



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 7, 2008

Mr. Miguel A. Saldaña
Brownsville Independent School District
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
103 East Price Road, Suite A
Brownsville, Texas 78521

OR2008-00179

Dear Mr. Saldaña:

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# 298972.

The Brownsville Independent School District (the "district"), which you represent, received a request for information pertaining to consultation of specified doctors by the Special Services Department during a specified time period, including the report evaluating the psychological services department. You claim that the submitted information is protected under rule 192.3(e) of the Texas Rules of Civil Procedure.¹ We have considered your arguments and reviewed the submitted information.

Initially, we note that you have only submitted the report evaluating the psychological services department. We assume that, to the extent any additional responsive information existed when the district received the request for information, you have released it to the requestor. If not, then you must do so immediately. *See* Gov't Code §§ 552.006, 552.301, 552.302; Open Records Decision No. 664 (2000).

¹Although you raise section 552.101 of the Government Code in conjunction with rule 192.3, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Thus, we will not address your claim that the submitted information is confidential under section 552.101 in conjunction with rule 192.3.

Next, we note that the United States Department of Education Family Policy Compliance Office (the “DOE”) has informed this office that the Family Education 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 purposes of our review in the open records ruling process under the Act.² 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”). You claim that the submitted information is subject to FERPA. Because our office is prohibited from reviewing education records, we will not address the applicability of FERPA to the information at issue.³ Such determinations under FERPA must be made by the educational authority in possession of the education record.

Next, we must address the district’s obligations under the Act. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is exempted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general’s decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See* Gov’t Code § 552.301(b). 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 the 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 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 if the information is voluminous. *See id.* § 552.301(e)(1)(A)-(D).

In this instance, the district did not comply with its ten-business-day deadline under section 552.301(b). The district also failed to comply with section 552.301(e). Pursuant to section 552.302 of the Government Code, a governmental body’s failure to comply with 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

²A copy of this letter may be found on the attorney general’s website, available at http://www.oag.state.tx.us/opinopen/og_resources.shtml.

³In the future, if the district does obtain parental consent to submit unredacted education records, and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

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 for non-disclosure exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Rule 192.3(e) provides a privilege against discovery that is subject to waiver. See TEX. R. EVID. 511; *Jordan v. Court of Appeals*, 701 S.W.2d 644, 649 (Tex. 1985); *Arkla, Inc. v. Harris*, 846 S.W.2d 623, 630 (Tex. Civ. App.—Houston [14th Dist.] 1993, orig. proceeding); *Aetna Cas. & Surety Co. v. Blackmon*, 810 S.W.2d 438, 440 (Tex. Civ. App.—Corpus Christi 1991, writ denied). Accordingly, the district's claim under rule 192.3(e) does not provide a compelling reason for non-disclosure for purposes of section 552.302. See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982); cf. Open Records Decision No. 677 at 10 (2002) (claim of attorney work-product privilege under TEX. R. CIV. P. 192.5 does not provide compelling reason for non-disclosure if claim does not implicate third party rights). Consequently, the district may not withhold the submitted information under rule 192.3.

In summary, this ruling does not address the applicability of FERPA to the submitted information. Should the district determine that all or portions of the submitted information consists of "education records" that must be withheld under FERPA, then the district must dispose of that information in accordance with FERPA, rather than the Act. The district must release the submitted information that is not subject to FERPA.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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,



Laura E. Ream
Assistant Attorney General
Open Records Division

LER/jb

Ref: ID# 298972

Enc. Submitted documents

c: Dr. Gloria Kury
P.O. Box 329
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(w/o enclosures)