



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

July 27, 2004

Ms. Sue M. Lee
Henslee, Fowler, Hepworth & Schwartz, L.L.P.
816 Congress Avenue, Suite 800
Austin, Texas 78701

OR2004-6286

Dear Ms. Lee:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 205992.

The Ennis Independent School District (the "district"), which you represent, received a request for statements concerning the requestor's child, who is a district student, given by the child and other students at a disciplinary hearing. You claim that the submitted information is exempted from disclosure under sections 552.101 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 exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information made confidential by other statutes. You contend that the submitted information is confidential under the Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of title 20 of the United States Code. 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). Section 552.026 of the Government Code incorporates FERPA into the Public Information Act (the "Act"). *See* Open Records Decision No. 634 at 6-8 (1995). Section 552.026 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.

Gov't Code § 552.026. "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). The submitted statements are records maintained by the district that contain information directly related to students. Thus, we agree that the statements constitute education records that are subject to FERPA.

Section 552.114(a) of the Government Code exempts from disclosure "information in a student record at an educational institution funded wholly or partly by state revenue." This office generally has treated "student record" information under section 552.114(a) as the equivalent of "education record" information that is protected by 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 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). You have redacted the names of district students from the submitted documents. However, as you seek to withhold the submitted statements in their entirety under FERPA, we will address your claim that the entire statements are confidential.

Under FERPA, a student's parents have an affirmative right of access to their child's education records, although this right does not extend to information in the student's records that identifies other students. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3; *see also* 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."). Thus, the requestor in this case has the right under FERPA to inspect and review or be informed of information pertaining to her child in the submitted education records. However, the requestor does not have a right of access to information in the records that pertains to other students.

An educational agency must withhold information from records subject to 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). As noted, you have redacted the names of the students at issue from the submitted statements. You have not provided any information indicating that release of the remaining information in the statements would allow the students' identities to be easily traced. We therefore determine that the remaining information in the submitted statements is not confidential under FERPA and may not be withheld under section 552.101 on that basis. Accordingly, we find that the district must allow the requestor to inspect and review or be informed of information pertaining to her child in the submitted education records, but that the names of students other than the requestor's child appearing in the submitted records must be withheld pursuant to section 552.101 of the Government Code in conjunction with FERPA.

Next, you contend that the statements are excepted under section 552.101 in conjunction with common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. The submitted statements pertain to the alleged sexual assault of a district student. However, the names of students other than the requestor's child must be withheld pursuant to FERPA, and we find that the remaining information does not contain highly intimate or embarrassing facts about any identifiable person. *See* Open Records Decision No. 432 (1985) (common-law privacy protects privacy of individual persons). We therefore determine that the statements may not be withheld under section 552.101 in conjunction with common-law privacy.

You also contend that the statements are excepted under section 552.101 in conjunction with the informer's privilege. The common-law informer's privilege, incorporated into Act by section 552.101, has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. The privilege excepts the informer's statement only to the extent necessary to protect that informer's identity. Open Records Decision No. 549 at 5 (1990). Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). We understand you to represent that the identities of students and district employees contained in the submitted statements are protected by the informer's privilege. As information identifying students is made confidential by FERPA, we need not reach your claim under the informer's privilege with respect to such information. With respect to two

district employees identified in the submitted documents, we note that the information at issue consists of statements of students rather than the district employees. You do not inform us, and the documents do not reflect, that the district employees at issue furnished a report of a violation of a criminal or civil statute to the district. We therefore determine that the district may not withhold any portion of the submitted information pursuant to section 552.101 in conjunction with the common-law informer's privilege.

You also raise section 552.135 of the Government Code with respect to the identities of the two district employees. Section 552.135 protects the identity of a school district "informer" and provides in part:

(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].

Gov't Code § 552.135(a), (b). 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 submitted records identify two employees "who were aware of the conduct" at issue. However, you do not inform us, and the documents do not reflect, that these individuals furnished a report of a violation of law to the district. Thus, we determine that the names of district employees in the submitted documents are not excepted under section 552.135 in this instance.

In summary, the district must withhold the names of students other than the requestor's child appearing in the submitted records pursuant to section 552.101 of the Government Code in conjunction with FERPA. The remainder of the submitted information must be released to the 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 thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten 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 ten 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 ten 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); *Tex. 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 ten calendar days of the date of this ruling.

Sincerely,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 205992

Enc: Submitted documents

c: Ms. Bonnie Abera
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(w/o enclosures)