



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

April 22, 2003

Mr. Fred A. Stormer
Underwood, Wilson, Berry, Stein & Johnson, P.C.
P.O. Box 9158
Amarillo, Texas 79105-9158

OR2003-2685

Dear Mr. Stormer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 179796.

The Tulia Independent School District (the "district"), which you represent, received three written requests from the same individual for records pertaining to the district's "drug use" testing policy. You contend that the requested information, to the extent it exists, is excepted from required disclosure pursuant to sections 552.026, 552.101, 552.103, and 552.114 of the Government Code.¹

We note at the outset that the release of some of the submitted records is governed by section 552.022 of the Government Code. Section 552.022 provides in pertinent 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:

(1) a *completed report*, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

¹You also describe some of the request items as "unintelligible." Please note that a request for records made pursuant to the Public Information Act may not be disregarded simply because a citizen does not specify the exact documents he desires. When a requestor makes a vague request, the district should make a good faith effort to advise the requestor of the type of documents available so that the requestor may narrow or otherwise clarify the request. See Open Records Decision No. 87 (1975)

Gov't Code § 552.022(a)(1) (emphasis added). Among the records you submitted to this office are documents that constitute "completed reports" for purposes of section 552.022(a)(1). Consequently, the district must release those documents unless they are expressly made confidential under other law.² As noted above, you contend that some of the submitted records are excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.); Open Records Decision No. 542 at 4 (1990) (governmental body may waive section 552.103). Furthermore, none of the completed reports contains information that is made confidential under other law. Thus, no portion of the "completed reports" may be withheld pursuant to the exceptions that you raised. Consequently, the district must release the records we have marked as coming within the ambit of section 552.022(a)(1).

We now address whether the remaining submitted information is excepted from required public disclosure. 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.

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. *See* 20 U.S.C. § 1232g(d). "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). Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982), 206 (1978); *see also* 34 C.F.R. § 99.3 (defining "personally identifiable information").

We agree that some of the documents you submitted to this office constitute "education records" to the extent those records contain information about identifiable students. We have marked the documents that the district must withhold in accordance with FERPA.³

² We note that you have not raised section 552.108 for the submitted reports. *See* Gov't Code § 552.022(a)(1).

³ Because we resolve this aspect of your request under section 552.026, we need not address the applicability of section 552.114 to these documents.

As noted above, you contend that the remaining submitted documents are excepted from required public disclosure pursuant to section 552.103 of the Government Code. Section 552.103 is often referred to as the "litigation" exception. To show that section 552.103(a) is applicable, the district must demonstrate that (1) litigation was pending or reasonably anticipated on the date the district received the records request 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).

In this instance, you have established that the submitted information relates to litigation to which the district is a party and that the litigation was pending on the date the district received the records requests. The district therefore may withhold the remaining submitted information pursuant to section 552.103 of the Government Code.

In reaching this conclusion, we assume that the opposing parties to the litigation have not previously had access to the records at issue; once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Consequently, if the opposing parties in the litigation have seen or had access to these records, there would be no justification for now withholding those records from the requestor pursuant to section 552.103. We also note that the applicability of section 552.103 ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the district must release in their entirety the documents we have marked as being subject to section 552.022(a)(1) of the Government Code. The district is authorized to withhold the documents we have marked as coming within the protection of section 552.103 of the Government Code. The documents we have marked as constituting education records must be withheld in accordance 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 Dep't of Pub. 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,



Heather Pendleton Ross
Assistant Attorney General
Open Records Division

HPR/RWP/seg

Ref: ID# 179796

Enc: Submitted documents

c: Mr. Gary Gardner
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(w/o enclosures)