



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 17, 2003

Mr. Kevin W. Cole  
Cole & Powell  
400 West 15<sup>th</sup> Street, Suite 304  
Austin, Texas 78701

OR2003-6540

Dear Mr. Cole:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 187785.

The Austin Independent School District (the "District"), which you represent, received a request for the following two categories of information:

1. All [District] and/or Reagan High School investigation/incident/accident reports, whether called so or something else, as well as any and all other reports of such nature not produced by [the District] but which are in the [District's] possession, pertaining to the death of [a named student];
2. All [District] and or [Reagan] High School investigation/incident/accident reports, whether generated by [the District] or some other party, as well as any other kind of record pertaining to [a named student's] disciplinary history, whether from the time period that he was a student at Reagan High School, at a Junior High School, or at any other [District] school.

You assert the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.114 of the Government Code as well as the attorney-client privilege. We reviewed the representative sample of information you submitted and considered the exceptions you claim.<sup>1</sup>

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<sup>1</sup> We assume the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

Initially, we address your obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. You inform us that the District received the present request for information on June 30, 2003. Thus, the District should have claimed all applicable exceptions no later than July 15, 2003. Though you assert some exceptions in your first letter to this office in which you request an attorney general decision, in your letter dated July 21, 2003, you assert an additional exception, the attorney-client privilege. Consequently, with respect to this exception, we conclude that the District has not complied with the requirements of section 552.301(b) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, a compelling reason is when some other source of law makes the information confidential or third party interests are at stake. Open Records Decision No. 150 at 2 (1977). The attorney-client privilege under section 552.107, a discretionary exception under the Act, does not constitute a compelling reason to overcome the presumption of openness. *See* Open Records Decision No. 630 at 4 (1994) (governmental body may waive attorney-client privilege, Gov't Code § 552.107(1)); *see also* Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general). Accordingly, we will not address your claim under this exception; however, we will address your arguments under the exceptions you timely claimed.

Next, we note that some of the submitted information is subject to section 552.022 of the Government Code. This provision provides, in pertinent part, as follows:

(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 include an executed agreement relating to the expenditure of public or other funds by a governmental body subject to section 552.022(a)(3). The District must release the executed contract unless it is confidential under other law. *See* Gov't Code § 552.022(a)(3). You assert section 552.103

of the Government Code, a discretionary exception under the Act, which does not constitute other law for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 663 (1999) (governmental body may waive Gov't Code § 552.103), 551 (1990) (statutory predecessor to Gov't Code § 552.103 serves only to protect a governmental body's position in litigation and does not itself make information confidential); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the District may not withhold the executed contract we have marked under section 552.103 of the Government Code. As you claim sections 552.101 and 552.114, which constitute other law for purposes of section 552.022 of the Government Code, we will address your arguments for the executed agreement, as well as the remaining documents, under these exceptions.

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Gov't Code § 552.114(a). Section 552.026 of the Act 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 and Privacy Rights Act of 1974 . . . ('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.<sup>2</sup> *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. *See* Open Records Decision No. 634 at 5 (1995).

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution must 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 must 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. Nevertheless, you have submitted such information to this office for consideration; therefore, we will address your arguments under FERPA.

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<sup>2</sup> Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses confidentiality provisions of other statutes such as FERPA.

In this instance, the District clearly maintains some of the submitted information, which directly relates to students. However, we note that the submitted information also contains records created by the Austin Independent School District Police Department (the "Department") for purposes of law enforcement. The Department's records do not constitute "education records" for purposes of FERPA. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8(b)(1) (2003) (defining law enforcement records); Open Records Decision No. 612 (1992) (term "education records" does not include records maintained by law enforcement unit of educational agency or institution created by that law enforcement unit for purpose of law enforcement). However, records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of the educational agency or institution other than the law enforcement unit are not records of a law enforcement unit. *See* 34 C.F.R. § 99.8(b)(2) (2003). Therefore, if the Department records are maintained by a District component other than the Department, then the records fall within the purview of FERPA.<sup>3</sup> Notably, the requestor is not a parent or legal guardian of any of the other identifiable students. *See* 20 U.S.C. § 1232g(a)(1)(A) (granting parents access to the education records of their children). Moreover, the requestor has not provided the District with written authorization from a parent or legal guardian of any of the other students granting him access to the submitted records. *Id.* § 1232g(b)(1). Further, as evidenced by category two of the request for information, the requestor knows the identity of one of the students at issue. Consequently, the District must withhold the Department records we have marked pursuant to FERPA, if held by a component of the District other than the Department.

However, we note that if the Department maintains the submitted law enforcement records, then FERPA does not apply to this information. Thus, we address your arguments under section 552.101 in conjunction with section 58.007 of the Family Code for these records. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. The relevant language of section 58.007(c) reads as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

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<sup>3</sup> If you have questions as to the applicability of FERPA to information that is the subject of an open records request, you may consult with the United States Department of Education Family Policy Compliance Office, whose contact information follows:

Family Policy Compliance Office  
United States Department of Education  
600 Independence Avenue S.W.  
Washington, D.C. 20202-4605  
(202) 260-3887

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Fam. Code § 58.007(c). The submitted law enforcement records indicate the suspects named in the information are juveniles who allegedly engaged in delinquent conduct that occurred after September 1, 1997. Based on our review of this information, we find no evidence that any of the exceptions in section 58.007 apply. Therefore, section 58.007(c) of the Family Code makes this information confidential. Thus, to the extent the submitted law enforcement records are not subject to FERPA, the District must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code.

With respect to the remaining information not created and maintained by the Department, we note that FERPA requires an educational institution to withhold information from required public disclosure only to the extent "reasonable and necessary to avoid personally identifying a particular student or one or both of the student's parents." Open Records Decision Nos. 332 (1982), 206 (1978). Further, relying on a statement from the director of the Family Policy and Regulations Office, this office determined that FERPA and section 552.114's predecessor statute do not prevent a governmental body from making the education records of deceased students available to members of the public. See Open Records Decision No. 524 (1989). This conclusion is consistent with the premise that the privacy rights of an individual lapse upon death. See *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.); see also *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979) ("action for invasion of privacy can be maintained only by a living individual whose privacy is invaded") (quoting Restatement of Torts 2d). Here, the remaining information subject to FERPA concerns a deceased student. Thus, the District may not withhold any portion of the remaining information under FERPA.

Last, for the submitted information that is not subject to section 552.022 of the Government Code, FERPA or section 58.007 of the Family Code, we address your arguments under section 552.103 of the Government Code. Section 552.103 states, in pertinent part, as follows:

(a) Information is excepted from the requirements of Section 552.021 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.

Gov't Code § 552.103(a), (c). To secure the protection of section 552.103(a), the District must demonstrate the requested information "relates" to pending or reasonably anticipated litigation. Open Records Decision No. 588 (1991). The District has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing the applicability of section 552.103(a) requires a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.<sup>4</sup> Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated").

In this instance, you inform us, and provide supporting documentation showing, that the requestor represents the mother of a student who was murdered by another student at Reagan High School. Additionally, you state that the requestor "has volunteered that [the District] 'is a potential defendant for future litigation.'" You also base your claim of the litigation

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<sup>4</sup> In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

exception on comments allegedly made by the deceased student's mother to a teacher. Based upon a review of the submitted information and in consideration of the totality of the circumstances, we determine that the District reasonably anticipated litigation on the date it received the present request for information. Furthermore, we agree that the information at issue relates to the anticipated litigation. Thus, we conclude that, other than the executed contract, the District may withhold the remaining submitted information, which we have marked, under section 552.103 of the Government Code.

However, 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). Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the District must release the executed agreement, which we have marked, in accordance with section 552.022(a)(3) of the Government Code. The District must withhold the information we have marked under section 552.101 in conjunction with either FERPA or section 58.007 of the Family Code. The District may withhold the remainder of the submitted information we have marked under section 552.103 of the Government Code.

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

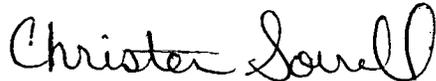
should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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,



Christen Sorrell  
Assistant Attorney General  
Open Records Division

CHS/seg

Ref: ID# 187785

Enc: Submitted documents

c: Mr. Sergei Kachura  
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