



July 2, 2002

Mr. James F. Gaertner
President
Sam Houston State University
P.O. Box 2026
Huntsville, Texas 77341-2026

OR2002-3581

Dear Mr. Gaertner:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 165146.

Sam Houston State University (the “university”) received a request for a videotape of damage done to the requestor’s belongings by the requestor’s roommate. You claim that the requested information is excepted from disclosure under sections 552.108 and 552.114 of the Government Code and under the Family Educational Rights and Privacy Act of 1974 (“FERPA”). 20 U.S.C. § 1232g. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the university did not supply this office with a copy of the request for information within the fifteen business day time period prescribed by section 552.301 of the Government Code. See Gov’t Code § 552.301(e)(1)(B). When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public. See Gov’t Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ’g Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). To overcome this presumption, the governmental body must show a compelling interest to withhold the information. See Gov’t Code § 552.302; *Hancock*, 797 S.W.2d at 381. Normally, a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Section 552.108 is a discretionary exception and, as such, does not generally provide a compelling reason to withhold information. See Open Records Decision

No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general); *but see* Open Records Decision No. 586 (1991) (need of governmental body, other than one that failed to comply with requirements for requesting open records ruling, to withhold information under 552.108 may be compelling reason to overcome presumption that information is public). However, as the presumption of openness can be overcome by a showing that information is confidential by law, we will consider your arguments under section 552.114 and FERPA.

You assert that the submitted videotape is a confidential education record. Section 552.101 of the Government Code excepts from disclosure information made confidential by statutes such as 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 id.* § 1232g(b)(1). Section 552.114 of the Government Code provides a similar prohibition against public release of student records from an educational institution funded wholly or in part by state funds. This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990); *see* Gov't Code § 552.026 (providing that Public Information Act only requires release of information from education records in conformity with FERPA).

"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). Prior decisions of this office have found the following information to be protected by FERPA: tape recordings of an interview between university officials and a former student to the extent that the tapes contain information about the former student's attendance at the university, *see* Open Records Decision No. 539 (1990), a student's handwritten letters, *see* Open Records Decision No. 224 (1979), and information about various student financial transactions with an educational institution, *see* Open Records Decision Nos. 193 (1978) (report of accident insurance claims paid to students); 151 (1977) (list of former university students credited with funds remaining in their general property deposit). 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).

You inform us that the requested videotape was created by an employee of the university's department of residence life and that it will be included in the disciplinary records of the student who damaged the requestor's belongings. The request indicates that the requestor knows the identity of the student and the conduct at issue. Under these circumstances, we find that the submitted information cannot be redacted to the extent reasonable and necessary to protect the student's identity. Accordingly, the university must withhold the submitted

videotape in its entirety under section 552.101 of the Government Code in conjunction with 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).

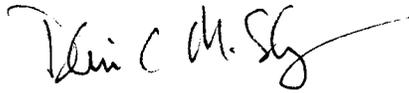
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 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,

A handwritten signature in black ink, appearing to read "Denis C. McElroy". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/seg

Ref: ID# 165146

Enc. Submitted documents

bc: requestor
(w/o enclosures)