



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 4, 2005

Mr. David Anderson  
General Counsel  
Texas Education Agency  
1701 N. Congress Ave.  
Austin, Texas 78701-1494

OR2005-01068

Dear Mr. Anderson:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 218251

The Texas Education Agency (the "agency") received a request for information regarding a named charter school. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.111, 552.114, and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially we must address the agency's procedural obligations under the Act. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(4). In this instance, the agency received the request on November 12, 2004. The agency did not submit the responsive documents to this office until December 16, 2004. Consequently, the agency failed to comply with section 552.301(e) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code

§ 552.302); Open Records Decision No. 319 (1982). This office has held that a compelling reason exists to withhold information when the information is confidential by another source of law. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). The agency asserts that the submitted information is excepted from public disclosure under sections 552.101, 552.111, 552.114, and 552.116 of the Government Code. Sections 552.111 and 552.116 are discretionary exceptions and are thus waived by the agency's failure to comply with section 552.301. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general); 470 (1987) (statutory predecessor to section 552.111 is a discretionary exception). Therefore, the agency may not withhold any of the submitted information under either section 552.111 or section 552.116.

Section 552.101, which encompasses "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," generally can provide a compelling reason to overcome the presumption of openness. The informer's privilege, however, is held by the governmental body and serves to protect its interests in preserving the flow of information to the governmental body. *See Roviario v. United States*, 353 U.S. 53, 59 (1957). Accordingly, a governmental body is free to waive the informer's privilege and release information for which it otherwise could claim the exception. Open Records Decision No. 549 at 6 (1990). Thus, the informer's privilege does not constitute a compelling reason to overcome the presumption of openness. We therefore determine that none of the information at issue may be withheld pursuant to the informer's privilege. On the other hand, the agency's claim under section 552.114 can provide a compelling reason for non-disclosure under section 552.302. Accordingly, we will consider your argument under this exception with respect to the submitted information.

You claim that portions of the submitted information are excepted from disclosure under section 552.114. This office generally applies the same analysis under section 552.114 and the Family Educational Rights and Privacy Act of 1974 ("FERPA"). *See* Open Records Decision No. 539 (1990). 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). "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. *Id.* § 1232g(a)(4)(A). Thus, FERPA governs the availability of student or education records held by educational agencies or institutions. *See* 20 U.S.C. § 1232g(b)(1); Gov't Code §§ 552.026, 552.114. The agency is an educational agency or institution subject to FERPA. *See* Attorney General Opinion JC-0333 at 4 (2001) (noting that the agency is an educational agency subject to FERPA's funding penalty for unauthorized release of information even though it does not enroll students). Section 552.026 of the Government Code provides that "information contained in education

records of an educational agency or institution” may only be released under the Act in accordance with FERPA.

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. *See* Open Records Decision No. 634 at 6-8 (1995). In this instance, it appears that some of the submitted information was forwarded to the agency directly from other educational institutions. *See, e.g.,* 20 U.S.C. § 1232g(b)(5) (providing that educational institutions may provide educational records to the agency “in connection with the audit and evaluation of any federally or State supported education program”). It also appears that those institutions redacted student identifying information before providing those records to the agency. However, you have submitted additional information that you contend is subject to FERPA. Accordingly, we will address your claim for this information.

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 both 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). Having reviewed the responsive information, we have marked the information that must be withheld in accordance with FERPA.

We note that some of the submitted information is excepted from disclosure under section 552.136 of the Government Code. This section provides:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. We have marked the account information that must be withheld under section 552.136.

In summary, the agency must withhold the information we have marked pursuant to FERPA. The agency must withhold the marked account information pursuant to section 552.136. The remaining submitted 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).

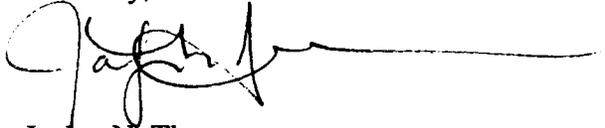
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,

A handwritten signature in black ink, appearing to read 'Jaclyn N. Thompson', with a long horizontal line extending to the right.

Jaclyn N. Thompson  
Assistant Attorney General  
Open Records Division

JNT/kr1

Ref: ID# 218251

Enc. Submitted documents

c: Ms. Telca Porras  
Assoc. Of Charter Educators  
P. O.Box 684884  
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(w/o enclosures)