



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 13, 2004

Mr. Hans P. Graff
Assistant General Counsel
Houston Independent School District
3830 Richmond Avenue
Houston, Texas 77027-5838

OR2004-2997

Dear Mr. Graff:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 199423.

The Houston Independent School District (the "district") received a request for the complete file from a specified sexual assault investigation. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit written comments explaining why information should or should not be released).

Initially, we note that the submitted information is subject to required public disclosure under section 552.022 of the Government Code. Section 552.022 provides in relevant part:

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[.]

Gov't Code § 552.022(a)(1). The submitted information constitutes a completed investigation report prepared by the district. Therefore, as prescribed by section 552.022(a)(1), the district must release the submitted information unless it is excepted under section 552.108 or confidential under other law.¹ Section 552.103 of the Government Code

¹We note that you do not raise section 552.108 as an exception to disclosure.

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 Are Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 665 at n.5 (2000) (discretionary exceptions generally). Thus, the district may not withhold the submitted information under section 552.103 of the Government Code.

Section 552.101 of the Government Code² excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” and encompasses information protected by other statutes, such as the Family Educational Rights and Privacy Act of 1974 (“FERPA”). *See* 20 U.S.C. § 1232g(b)(1). 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); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). Under 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. *See id.* § 1232g(a)(4)(A).

The submitted information consists entirely of records maintained by the district that directly relate to a student of the district. Accordingly, the submitted information constitutes education records for purposes of FERPA. *See, e.g., Belanger v. Nashua, New Hampshire School District*, 856 F. Supp. 40, 48-50 (D.N.H. 1994) (broadly construing FERPA definition of “education records”). Under FERPA, a student's parents or guardians generally have an affirmative right of access to their child's education records. 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3 (“parent” includes legal guardian of student). Specifically, FERPA provides in part that:

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.

²The Office of the Attorney General will raise mandatory exception such as section 552.101 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

20 U.S.C. § 1232g(a)(1)(A). In regard to this right of access, FERPA further states that whenever the student “has attained eighteen years of age, or is attending an institution of postsecondary education,” the right of access “shall thereafter only be . . . accorded to the student.” *Id.* § 1232g(d). In this case, the requestor is the attorney for the mother of the student, and the mother of the student has provided a signed authorization permitting the release of information related to her daughter to the attorney. We note, however, that the student at issue is 21 years old. Accordingly, under FERPA, the right of access to this information generally lies solely with the student. *Id.* Therefore, the submitted information must be withheld in its entirety unless the requestor has a right of access to this information.

We are unable to determine whether the requestor, as the attorney for the mother of a student who has attained the age of majority, has a right of access to these records. We note, however, that under certain circumstances, a parent of an adult student does have a right of access to the student’s education records. *See* 34 C.F.R. § 99.31 (educational agency or institution may disclose personally identifiable information from education record of student without required consent if disclosure is to parents of dependent student, as defined in section 152 of Internal Revenue Code of 1986); 19 T.A.C. § 89.1049 (unless student’s parent or other individual has been granted guardianship of student under Probate Code, all rights granted to parent under Individuals with Disabilities Education Act (“IDEA”) will transfer to student upon reaching age 18); 34 C.F.R. § 300.562 (giving parent right to inspect and review any education records relating to child with disability receiving special education services under IDEA); *see also* 34 C.F.R. § 300.562(c) (“An agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.”).

If the requestor or the student’s parent has a right of access to the submitted information, it must be released to the requestor. If the requestor or the parent does not have a right of access, then because the requestor knows the student’s identity and the student’s identity is inextricably embedded in the submitted information, we find that the submitted information cannot be redacted to avoid identifying the student. Accordingly, in the event the requestor or parent does not have a right of access, the district must withhold the submitted information in its entirety pursuant to section 552.101 of the Government Code in conjunction with FERPA. *See* Open Records Decision Nos. 539 (1990), 332 (1982), 206 (1978).

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,



Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/lmt

Ref: ID# 199423

Enc. Submitted documents

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(w/o enclosures)