



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 17, 2005

Mr. S. Anthony Safi  
Mounce, Green, Myers, Safi & Galatzan, P.C.  
P.O. Box 1977  
El Paso, Texas 79950-1977

OR2005-09385

Dear Mr. Safi:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 234461.

The El Paso Independent School District (the "district"), which you represent, received a request for the names and addresses of the one thousand participants in the district's Families 1st Program for the 2004-2005 school year, the start date for each participant, information regarding the program progress for each participant, and information comparing the participants' TAKS results for the 2003 and 2004 school years. You claim that the requested information is excepted from disclosure under sections 552.026, 552.101, and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note that the district has not complied with the procedural requirements of section 552.301 of the Government Code. Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request: 1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; 2) a copy of the written

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<sup>1</sup> We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

request for information; 3) a signed statement of the date on which the governmental body received the request, or evidence sufficient to establish that date; and 4) the specific information that the governmental body seeks to withhold or representative samples of the information if it is voluminous. *See Gov't Code § 552.301(e)(1)(A)-(D).*

You state that you received the request on July 26, 2005. Thus, you were required to submit the responsive information by August 16, 2005. However, you did not submit a representative sample of the responsive information until August 22, 2005. By submitting the representative sample later than the fifteen business day deadline, you have 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 the procedural requirements of section 552.301 results in the legal presumption that the information is public and 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, 382-82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 319 (1982) (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). Because section 552.101 and FERPA can provide compelling reasons to overcome the presumption of openness, we will address your arguments under these exceptions.

You argue that the information you have highlighted in green is subject to the Family Educational Rights and Privacy Act of 1974 ("FERPA"). *See* 20 U.S.C. § 1232g(b)(1). 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 id.* "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or by a person acting for such agency or institution. *Id.* §1232g(a)(4)(A). This office generally applies the same analysis under FERPA and section 552.114 of the Government Code. Open Records Decision No. 539 (1990).

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. 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. 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 exception. In this instance, however, you have submitted a representative sample of the requested information to this office for consideration. Therefore, we will consider whether this information is excepted from disclosure under section 552.114 of the Government Code and FERPA.

"Directory information" may be released to the public under FERPA if the educational agency or institution complies with section 1232g(a)(5)(B) of the federal law. *See* 20 U.S.C. § 1232g(d); 34 C.F.R. § 99.37. "Directory information" includes a student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student. *See* 20 U.S.C. § 1232g(a)(5)(A). However, information that would reveal a student's status as a non-native speaker of English does not constitute "directory information" under FERPA. *Id.*; *see also* 34 C.F.R. § 99.3 (directory information means information contained in student's education record that would not generally be considered harmful or invasion of privacy if disclosed).

The submitted information relates to students who are part of the Families 1st Program. You state that the Families 1st Program is a program utilized to assist students in the district who are learning English as a second language. Thus, we agree that the information does not constitute directory information. Therefore, we conclude that the information highlighted in green must be withheld pursuant to FERPA.

Section 552.101 of the Government Code also encompasses section 39.030 of the Education Code, which provides in relevant part:

- b) The results of individual student performance on academic skills assessment instruments administered under [subchapter B, Chapter 39 of the Education Code] are confidential and may be released only in accordance with [FERPA]. However, overall student performance data shall be aggregated by ethnicity, sex, grade level, subject area, campus, and district and made available to the public, with appropriate interpretations, at regularly scheduled meetings of the board of trustees of each school district. The information may not contain the names of individual students or teachers.

Educ. Code § 39.030(b). Therefore, portions of the requested information that consist of individual results of student performance on the TAKS test<sup>2</sup> are confidential under section 39.030(b) of the Education Code and must be withheld under section 552.101 of the Government Code on that basis.

In summary, the information highlighted in green on the representative sample of information must be withheld by the district under FERPA. The district must also withhold student TAKS tests results pursuant to section 552.101 in conjunction with section 39.030 of the Education Code. All remaining 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, 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); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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<sup>2</sup> The TAKS test is an academic skills assessment instrument as contemplated by subchapter B, chapter 39 of the Education Code. *See id.*

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 Office of the Attorney General 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. 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,



Lisa V. Cubriel  
Assistant Attorney General  
Open Records Division

LVC/seg

Ref: ID# 234461

Enc: Submitted documents

c: Ms. Christina Montoya  
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(w/o enclosures)