



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 5, 2006

Ms. Joyce E. Smith
Assistant Counsel
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2006-07094

Dear Ms. Smith:

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# 252003.

The Texas Education Agency (the "agency") received two requests from the same requestor for the investigative files relating to two named educators. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also received and considered comments submitted by the requestor. *See Gov't Code § 552.304* (allowing interested party to submit comments indicating why requested information should or should not be released).

Initially, we must address the agency's procedural obligations under section 552.301 of the Government Code. 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 (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the

¹We 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.

written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e). Additionally, section 552.301(e-1) requires that a governmental body send to the requestor a copy of its written comments to the attorney general. *Id.* § 552.301(e-1).

In this instance, you state that the agency received the request for information on April 3, 2006. Therefore, fifteen business days after the agency's receipt of the request was April 24, 2006. You did not, however, submit a complete copy of your written comments explaining the applicability of your claimed exceptions until May 22, 2006. Further, you inform us that you failed to provide a copy of this brief to the requestor as required by section 552.301(e-1). Consequently, we conclude that the agency 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 the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 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). 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). Section 552.111 of the Government Code is a discretionary exception that protects a governmental body's interests and may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 677 at 10 (2002) (claim of attorney work-product privilege under section 552.111 or Texas Rule of Civil Procedure 192.5 does not provide compelling reason for purposes of section 552.302 if it does not implicate third party rights), 665 at 2 n.5 (2000) (discretionary exceptions in general). Therefore, the agency may not withhold any of the submitted information pursuant to section 552.111. However, because section 552.101 of the Government Code can provide a compelling reason to overcome the presumption of openness, we will address your claim under that exception.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 59.001 of the Occupations Code provides the following:

The social security number of an applicant for or holder of a license, certificate of registration, or other legal authorization issued by a licensing agency to practice in a specific occupation or profession that is provided to the licensing agency is confidential and not subject to disclosure under Chapter 552, Government Code.

Occ. Code § 59.001.² You state that the submitted social security number pertains to a holder of a license issued by the State Board for Educator Certification.³ Therefore, we find that the agency must withhold the submitted social security number pursuant to section 552.101 in conjunction with section 59.001 of the Occupations Code.⁴

Section 552.101 of the Government Code also encompasses the Family Educational Rights and Privacy Act of 1974 (“FERPA”), which 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). Section 552.026 of the Government Code incorporates FERPA into the Act and provides that “information contained in education records of an educational agency or institution” is not subject to required public disclosure the Act except in conformity with FERPA. 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). We note that 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).

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). We note that some of the student-identifying information in the submitted documents has been redacted pursuant to FERPA.⁵ We agree that the agency must withhold

²This section was renumbered from Occ. Code § 58.001 by the Act of May 25, 2005, 79th Leg., R.S., H.B. 2018, § 23.001(68).

³The 79th Texas legislature passed House Bill 1116, which required the transfer the of administrative functions and services of the State Board for Educator Certification to the agency, effective September 1, 2005.

⁴As we are able to make this determination, we need not address your remaining argument against disclosure for this information.

⁵In Open Records Decision No. 634, this office concluded that 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.

this redacted information in accordance with FERPA. The agency must also withhold the additional student-identifying information we have marked pursuant to FERPA.

In summary, we conclude that the submitted social security number must be withheld under section 552.101 of the Government Code in conjunction with section 59.001 of the Occupations Code. The agency must withhold the redacted student-identifying information and the additional information we have marked pursuant to section 552.101 of the Government Code in conjunction with FERPA. The remaining submitted information must be released to the requestor.

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,



Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/sdk

Ref: ID# 252003

Enc. Submitted documents

c: Mr. Michael J. Currie
Texas Classroom Teachers Association
P.O. Box 1489
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(w/o enclosures)