



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 3, 2006

Mr. Stephan B. Rogers  
Henslee Fowler Hepworth & Schwartz, L.L.P.  
6243 IH-10 West, Suite 550  
San Antonio, Texas 78201

OR2006-08653

Dear Mr. Rogers:

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# 255737.

The Boerne Independent School District (the "district"), which you represent, received a request for "statistics [consisting of t]he grades of all the students (without names) in . . . 9<sup>th</sup> grade Biology classes" for the 2004-2005 and 2005-2006 school years. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.114 of the Government Code. We have considered your claimed exceptions and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we must address the district's procedural obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. *See* Gov't Code § 552.301(b).

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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.

Additionally, 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 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. *See Gov't Code § 552.301(e)*. You state that the district received the request on May 9, 2006. You did not, however, request a decision from this office until May 25, 2006, or provide the information required by section 552.301(e) until August 2, 2006. You do not indicate that the district was closed for business during this time period. 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 information is public and must be released. *See Gov't Code § 552.302*. 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 section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. *See Open Records Decision No. 150 at 2* (1977). As the district's claim under sections 552.101 and 552.114 of the Government Code can provide compelling reasons for non-disclosure under section 552.302, we will address these exceptions.

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, such as 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 20 U.S.C. § 1232g(b)(1)*; *see also 34 C.F.R. § 99.3* (defining personally identifiable information).

Section 552.026 of the Government Code incorporates FERPA into chapter 552 of the Government Code. *See Open Records Decision No. 634 at 6-8* (1995). 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. "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). 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 at 3 (1982), 206 at 2 (1978).

Section 552.114(a) of the Government Code requires that the district withhold "information in a student record at an educational institution funded wholly or partly by state revenue." This office generally has treated "student record" information under section 552.114(a) as the equivalent of "education record" information that is protected by FERPA. *See* Open Records Decision No. 634 at 5 (1995).

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 of the Government Code 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 of the Government Code 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. In this instance, you ask this office to determine if FERPA applies to the requested information. Therefore, we will consider whether any of the information at issue is protected by FERPA.

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). This includes information that directly identifies a student or parent, 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). FERPA does not specifically define the term "easily traceable" and whether or not the release of information might be considered easily traceable must be analyzed on a case-by-case basis. You state that "[g]rade information is typically kept in alphabetical order by student." You argue that the requestor could easily "find out which students were in the classes and cross-reference this information with the grade statistics[,] thereby tracing the identities of the students. While we agree that releasing the grade information in alphabetical order could make the students' identities traceable, we find that redacting the student identification numbers and scrambling the alphabetical order of the grades sufficiently protects the students' identities. *See Kryston v. Board of Education, East*

*Ramapo Central School District*, 430 N.Y.S.2d 688 (N.Y. App. Div. 1980); *see also Bowie v. Evanston Community Consolidated School District 65*, 522 N.E.2d 669 (Ill. App. Ct.-1st Dist. 1988). Therefore, pursuant to FERPA, the district must release the requested grade information after redacting the student identification numbers and rearranging the grades so as to take them out of alphabetical order. *See Kryston*, 430 N.Y.S.2d at 690 (rearranging test scores to change listed order would not be preparation of new record by school district).

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).

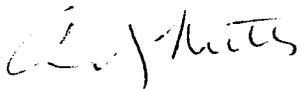
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/eb

Ref: ID# 255737

Enc. Submitted documents

c: Mr. Marcial Luevano  
107A Northview Drive  
Boerne, Texas 78006  
(w/o enclosures)