



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 9, 2004

Ms. Angela G. Bishop
Henslee, Fowler, Hepworth, & Schwartz, L.L.P.
3200 S.W. Freeway, Suite 2300
Houston, Texas 77027

OR2004-4719

Dear Ms. Bishop:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 203138.

The Alief Independent School District (the "district"), which you represent, received a request for reports, results of investigations, or other information concerning an incident that occurred on February 27, 2004 between two students. The requestor also seeks information concerning whether and in what manner a particular district employee was disciplined for his role in the February 27th incident. You state that the district does not have documents responsive to the portion of the request concerning the district employee. We note that the Public Information Act (the "Act") does not require the district to disclose information that did not exist at the time the request was received. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986). You claim that the submitted information is excepted from disclosure under sections 552.026, 552.101, 552.108, 552.114, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You claim that portions of Exhibits B and C are excepted from disclosure under section 552.101. The Family Educational Rights and Privacy Act of 1974 ("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). "Education records" under FERPA are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A).

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 of the Government Code 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 of the Government Code 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. *See* Open Records Decision No. 634 at 6-8 (1995). As you have submitted information that you contend is confidential under FERPA, we will address your claim.

Under FERPA, a student's parents have an affirmative right of access to the education records of that student. 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3. Furthermore, under FERPA, the district must release a student's education records to a third party requestor upon receipt of the proper written consent of the student's parents. 20 U.S.C. § 1232g(b). However, the right to inspect or review the student's education records does not extend to information in the records that identifies other students. *See* 34 C.F.R. § 99.12(a) ("If the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student.").

Exhibits B and C relate to district students and consist of education records for purposes of FERPA. The requestor in this case is the attorney for two of the students at issue. As the students' attorney, the requestor has a right of access to her clients' education records pursuant to FERPA. *See* 20 U.S.C. § 1232g(a)(1)(A), (b)(1). As noted, however, this right of access would not extend to information identifying other students. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.12(a). In these circumstances, information that identifies other students, including their handwritten statements, must be withheld pursuant to FERPA. *See* Open Records Decision No. 224 (1979) (student's handwritten comments making identity of student easily traceable through handwriting, style of expression, or particular incidents related in comments protected under FERPA). We have marked this information accordingly. As the requestor has a right of access to the remaining information contained in Exhibits B and C, however, we must address the district's claim under section 552.135 of the Government Code.

Section 552.135 of the Government Code provides:

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

(d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or prosecutor upon proper request made in compliance with applicable law and procedure.

(e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be constitutional, statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.

Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under section 552.135 must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See* Gov't Code § 552.301(e)(1)(A). You state that the district employees at issue reported an incident of an alleged assault under section 22.02 of the Penal Code. Thus, you contend that Exhibit C contains identifying information of employee informers within the scope of section 552.135. As noted, however, Exhibit C is subject to FERPA. Where a state statute, such as section 552.135 of the Government Code, conflicts with FERPA, the federal law prevails. *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). Consequently, information identifying the district employees contained in Exhibit C may not be withheld pursuant to section 552.135 of the Government Code and must be released to the requestor.

Next, we note that Exhibit D consists of law enforcement records that are subject to section 58.007 of the Family Code.¹ 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:

- (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.

Exhibit D involves juvenile conduct that occurred after September 1, 1997. It does not appear that any of the exceptions in section 58.007 apply; therefore, Exhibit D is confidential pursuant to section 58.007(c) of the Family Code.²

In summary, we have marked the information in Exhibits B and C that must be withheld under FERPA. Exhibit D must be withheld in its entirety under section 552.101 in

¹We note that a school district police 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); *See also* 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).

²As our ruling on this issue is dispositive, we need not address your remaining arguments against disclosure.

conjunction with section 58.007 of the Family Code. The remaining information must be released to this requestor.

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,

A handwritten signature in black ink that reads "Melissa Vela-Martinez". The signature is written in a cursive style with a large, looping initial "M".

Melissa Vela-Martinez
Assistant Attorney General
Open Records Division

MVM/sdk

Ref: ID# 203138

Enc. Submitted documents

c: Ms. Ayesha G. Mutope-Johnson
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(w/o enclosures)