. John F. Carroll
Attorney at Law
111 West Olmos Drive
San Antonio, Texas 78212
(w/o enclosures)