



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 29, 2003

Mr. Juan Gonzales
Law Offices of Juan E. Gonzalez
3110 East Business Highway 83
Weslaco, Texas 78596

OR2003-6827

Dear Mr. Gonzales:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 190731.

The Mercedes Independent School District (the "district"), which you represent, received a request for:

- 1) the minutes for the Mercedes Board of Trustees meeting (open session) held on May 13, 2003,
- 2) the tape recording generated at the May 22, 2003, Mercedes Board of Trustees executive session relevant to cheerleader tryout grievances, and
- 3) a copy of the transcript and other documents presented at the May 13, 2003 Board of Trustees Level 3 Grievances, executive session, relevant to cheerleader tryouts.

You state that you have released items No. 1 and No. 2 to the requestor pursuant to an order from a Texas Education Agency hearing officer. You note that an audiotape of the May 13, 2003 executive session exists, but a transcript of the session, as requested in item No. 3, does not exist. You claim that the remainder of the requested documents is excepted from disclosure under sections 552.101 and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information another statute makes confidential. Section 551.104(c) of the Government Code provides that "the certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3)." *See also* Open Records Decision No. 495 (1988) (Open Meetings Act removes certified agendas and tape recordings of executive sessions from review by attorney general under Government Code chapter 552).

We note, however, that section 551.104(c), a state statute, may be preempted by federal law to the extent it conflicts with that federal law. *See, e.g., Equal Employment Opportunity Comm'n v. City of Orange, Texas*, 905 F. Supp 381, 382 (E.D. Tex. 1995); *see also* Open Records Decision No. 431 (1985) (FERPA prevails in conflict with state law). The documents you provide show parental complaints regarding student cheerleader tryouts were discussed in executive session. If this is the case, then the tape recording constitutes an "education record" for purposes of the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. "Education records" are defined as 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). Because FERPA preempts section 551.104(c), a state statute, we must examine whether the audiotape of the closed session can be withheld under 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* 20 U.S.C. § 1232g(b)(1). FERPA also provides to parents an affirmative right of access to their child's education records:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. . . . Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

20 U.S.C. § 1232g(a)(1)(A).

In this case, the requestor is one of the parents of a district student involved in the grievance hearings. Therefore, if the requestor's child is discussed in the recording, then pursuant to

FERPA, the district must provide the requestor parent with those portions of the audiotape. *See Open Records Decision No. 152 (1977)* (educational institution must provide copy of education record to qualified individuals).¹ However, we note that the certified agenda of the executive session is excepted from disclosure under section 551.104(c) of the Government Code.

We now turn to your section 552.114 argument against disclosure of the submitted documents. Section 552.114 of the Government Code requires the district to withhold "information in a student record at an educational institution funded wholly or partly by state revenue." Gov't Code § 552.114(a). This office generally has treated "student record" information under section 552.114 as the equivalent of "education record" information that is subject to 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 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. In this instance, however, you have submitted the documents at issue to this office for consideration. Therefore, we will consider whether these documents are excepted from disclosure under FERPA and section 552.114 of the Government Code.

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)*. Such information 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 protected under FERPA because they make identity of student easily traceable through handwriting, style of expression, or particular incidents related). We note, however, that FERPA provides the requestor a right of access to information that identifies the requestor's child. *See 20 U.S.C. § 1232g(a)(1)(A); see also Gov't Code § 552.114(b)(2)* (information in a student record shall be made available on the request of the student's parent). The requestor here is a parent of a student who is the subject matter of the submitted documents.

In this case, the requestor has a right of access to the documents that directly relate to their student child. However, some of the submitted documents, considered "student records,

¹ If you have questions as to the applicability of FERPA to the information at issue, you may wish to consult with the Department of Education at 202-260-3887.

relate to identifiable students other than the requestor's child and must be protected by FERPA. *See* 20 U.S.C. § 1232g(a)(4)(A). We have marked the student information that must be withheld pursuant to FERPA and section 552.114. The remainder of the information must be released.

We conclude that: (1) if the requestor's child is discussed in the recording, then those portions of the audiotape must be released to the requestor pursuant to FERPA, (2) the marked certified agenda must be withheld under section 551.104(c) of the Government Code, (3) the documents that directly relate to the requestor's child must be released under section 552.114(b) of the Government Code, and (4) information related to other students must be withheld as marked under FERPA and section 552.114 of the Government Code. The remainder of the information must be released.

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).

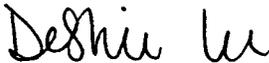
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 190731

Enc. Submitted documents

c: Mr. Oscar Garcia
851 Iowa Street
Mercedes, Texas 78570
(w/o enclosures)