



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 2, 2004

Mr. Miles T. Bradshaw  
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OR2004-10216

Dear Mr. Bradshaw:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 213998.

The Royal Independent School District (the "district"), which you represent, received a request for all records pertaining to the children of the requestor's client, who are students of the district. You state that the district will release education records of the students at issue upon receipt of parental authorization. Otherwise, you state that the district will withhold such education records pursuant to the Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of title 20 of the United States Code. *See* Open Records Decision No. 634 (1995) (educational agency may withhold information that is protected by FERPA without necessity of requesting an attorney general decision); *see also* 20 U.S.C. § 1232g(a)(1)(A) (student's parents have an affirmative right of access to their child's education records), (a)(4)(A) (defining "education records"); 34 C.F.R. § 99.3. You claim that the responsive information you have submitted for review is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.114, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

First, in addition to informing us that the district is withholding certain education records that are subject to FERPA while awaiting receipt of the parent's authorization to release the records, you also assert that the information you have submitted for review is subject to FERPA. *See* 20 U.S.C. § 1232g(a)(1)(A). You contend that, should the district receive proper parental consent under FERPA to release the submitted information, a portion of the information is nevertheless excepted from disclosure pursuant to your claimed exceptions

under the Public Information Act. We must therefore begin by addressing the applicability of FERPA to the submitted information.<sup>1</sup>

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 chapter 552 of the Government Code. *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). Section 552.114(a) of the Government Code excepts 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).

The submitted documents consist of investigative records of the Royal Independent School District Police Department (the "district police department"), and a memorandum from a district administrator, which are directly related to one of the students at issue in the present request.<sup>2</sup> The submitted records of the district police department were created for law enforcement purposes and 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

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<sup>1</sup> As noted, this office has determined that information that is protected by FERPA may be withheld without the necessity of requesting an attorney general decision. Open Records Decision No. 634 (1995). In this case, because you have submitted information that you contend is confidential under FERPA, we will address the applicability of FERPA to the submitted information.

<sup>2</sup> The submitted investigative documents indicate that the submitted videotape and audio tape are maintained by the district police department in connection with its investigation of the incident at issue. We therefore consider the submitted videotape and audio tape to be records of the district police department. The district police department records are Bates-stamped KG 000325-000370. The memorandum from the district administrator is Bates-stamped KG 000323-000324.

records maintained by law enforcement unit of educational agency or institution created by that law enforcement unit for purpose of law enforcement). Because the district police department records are not subject to FERPA, the parent of the student at issue does not have a right of access to these records under FERPA. We agree, however, that the submitted memorandum is an education record and is subject to FERPA.

You contend that in this instance, the submitted information must be withheld from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information made confidential by other statutes. Section 58.007(c) of the Family Code provides 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.

Fam. Code § 58.007(c). You indicate that the submitted memorandum from a district administrator is excepted under section 552.101 in conjunction with section 58.007. However, the memorandum is not a juvenile law enforcement record. Thus, the district may not withhold the memorandum under section 552.101 on that basis. The submitted district police department records, however, do consist of law enforcement records pertaining to alleged criminal conduct by juvenile suspects. Thus, we find that these records are within the scope of section 58.007(c) of the Family Code. Accordingly, we determine that the submitted district police department records, which we have marked, are confidential pursuant to section 58.007(c) and must be withheld from disclosure pursuant to section 552.101 of the Government Code. Based on this finding, we do not reach your additional arguments against disclosure of the district police department records.

We next address your remaining claims with respect to the submitted memorandum from a district administrator. Because we find that the memorandum is an education record for

purposes of FERPA, we must address the right of the requestor's client, as the parent of a child to whom the record relates, to have access to it. As noted, a child's parent has a right of access to the child's education records, although this right of access does not extend to information in the records that identifies other students. 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.12(a). We note that while the memorandum at issue does make reference to the child of the requestor's client and "two male students," the memorandum does not contain information personally identifying these students. *See* 34 C.F.R. § 99.3. Accordingly, we determine that the requestor's client has a right of access to the memorandum pursuant to FERPA. *See* 20 U.S.C. § 1232g(a)(1)(A); *see also id.* § 1232g(b) (regarding parent's written consent for release of education records to third party).

You contend that the submitted memorandum is excepted under section 552.103 of the Government Code, which provides as follows:

(a) Information is excepted from [required public disclosure] 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). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, 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, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state that the submitted memorandum is related to litigation that the district anticipates will be filed by the requestor's client. However, we must address the district's claim under section 552.103 in light of the parent's right of access under FERPA. Where a state statute, such as section 552.103 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, the submitted memorandum may not be withheld pursuant to section 552.103 of the Government Code in this case. As you raise no other exceptions to disclosure for the memorandum, we determine that the district must release the memorandum to the requestor upon receipt of proper authorization from the requestor's client.<sup>3</sup>

In summary, the submitted district police department records, which we have marked, are confidential under section 58.007 of the Family Code and must be withheld pursuant to section 552.101 of the Government Code. The submitted memorandum from a district administrator, which we have marked, is subject to FERPA and must be released to the requestor, upon the district's receipt of written authorization from the requestor's client to release the memorandum.

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).

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<sup>3</sup> As you do not raise section 552.108 or section 552.135 with respect to the memorandum, we do not address your claims under these sections.

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# 213998

Enc: Submitted documents

c: Ms. Shelina P. Shariff  
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(w/o enclosures)