



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 4, 2005

Ms. Linda Meekins McLain
The Law Offices of Rodgers, Miller & McLain
P.O. Box 4884
Bryan, Texas 77805-4884

OR2005-07038

Dear Ms. McLain:

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# 229679.

Blinn College (the "college"), which you represent, received a request for five categories of information related to the requestor. You state that you have provided the requestor with a portion of the requested information. You also state that you have no responsive information regarding a portion of the request.¹ You claim, however, that the remaining requested information is excepted from disclosure under sections 552.101, 552.111, 552.114, and 552.135 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

¹ We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). However, a governmental body must make a good faith effort to relate a request for information to any responsive information that is within its custody or control. *See* Open Records Decision No. 561 at 8-9 (1990).

² Although you also raise section 552.107 of the Government Code, you have not provided any arguments in support of this claim. Thus, the college has waived its claim under section 552.107. *See* Gov't Code § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general).

Section 552.101 of the Government Code 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. Gov’t Code § 552.101. You contend that portions of the submitted information are 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). “Education records” are 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. 20 U.S.C. § 1232g(a)(4)(A). The submitted documents constitute records maintained by the college that contain information directly related to students, and thus constitute education records that are subject to FERPA.

Under FERPA, a student has an affirmative right of access to the student’s own 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.”). As the requestor in this instance is the student whose information is at issue, the requestor has a right of access under FERPA to education records that pertain to her. Thus, this information generally may not be withheld pursuant to an exception to disclosure under the Act. Although the college raises sections 552.101 and 552.135, as well as the deliberative process privilege encompassed by section 552.111, these are state statutes that are preempted by federal law to the extent they conflict with that federal law. *See, e.g., Equal Employment Opportunity Comm’n v. City of Orange*, 905 F. Supp 381, 382 (E.D. Tex. 1995); *see also* Open Records Decision No. 431 (1985) (information subject to right of access under FERPA may not be withheld pursuant to statutory predecessor to section 552.103). Because FERPA, as federal law, provides the requestor with an affirmative right of access to the submitted information, we conclude that the college may not withhold any portion of the submitted information under either section 552.101 or section 552.135, or the deliberative process privilege encompassed by section 552.111 of the Government Code.

We note, however, that some of the submitted records contain the identifying information of other students that is confidential pursuant to section 552.114 of the Government Code and FERPA. Accordingly, we conclude that the college must allow access to the submitted information with only the identifying information of the other college students, which we have marked, redacted. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.12(a) (right of access does not extend to information regarding other students); *See also* Open Records

Decision Nos. 332 (1982), 206 (1978) (information must be withheld under FERPA only to extent reasonable and necessary to avoid personally identifying particular student).

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink that reads "Lauren E. Kleine". The signature is written in a cursive style with a small horizontal line above the letter 'i' in "Kleine".

Lauren E. Kleine
Assistant Attorney General
Open Records Division

LEK/jev

Ref: ID# 229679

Enc. Submitted documents

c: Ms. Krissa Fritsche
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(w/o enclosures)