



**THE ATTORNEY GENERAL
OF TEXAS**

July 7, 1987

**JIM MATTOX
ATTORNEY GENERAL**

Mr. Travis Hiester
Atlas and Hall
820 Pecan, Suite 818
McAllen, Texas 78502

Open Records Decision No. 467

Re: Availability under the Open Records Act, article 6252-17a, V.T.C.S., of college transcripts of all school teachers and administrators who have taken six or more semester hours per semester since 1975

Dear Mr. Hiester:

You indicate that the McAllen Independent School District received a request under the Texas Open Records Act, article 6252-17a, V.T.C.S., for certain personnel records held by the school district and for other information:

1. Copies of college transcripts of all school teachers and/or administrators who have taken six or more semester hours per semester from 1975 to the present time.
2. A list of duties which my client is alleged to have neglected on a continuing or repeated basis.
3. The dates upon which she neglected such duties, the individual(s) who can testify that she neglected such duties and a summary of what each such individual would or will testify to.
4. A summary of all discussions held in executive session regarding my client.

As attorney for the school district, you request our decision pursuant to section 7 of the act on the availability of the information to the public.

You indicate that the school district does not have the information referred to as items 2, 3, and 4 above. No information regarding the individual's "neglect of duties" has been documented and no tape or notes of any executive sessions have been made. It is well-

established that the Open Records Act does not require governmental bodies to create or prepare new information. Attorney General Opinion JM-672 (1987); Open Records Decision No. 452 (1986). Nor does the act require the preparation of information in the form requested by a member of the public. Open Records Decision No. 145 (1976). Consequently, the act does not require you to prepare the information requested in items 2, 3, or 4. See also Open Records Decision Nos. 461 (1987); 330 (1982) (tape or transcript of legally-called executive session may be withheld under Open Records Act).

You indicate that the district does have, in numerous different personnel files, the college transcripts requested. Under the Open Records Act, information must be released unless it falls within one of the act's specific exceptions to disclosure. When a governmental body requests an open records decision, the governmental body must state which exceptions apply and why. Open Records Decision No. 252 (1980). You assert that sections 3(a)(1), 3(a)(2), and 3(a)(14) protect from required public disclosure the college transcripts of teachers employed by the district.

Section 3(a)(1) protects

information deemed confidential by law, either Constitutional, statutory, or by judicial decision.

The primary purpose of this section is to protect privacy interests. Section 3(a)(1) incorporates constitutional privacy, common-law privacy, and confidentiality interests granted by statutes.

Section 3(a)(2) protects

information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. . . .

This section protects personnel file information if release of the information would cause an invasion of privacy under the common-law privacy test articulated for section 3(a)(1) of the act. Hubert v. Harte-Hanks Texas Newspapers, Inc., 652 S.W.2d 546, 550 (Tex. App. - Austin 1983, writ ref'd n.r.e.). For this reason, sections 3(a)(1) and 3(a)(2) will be addressed together.

Sections 3(a)(1) and 3(a)(2) incorporate the common-law privacy test articulated by the Texas Supreme Court in Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668 (Tex. 1976). Under this test, information may be withheld only if (1) the information contains highly intimate and embarrassing facts about a person's personal affairs such that release of the information would

be highly objectionable to a reasonable person, and (2) the information is of no legitimate concern to the public. Open Records Decision No. 464 (1987). This office has indicated on several occasions that college transcripts submitted by a licensee to a licensing board as part of the licensing process are not protected under section 3(a)(1) of the Open Records Act unless a statute expressly provides such protection. See Open Records Decision Nos. 215 (1978); 157 (1977); Attorney General Opinion H-242 (1974). Similar considerations apply to the college transcripts of public employees. The fact that a public employee received less than perfect -- or even "bad" -- grades in college is not the type of "highly intimate" information protected by common-law privacy. Moreover, the public has a legitimate interest in the job qualifications of public employees. See, e.g., Open Records Decision No. 441 (1986) (names of school district personnel who have not passed the TECAT examination may not be withheld).

As indicated, section 3(a)(1) also encompasses constitutional privacy and statutory privacy. The only statute that protects this information relates to student records and will be addressed in the discussion of section 3(a)(14) to follow. The Industrial Foundation court indicated that constitutional privacy protects information within the "zones of privacy" described by the United States Supreme Court in Roe v. Wade, 410 U.S. 113 (1973) and Paul v. Davis, 424 U.S. 693 (1976). These "zones" include matters related to marriage, procreation, contraception, family relationships, and the education of and rearing of children. The constitutional right to privacy consists of two related interests: (1) the individual interest in independence in making certain kinds of important decisions, and (2) the individual interest in avoiding disclosure of personal matters. The first interest applies to the traditional "zones of privacy." None of these zones applies to college transcripts held by a school district as part of a teacher's personnel file. The second interest, in non-disclosure or confidentiality, is somewhat broader. Fadjo v. Coon, 633 F.2d 1172, 1175 (5th Cir. 1981). In other words, information need not necessarily fall into one of the "zones of privacy" to be protected by constitutional privacy principles.

In Open Records Decision No. 455 (1987), this office discussed Fadjo v. Coon, supra, and other recent developments in federal decisions on constitutional disclosural privacy and concluded:

When these cases are read together, the following becomes apparent: (1) in addition to the freedom to make certain decisions without government interference, an individual's Fourteenth Amendment liberty interest in privacy encompasses the freedom from being required to disclose certain personal matters; (2) the term 'personal matters' is nebulous, but should at

least be construed as involving 'the most intimate aspects of human affairs,' (3) the public disclosure of personal matters is permissible if there is a 'legitimate state interest which is found to outweigh the threat to the plaintiff's privacy interest,' (4) unlike the common law privacy test articulated by the Texas Supreme Court in Industrial Foundation of the South v. Texas Industrial Accident Board, supra, the test for determining whether private information may be publicly divulged without violating constitutional disclosural privacy rights is a balancing test, and (5) whether the subject of the information is a public official or an 'ordinary citizen' will affect the nature of his privacy rights. [Citations omitted].

When a public employee or an applicant for public employment submits a college transcript as part of his or her job qualifications, the employee or applicant removes that transcript from the realm of personal or intimate aspects of human affairs.

You also suggest that:

An invasion of the person's personnel file to extract information containing the specific grades made by the teacher in specific courses would be almost like a search of that person's personnel file and prohibited by the Fourth Amendment to the United States Constitution which would entitle the transcript to the exception listed under Section 3(a)(1) of the Open Records Act..

It should be noted that the "search" in question is of a government file, not of a personal file. Moreover, the employee submitted the information to the governmental body as part of the employee's job qualifications. For these reasons, your argument is inapplicable here.

Section 3(a)(14) of the Open Records Act protects

student records at educational institutions funded wholly, or in part, by state revenue; but such records shall be made available upon request of educational institution personnel, the student involved, that student's parent, legal guardian, or spouse or a person conducting a child abuse investigation required by Section 34.05, Family Code.

See also art. 6252-17a, §14(e) (requiring compliance with the federal law, the "Buckley Amendment," 20 U.S.C. §1232g, prohibiting the release of certain student records).

In Open Records Decision No. 157 (1977), this office concluded that section 3(a)(14) does not protect an engineer's college transcript when it is included in licensing files of the Texas State Board of Registration for Professional Engineers. See also Open Records Decision No. 215 (1978). The conclusion in Open Records Decision No. 157 rested on the fact that the licensing board is not a wholly or partially state-funded educational institution within the meaning of section 3(a)(14). In contrast, a school district does fall within the meaning of educational institution under section 3(a)(14). See Open Records Decision No. 193 (1978). The records about a teacher employed by the school district are not, however, "student records" of that educational institution. Accordingly, you may not withhold teachers' college transcripts under section 3(a)(14).

Finally, you assert that compliance with this request will entail a massive amount of employee time and will disrupt the administration of the school district. In Industrial Foundation of the South, Inc. v. Texas Industrial Accident Board, the Texas Supreme Court addressed a similar concern about a request for a massive amount of information. See 540 S.W.2d at 686-87. The court stated that "the Act does not allow either a custodian of records or a court to consider the cost or method of supplying requested information in determining whether such information should be disclosed." 540 S.W.2d at 687.

On the other hand, as indicated at the beginning of this decision, the Open Records Act does not require the preparation of information in the form requested by a member of the public. See Open Records Decision No. 145 (1976). In Open Records Decision No. 87 (1975), this office addressed a request that required a city to collect and assemble information in a form requiring research and compilation. The opinion stated:

A governmental body's responsibility to extract information from source records is normally limited to those instances where the confidential or non-disclosable nature of a portion of the information must be protected, or where the nature of the record keeping system or administrative necessity or convenience requires the extraction to be performed by the agency itself.

See also Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d at 687; Attorney General Opinion JM-672 (1987) (governmental body must delete confidential information). If the school district determines that searching for the college

transcripts of all school teachers and administrators who have taken six or more semester hours per semester since 1975 is more burdensome than simply providing all teachers' and administrators' college transcripts, the district may release all of the transcripts. As indicated, college transcripts are not protected from disclosure as confidential information under the Open Records Act.

You also ask about the period of time within which the school district must comply with this request for information; you ask whether the school district may take a "reasonable time" to comply with the request. Although no provision of the Open Records Act addresses this question directly, several provisions provide indirect guidance on this question. Section 4 provides that the governmental body shall "promptly" produce public information, unless the information is in immediate active use. See Open Records Decision Nos. 225 (1979); 148 (1976). Section 13 provides that governmental bodies "may promulgate reasonable rules of procedure by which public records may be inspected efficiently, safely, and without delay." (Emphasis added). With these provisions, the act prohibits unreasonable delays in providing public information while recognizing that the functions of the governmental body must be allowed to continue. The interests of one person requesting information under the Open Records Act must be balanced with the interests of all the members of the public who rely on the functions of the governmental body in question. Accordingly, a governmental body may take a reasonable amount of time to comply with a request for public information. What constitutes a reasonable period of time depends on the facts in each case. The volume of information requested is highly relevant to what constitutes a reasonable period of time.

You also ask whether the district may charge for its employees' time in complying with this request. Generally, the requestor must pay for the costs of producing public records. In Attorney General Opinion JM-114 (1983), the attorney general determined that governmental bodies may charge only those costs authorized in section 9. Subsection (a) of section 9 governs standard-sized reproductions. In Attorney General Opinion JM-114, this office relied on Hendricks v. Board of Trustees of Spring Branch Independent School District, 525 S.W.2d 930 (Tex. Civ. App. - Houston [1st Dist.] 1975, writ ref'd n.r.e.) to conclude that the act does not authorize "access" charges for standard-sized reproductions of public records. Consequently, a government body may not ordinarily charge for employee time in making records available under subsection 9(a). Attorney General Opinion JM-114. Cf. Attorney General Opinion Nos. JM-672 (1987); JM-292 (1984) (deletion of confidential information). Requestors may be required to post bond for the payment of authorized costs as a condition precedent to the preparation of records when the preparation of the records is "unduly costly" and their reproduction would cause "undue hardship to the . . . agency if the costs were not paid." Art.

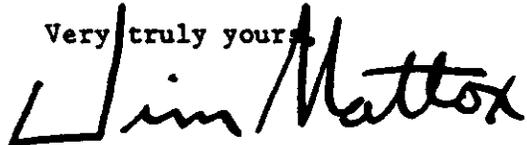
6252-17a, §11; see, e.g., Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d at 687-88.

S U M M A R Y

The Texas Open Records Act, article 6252-17a, V.T.C.S., does not require governmental bodies to create or prepare new information or to prepare information in the form requested by a member of the public. Consequently, if the McAllen Independent School District does not have information regarding a certain individual's "neglect of duty" or notes or tapes of an executive session, it need not prepare the information.

The college transcripts, in a school district's personnel files, of teachers employed by the school district are not protected from required public disclosure by sections 3(a)(1), 3(a)(2), or 3(a)(14) of the Open Records Act.

Very truly yours,



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