



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

September 20, 1996

Mr. Frank R. Lopez  
Lewis & Collins  
1220 Montana Avenue  
El Paso, Texas 79902

OR96-1721

Dear Mr. Lopez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 100752.

The Ysleta Independent School District (the "district"), which you represent, received two requests for all documentation related to the investigation and possible termination of a certain teacher. You contend that some of the requested information is excepted from required public disclosure by sections 552.101, 552.102, and 552.103 of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue.<sup>1</sup>

You claim that the documents submitted in exhibit D are excepted from disclosure by section 552.102 because they contain private material in a personnel file. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the act. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by common-law privacy and excepts from disclosure private facts about an individual. *Industrial*

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<sup>1</sup>In reaching our conclusion here, 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.

*Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1. After reviewing the materials in exhibit D, we do not believe that the district may withhold the information in its entirety because of common-law privacy.

Notwithstanding this ruling, there appears to be some information within the documents that is protected by a right to privacy. This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), and information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987). We have reviewed exhibit D and have marked a sample of the information that must be withheld under constitutional or common-law privacy. For your convenience, we have also included for your review a sampling of common types of information deemed confidential.

We note, however, that section 552.101 also encompasses information protected by statutes. Within exhibit D, there are several documents which evaluate a district teacher. In the last legislative session, Senate Bill 1 was passed, which added section 21.355 to the Education Code. Section 21.355 provides, "Any document evaluating the performance of a teacher or administrator is confidential." This office recently interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, this office also concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* Based on the reasoning set out in Open Records Decision No. 643 (1996), we conclude that those documents in exhibit D which evaluate a teacher are confidential under section 21.355 of the Education Code. Therefore, pursuant to section 552.101 of the Government Code, the district must withhold those documents that we have marked as confidential.

In addition, section 552.102(b) of the Government Code excepts from disclosure a transcript from an institution of higher education maintained in the personnel file of a professional public school employee, with the exception of the degree obtained and the curriculum. The district must, therefore, edit from the transcript all information other than the employee's name, the degree obtained, and the courses taken. Open Records Decision No. 526 (1989) at 2-3. Moreover, some of the requested material includes the home address, phone number, social security number and family information of a current or former city official or employee. It is possible that this information may be confidential under section 552.117 of the Government Code, and therefore, this specific information, depending on the specific circumstances, may not be released. Section 552.117 of the Government Code excepts from required public disclosure the home addresses, telephone

numbers, social security numbers, or information revealing whether a public employee has family members of public employees who request that this information be kept confidential under section 552.024. Therefore, section 552.117 requires you to withhold the home telephone number or social security number of a current or former employee or official who requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold the information of a current or former employee who made the request for confidentiality under section 552.024 after this request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 (1989) at 5. We have marked a sample of that kind of information that must be withheld if the official made the election not to allow public access to the information.

You also assert that exhibit D is excepted from disclosure because the documents are education records made confidential by the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, or section 552.114 of the Government Code. In Open Records Decision No. 634 (1995), this office concluded: (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 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 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.

We note that this ruling applies only to "education records" under FERPA. "Education records" are records that

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A). *See also* Open Records Decision Nos. 462 (1987), 447 (1986). Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982), 206 (1978).<sup>2</sup> We have marked a sampling of that kind of information you must withhold under FERPA. If you have further questions as to the applicability of FERPA to information that is the subject of an open records request, you may consult with the United States Department of Education's Family Policy Compliance Office. *See* Open Records Decision No. 634

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<sup>2</sup>*But see* 20 U.S.C. § 1232g(a)(1)(A), (d) (parent or adult student has affirmative right of access to that student's education records). *See also* Open Records Decision No. 431 (1985) (Open Records Act's exceptions to required public disclosure do not authorize withholding of "education records" from adult student). As one of the requestors here is the parent of student, you must release that student's records to his parents.

(1995) at 4, n.6, 8.<sup>3</sup>

In exhibit A, you seek to withhold a portion of the transcription from an appeal hearing before a Texas Education Agency hearing examiner. You first claim that section 21.256 of the Education Code deems the information confidential. Section 21.256 provides that

(a) A hearing under this chapter must be private unless the teacher requests in writing that the hearing be public, except that a hearing examiner may close a hearing if necessary to maintain decorum.

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(f) To protect the privacy of a witness who is a child, the hearing examiner may:  
(1) close the hearing to receive the testimony of the witness.

Educ. Code § 21.256. Although the Education Code provides for a closed appeal hearing, we do not believe that the statute makes the transcription of the hearing or documents related to the hearing confidential by law. Open Records Decision No. 478 (1987) (a statutory confidentiality provision generally requires express language making certain information confidential or stating that information shall not be released to the public); *cf.* Open Records Decision No. 605 (1992) (mere fact that information was discussed in an executive session does not make it confidential under the Open Records Act); 485 (1987). Therefore, the district may not withhold the information pursuant to section 21.256.

You also argue that exhibit A is protected by sections 552.101 and 552.102 of the Government Code. As outlined above, we believe that there is some information within the documents that must be withheld pursuant to FERPA and a constitutional or common-law right to privacy. We have marked a sample of that kind of information that you must withhold in exhibit A.

You next assert that exhibits B and C, the recommendation of the hearing examiner and the transcription of the district's board meeting, are excepted from required public disclosure by section 552.103. Section 552.103(a) excepts from disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

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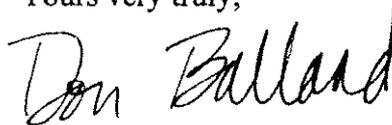
<sup>3</sup>The district is not required to submit copies of education records to this office. See Open Records Decision No. 634 (1995) at 10 (if district does not make a determination but seeks determination from this office, district must first obtain parental consent to disclose personally identifiable information or must edit records to protect personally identifiable information).

The district has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No 551 (1990) at 4. The district must meet both prongs of this test for information to be excepted under 552.103(a). To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 (1986) at 4. Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4. In this instance, you make no argument and do not demonstrate how litigation is reasonably anticipated or that it is now pending. The district may not, therefore, withhold exhibits B or C under section 552.103. We caution, however, that there may be information within the exhibits that you must withhold pursuant to section 552.101 and FERPA.

You finally assert that exhibit C may be withheld because it is the transcription of a school board meeting. We note that section 551.104(c) of the Government Code states that a "certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order." Thus, the district's executive session tapes must not be disclosed unless a court rules otherwise in an action filed under the Open Meetings Act. Gov't Code 551.104; Open Records Decision No. 495 (1988) (attorney general lacks authority to review certified agendas or tapes of executive sessions). It does not appear, however, that this school board meeting was an "executive session." The documents, therefore, are not excepted from disclosure under section 551.104 and with the exception of information protected by FERPA or privacy must be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you questions about this ruling, please contact our office.

Yours very truly,



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Assistant Attorney General  
Open Records Division

JDB/ch

Ref: ID#100752

Enclosures: Marked documents  
List of Confidential Information