



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 19, 2006

Mr. John West
General Counsel
Texas Department of Criminal Justice
P.O. Box 13084
Austin, Texas 78711

OR2006-12330

Dear Mr. West:

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# 262361.

The Texas Department of Criminal Justice (the "department") received a request for information pertaining to a specified investigation. You state that some responsive information has been released to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.026, 552.101, 552.108, 552.114, 552.117, 552.1175, 552.134, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first note that the United States Department of Education Family Policy Compliance Office (the "DOE") recently informed this office that the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.¹ Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). Among the documents you

¹A copy of this letter may be found on the Office of the Attorney General's website: http://www.oag.state.tx.us/opinopen/og_resources.shtml.

have submitted for our review are unredacted education records obtained from the Dallas Independent School District by means of a subpoena. *See id.* § 99.3(a)(9)(i). These records are subject to FERPA. *See id.* § 99.3(a)(9)(ii)(B). Because our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records. Such determinations under FERPA must be made by the educational authority in possession of the education records.² However, we will consider the applicability of your remaining claimed exceptions to disclosure to the submitted information not subject to FERPA.

You claim that the information at issue is excepted from public disclosure under section 552.134 of the Government Code. Section 552.134 relates to inmates of the department and provides in relevant part as follows:

(a) Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the Texas Department of Criminal Justice is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov't Code § 552.134(a). Section 552.134 is explicitly made subject to section 552.029. Section 552.029 states as follows:

Notwithstanding . . . Section 552.134, the following information about an inmate who is confined in a facility operated by or under a contract with the Texas Department of Criminal Justice is subject to required disclosure under Section 552.021:

...

(8) basic information regarding the death of an inmate in custody, an incident involving the use of force, or an alleged crime involving the inmate.

Id. § 552.029(8). The submitted information pertains to an inmate for purposes of section 552.134. However, under section 552.029, basic information regarding an incident of an alleged crime involving an inmate is subject to required disclosure. Basic information includes the time and place of the incident, names of inmates and department officials directly involved, a brief narrative of the incident, a brief description of any injuries

²In the future, if the department does obtain parental consent to submit unredacted education records and the department seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

sustained, and information regarding criminal charges or disciplinary actions filed as a result of the incident. The submitted information includes an investigation related to an alleged crime involving the inmate. The basic information regarding this incident must be released pursuant to section 552.029(8). The department must generally withhold the remaining information under section 552.134 of the Government Code.

We note, however, that the information at issue involves an alleged violation of section 32.51 of the Penal Code, which provides that “[a] person commits an offense if the person obtains, possesses, transfers, or uses identifying information of another person without the other person’s consent and with intent to harm or defraud another.” Penal Code § 32.51(b). For purposes of section 32.51, “identifying information” includes an individual’s name, government issued identification number, and financial institution account number. *Id.* § 32.51(a)(1)(A), (C). Article 2.29 of the Code of Criminal Procedure pertains to alleged violations of section 32.51 that occurred on or after September 1, 2005 and provides as follows:

(a) A peace officer to whom an alleged violation of Section 32.51, Penal Code, is reported shall make a written report to the law enforcement agency that employs the peace officer that includes the following information:

- (1) the name of the victim;
- (2) the name of the suspect, if known;
- (3) the type of identifying information obtained, possessed, transferred, or used in violation of Section 32.51, Penal Code; and
- (4) the results of any investigation.

(b) On the victim’s request, the law enforcement agency shall provide the report created under Subsection (a) to the victim. In providing the report, the law enforcement agency shall redact any otherwise confidential information that is included in the report, other than the information described by Subsection (a).

Crim. Proc. Code art. 2.29. In this instance, the submitted information pertains to an alleged theft of a person’s identifying information, which constitutes an alleged violation of section 32.51. *See* Penal Code § 32.51. For purposes of article 2.29, an offense is committed on or after September 1, 2005 if no “element of the offense occurs before that date.” Act of Jun. 17, 2005, 79th Leg., R.S., ch. 294, § 1(b), 2005 Tex. Gen. Laws 885. The requestor in this instance is a parent of the alleged victim. Because we are unable to determine based on the information provided whether any element of the alleged offense occurred prior to September 1, 2005 or if the requestor is the authorized representative of the alleged victim, we must rule conditionally.

If the alleged offense occurred on or after September 1, 2005, the submitted information is subject to article 2.29. *See* Crim. Proc. Code art. 2.29(b), Gov't Code § 552.023. Section 552.134 of the Government Code makes information confidential for purposes of article 2.29. However, provided that the requestor is acting as the victim's authorized representative, she has a right of access to (1) the name of the victim; (2) the name of the suspect, if known; (3) the type of identifying information obtained, possessed, transferred, or used in violation of Section 32.51, Penal Code; and (4) the results of any investigation, and this information must be released to her. *See* Crim. Proc. Code art. 2.29. With the exception of basic information that must also be released, the remaining information must be withheld under section 552.134 of the Government Code. However, if the alleged offense occurred before September 1, 2005 and the submitted information is not subject to article 2.29, or in the event the information is subject to article 2.29 but the requestor is not acting as the victim's authorized representative, we conclude that (1) basic information must be released pursuant to section 552.029(8) of the Government Code, and (2) the department must withhold the remaining information under section 552.134 of the Government Code. *See id.* art. 2.29(b). As we are able to make these determinations, we need not address your remaining arguments against disclosure.

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).

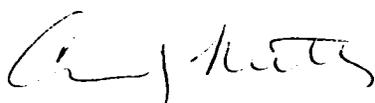
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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# 262361

Enc. Submitted documents

c: Ms. Esther Moore
2044 Echota Way
Riverdale, Georgia 30296
(w/o enclosures)