



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 24, 2012

Ms. Brandy N. Davis
For McKinney Independent School District
Abernathy Roeder Boyd & Joplin, P.C.
P.O. Box 1210
McKinney, Texas 75070

OR2012-02845

Dear Ms. Davis:

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# 446340.

The McKinney Independent School District (the “district”), which you represent, received a request for certain information related to the requestor’s child. You state you have released some of the requested information to the requestor. You state some of the requested information does not exist.¹ You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov’t Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

You indicate the submitted information constitutes education records subject to the Family Educational Rights and Privacy Act (“FERPA”), section 1232g of title 20 of the United States Code. The United States Department of Education Family Policy Compliance Office (the “DOE”) has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally

¹In responding to a request for information under the Act, a governmental body is not required to disclose information that did not exist at the time the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.² We note the submitted information consists of the requestor's child's education records. Because our office is prohibited from reviewing education records, we will not address FERPA with respect to the information other than to note a parent has a right of access to her child's education records. 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3. We further note that the DOE also has informed this office that if a state law prohibits a school district from providing a parent with access to the education records of his or her child and an opportunity to inspect and review the record, then the state statute conflicts with FERPA, and an educational agency or institution must comply with FERPA if it wishes to continue to receive federal education funds. Letter advisement from Ellen Campbell, Family Compliance Office, U.S. Department of Education to Robert Patterson, Open Records Division, Office of the Texas Attorney General (April 9, 2001). *See Equal Employment Opportunity Comm'n v. City of Orange*, 905 F. Supp 381, 382 (E.D. Tex. 1995); Open Records Decision No. 431 (1985) (FERPA prevails when in conflict with state law). Because the educational authority in possession of the education records is now responsible for determining the applicability of FERPA, we will only address your claimed exception to the disclosure of the submitted information.

Next, we must address the requestor's assertion the district failed to comply with its procedural obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See Gov't Code* § 552.301(b). Under 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) 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 id.* § 552.301(e).

In this instance, the requestor provides our office with documentation showing the district received two requests from the requestor for a portion of the information at issue. The initial request for information was for a specified form and assessment pertaining to the requestor's child. The second request was for multiple categories of information related to the requestor's child, including the previously requested specified form and assessment. We note the submitted information includes the specified form requested in both requests for information. The district received the initial request for information on December 1, 2011 but withheld information from the requestor, and did not request a ruling from our office

²A copy of this letter may be found on the attorney general's website, available at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

until December 16, 2011, or submit the requested information for our review until December 29, 2011, in response to the second request. Consequently, we find that the district failed to comply with the procedural requirements of section 552.301 with regard to the submitted information responsive to the first request for information. Additionally, we note the district has redacted substantial portions of its arguments under section 552.101 of the Government Code from the requestor's copy of the district's comments. We further note the redacted portions of the district's comments neither disclose nor contain the substance of the submitted information. Therefore, with respect to the second request for information, we conclude the district failed to comply with section 552.301(e-1) of the Government Code in requesting a decision under section 552.101 of the Government Code.

Generally, a governmental body's failure to comply with section 552.301 results in the waiver of its claims under the exceptions at issue, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). 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 Nos. 630 at 3 (1994), 325 at 2 (1982). Section 552.101 of the Government Code encompasses other laws that make information confidential and can provide a compelling reason for non-disclosure. Accordingly, we will consider the district's assertion of section 552.101 of the Government Code for the submitted information.

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. Section 552.101 encompasses information protected by other statutes, such as section 48.101 of the Human Resources Code, which provides in relevant part:

(a) The following information is confidential and not subject to disclosure under [the Act]:

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

(b) Confidential information may be disclosed only for a purpose consistent with this chapter and as provided by [the Texas Department of Family and

Protective Services (the “DFPS”)] or investigating state agency rule and applicable federal law.

Hum. Res. Code § 48.101(a)-(b). The only entities authorized to conduct an investigation under chapter 48 of the Human Resources Code are the DFPS and certain other state agencies, depending on the circumstances surrounding the incident. *See id.* §§ 42.151, .152, .252, .301. Thus, records of a school district’s internal investigation are not subject to section 48.101. The submitted information reflects it was created and collected by the district pursuant to its own investigation. Thus, we conclude no portion of the submitted information was used or developed in an investigation under chapter 48 of the Human Resources Code. Consequently, the submitted information may not be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 also encompasses section 261.201 of the Family Code, which provides in relevant part:

(a) [T]he 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, audiotapes, videotapes, 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); *see also id.* §§ 101.003(a) (defining “child” for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes), 261.001(1), (4) (defining “abuse” and “neglect” for purposes of Family Code ch. 261). We note the district is not an agency authorized to conduct an investigation under chapter 261 of the Family Code. *See id.* § 261.103 (listing agencies that may conduct child abuse or neglect investigations). Furthermore, although you state that Child Protective Services and DFPS were contacted regarding the incident at issue, you do not explain, and the records at issue do not indicate, the submitted information was used or developed in an investigation conducted under chapter 261 of the Family Code. Accordingly, we find you have failed to demonstrate that any of the submitted information constitutes a report of alleged or suspected child abuse or neglect made under chapter 261 or that this information was used or developed in an

investigation under chapter 261. Accordingly, we conclude the district may not withhold the submitted information under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. As no further exceptions are raised, the submitted information must be released. This ruling does not address the applicability of FERPA to the submitted information. Should the district determine all or portions of the submitted information consist of "education records" that must be withheld under FERPA, the district must dispose of any such information in accordance with FERPA, rather than the Act.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 446340

Enc. Submitted documents

c: Requestor
(w/o enclosures)