



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 20, 2006

Mr. Elvin W. Houston
Walsh, Anderson, Brown, Schulze, & Aldridge, P.C.
One International Center
100 N.E. Loop 410, Suite 1000
San Antonio, Texas 78216

OR2006-04003

Dear Mr. Houston:

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# 249719.

The East Central Independent School District (the "district"), which you represent, received a request for any and all records pertaining to a named student. You state that the district has released some of the requested information. You claim that the submitted information is exempted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we must address the district's obligations under the Act. Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(a), (b). You state that the district received the present request for information on February 27, 2006. However, the district did not request a ruling from our office until March 15, 2006. Consequently, we find that the district failed to comply with the procedural requirements of section 552.301.

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 requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See* Gov't Code § 552.302; *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 section 552.302); Open Records Decision No. 319 (1982). Generally, a compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Because section 552.101 of the Government Code can provide a compelling reason to withhold information, we will address your arguments concerning this exception.

We note that the submitted information consists of student education records that fall within the purview of the Family Education Rights and Privacy Act of 1974 ("FERPA"). 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). Under FERPA, "education records" 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 an agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). The submitted information is both related to a student and maintained by the district; therefore, it is subject to FERPA.

Under FERPA, an education agency or institution is generally required to provide parents of minor students access to the student's education records. 20 U.S.C. § 1232g(a)(1)(B). Thus, in this case, the requestor, as the attorney representing the parent of the student whose education records are at issue, would generally have a right to the submitted information under FERPA. Similarly, section 26.004 of the Texas Education Code provides that "[a] parent is entitled to access to all written records of a school district concerning the parent's child[.]" Educ. Code § 26.004. Thus, the requestor would also normally have a right of access to the information under section 26.004.

We note, however, that the submitted information is also subject to the federal Child Abuse Prevention and Treatment Act ("CAPTA"). CAPTA conditions federal grant funding for state child abuse prevention and treatment programs on the fulfillment of certain eligibility criteria and requires states to adopt methods to preserve the confidentiality of information concerning child abuse and neglect. *See* 42 U.S.C. §§ 5106a(b)(1)(A), 5106a(b)(2)(A)(viii). Chapter 261 of the Family Code was enacted in accordance with CAPTA. Section 261.201 of the Family Code provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). We note that a school district is not an agency authorized to conduct a chapter 261 investigation. *See* Gov't Code §§ 261.301, 261.406. However, the submitted information pertains to an investigation into an allegation of child abuse against a minor child that the Texas Department of Family and Protective Services created and provided to the district. Because the submitted information was used in an investigation conducted under chapter 261 of the Family Code, we conclude that this information is made confidential by section 261.201. You have not indicated that the district has adopted a rule that governs the release of this type of information. Therefore, we assume that no such regulation exists. Given that assumption, the submitted information is generally confidential pursuant to section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute).

However, we are presented with a conflict between the confidentiality provisions of section 261.201 and the requestor's right of access under FERPA. *Cf.* Gov't Code § 552.114(b)(2) (granting right of access to the student's parent or legal guardian). To resolve the conflict between FERPA and chapter 261, we defer to the decision of the Family Compliance Office ("compliance office") of the United States Department of Education, the office responsible for interpreting and construing FERPA. The compliance office has found that the Texas statute was promulgated pursuant to CAPTA and that any statutory conflict would, thus, be between the two federal statutes rather than the Texas statute and FERPA. *See* Letter from Leroy S. Rooker, Director, Family Policy Compliance Office, U.S. Department of Education, to Stacy Ferguson, Attorney, Schulman, Walheim & Heidelberg (Oct. 10, 1997); *see also* *Watt v. Alaska*, 451 U.S. 259, 267 (1981). As the two federal statutes were in irreconcilable conflict, the compliance office concluded that CAPTA governs, being the later enacted statute. *Id.* Thus, the compliance office concluded that the CAPTA-compliant Texas Family Code provision concerning reporting suspected incidents of abuse or neglect prevailed over FERPA. *Id.* We agree with the compliance office's ruling that CAPTA prevails over FERPA.

We note that section 26.004 of the Education Code also conflicts with chapter 261 of the Family Code. However, because chapter 261 was enacted pursuant to CAPTA, we conclude that any statutory conflict would actually be between CAPTA and section 26.004, rather than between the two Texas statutes. Such conflicts are governed by the Supremacy Clause, which provides that the laws of the United States "shall be the supreme Law of the Land [,] . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. State law that conflicts with federal law is

preempted and “without effect.” *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (citing *M’Culloch v. Maryland*, 17 U.S. 316 (1819)). Therefore, we find in this instance that CAPTA also prevails over section 26.004.

Accordingly, the submitted information is confidential under section 261.201 of the Family Code. Therefore, the district must withhold the submitted information under section 552.101 of the Government Code as information made confidential by law.

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).

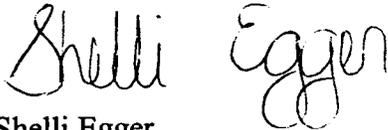
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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).

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,

A handwritten signature in cursive script that reads "Shelli Egger". The signature is written in black ink and is positioned above the typed name.

Shelli Egger
Assistant Attorney General
Open Records Division

SE/er

Ref: ID# 249719

Enc. Submitted documents

c: Mr. Harold Zuflacht
Law Offices of Higdon, Hardy, & Zuflacht, L.L.P.
12000 Huebner Road, Suite 200
San Antonio, Texas 78230
(w/o enclosures)