



Office of the Attorney General

State of Texas
January 24, 1997

DAN MORALES
ATTORNEY GENERAL

Mr. Robert A. Schulman
Schulman, Walheim & Heidelberg, Inc.
745 E. Mulberry Drive, Suite 700
San Antonio, Texas 78212

OR97-0151

Dear Mr. Schulman:

You represent the Alamo Community College District (the "district"). On behalf of the district, you have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 103110.

The district received a request for personnel records of a named faculty member and other documents that relate to the named faculty member. You assert that the records at issue are excepted from disclosure pursuant to sections 552.101, 552.102, 552.103, 552.107, 552.114, and 552.117 of the Government Code.

We note initially that the medical and health information at issue is generally confidential. In Open Records Decision No. 641 (1996), this office determined that medical information obtained pursuant to the Americans with Disabilities Act of 1990 (the "ADA") 42 U.S.C. § 12101 *et seq.*, is confidential. *See also* 29 C.F.R. § 1630.14(b)(1) (providing that medical information "shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record").

Access to medical records is governed by the Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes. Open Records Decision No. 598 (1991). Section 5.08(b) and (c) of the MPA provide:

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Section 5.08(j)(1) provides for release of medical records upon the written consent of a patient when such written consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Also, section 5.08(j)(3) requires that any subsequent release of medical records be consistent with the purposes for which the district obtained the records. Open Records Decision No. 565 (1990) at 7. We have marked the types of records that are confidential pursuant to the ADA and the MPA.

You assert that information about the faculty member's race, his college transcripts, documents showing his social security number, records about his retirement and classroom performance, and other documents are excepted from disclosure under sections 552.101 and 552.102 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.102(a) protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The test to determine whether information is private and excepted from disclosure under common-law privacy provisions, which are encompassed in section 552.101 and section 552.102 of the Government Code, is whether the information is (1) highly intimate or embarrassing to a reasonable person and (2) of no legitimate public concern.¹ *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 930 (1977); *Hubert v. Harte-Hanks Texas Newspapers Inc.*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.).

Many of the records at issue relate to the job performance and work behavior of a public servant. There is a legitimate public interest in how a public servant conducts himself while on-duty and how he performs his job functions. Open Records Decision Nos. 470 (1987) at 4 (public has legitimate interest in job performance of public employees), 423 (1984) at 2 (scope of public employee privacy is narrow). Also, information showing that an employee is participating in a program funded either in part or in whole by the state is the type of information that is not generally protected by common-law privacy, as it concerns a financial transaction between the employee and the governmental body. Open Records Decision No. 600 (1992) at 9. However, we agree that some of the information submitted to this office is protected by common-law privacy and have marked sample documents to show what must be withheld from disclosure under sections 552.101 and 552.102.²

¹We assume that you are asserting that the transcripts are excepted from disclosure on the basis of constitutional or common-law privacy. Section 552.102(b) also provides an exception from disclosure for "a transcript from an institution of higher education maintained in the personnel file of a professional public school employee." As the faculty member is not a public school employee, section 552.102(b) is inapplicable to the transcripts.

²You had also asserted that the information at issue is protected by the federal constitution. We note that protection for information under common-law privacy is broader than the protection provided under constitutional privacy. To determine whether the constitutional right of privacy protects particular information, the release of which implicates a person's interest in deciding the kinds of personal facts to disclose to the world, this office applies a balancing test, weighing the individual's interest in privacy against the public's right to know the information. Although such a test might appear more protective of privacy interests than the common-law test, the scope of information considered private under the

We note that you submitted to this office information about the named individual's retirement plan. You did not tell this office whether the retirement plan is funded in whole or in part by the district. A public employee's participation in a voluntary investment plan to which his employer offers no funding, is generally private financial information that is protected from disclosure by common-law privacy. Open Records Decision No. 600 (1992) at 9. If the retirement plan is funded entirely by the named employee, the documents submitted to this office that concern the retirement plan must be withheld in their entirety. However, a public employee's participation in an investment program that is funded in part or in whole by the governmental body is not confidential information. *Id.* Thus, if the district contributes to the retirement plan, the documents submitted to this office may not be withheld from disclosure in their entirety.

You contend that some of the documents that evaluate the named faculty member are excepted from disclosure by section 21.355 of the Education Code, in conjunction with section 552.101 of the Government Code. Section 21.355 of the Education Code provides that "[A] document evaluating the performance of a teacher or administrator is confidential." You assert that this provision is applicable to junior college or community college teachers by virtue of section 130.084 of the Education Code. Section 130.084 reads as follows:

The board of trustees of junior college districts shall be governed in the establishment, management and control of the junior college by the general law governing the establishment, management and control of independent school districts insofar as the general law is applicable.

By its terms, section 130.084 effects only the authority of junior college trustees to direct a junior college. *See San Antonio Union Junior College Dist. v. Daniel*, 206 S.W.2d 995 (Tex. 1947). Thus, this office has applied section 130.084 and its predecessor to confer various school district powers on junior college trustees. *See, e.g.*, Attorney General Opinions DM-178 (1992) (power to borrow money secured by delinquent maintenance tax revenues under Educ. Code § 20.45), M-878 (1971) (power to issue time warrants to repair, renovate, and equip school buildings under Educ. Code § 20.43), M-700 (1970) (power to exercise right of eminent domain under Educ. Code § 23.31). We do not think that a statute that makes certain information confidential, such as section 21.355 of the Education Code, bears on the trustees' direction of a junior or community college or in any way confers power on those trustees.

Further, we do not believe section 21.355 is a general law that is applicable to the district through section 130.084. Section 21.355 is part of subchapter H of the Education Code which sets forth the appraisal processes that relate to the accountability of public schools providing compulsory public education. Subchapter H is applicable only to public school districts and not to junior or community college districts.

constitutional doctrine is generally far narrower than that under the common law, because the material must concern the "most intimate aspects of human affairs." *See* Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)).

We note that this office has limited the meaning of "teacher" and "administrator" for purposes of section 21.355. *See* Open Records Decision No. 643 (1996). The term "teacher" in section 21.355 means an individual who is required to hold and does hold a teaching certificate or school district teaching permit under subchapter B of chapter 21, and who is engaged in teaching at the time of the evaluation. *See id.* at 4. An "administrator" for purposes of section 21.355 is a person who is required to hold and does hold an administrator's certificate under subchapter B of chapter 21, and is currently performing the functions of an administrator. *See id.* The named faculty member is not a "teacher" or an administrator" as those terms are used in section 21.355. The evaluation documents are not made confidential by section 21.355 of the Education Code.

You also assert that certain documents are excepted from disclosure under section 552.103 as the documents pertain to settlement negotiations. Section 552.103(a) provides an exception from disclosure for information "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" when the governmental body's attorney determines the information should be withheld from disclosure. You inform this office that a settlement agreement has been signed. We note that the applicability of section 552.103(a) generally ends once the litigation, or settlement, has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You assert that section 552.107 protects some of the documents from disclosure. Section 552.107(1) generally excepts from disclosure communications that reveal client confidences or the attorney's legal opinion or advice. Open Records Decision Nos. 589 (1991) at 1, 574 (1990) at 3, 462 (1987) at 9-11. We agree that section 552.107(1) protects some of the information from disclosure and have marked documents to show the type of information that may be withheld from disclosure pursuant to section 552.107(1).

Some of the submitted documents contain information that is protected from disclosure pursuant to sections 552.026 and 552.114 of the Government Code and the Family Educational Rights and Privacy Act of 1974 ("FERPA"), title 20 of the United States Code, section 1232g. Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 excepts from disclosure educational records unless released in conformity with the Family Educational Rights and Privacy Act ("FERPA"), title 20 of the United States Code, section 1232g.³ FERPA provides that federal funding shall not be made available to "any educational agency or institution which has a policy or practice of permitting the release of educational records" of students without the written consent of the parents of a minor student. 20 U.S.C. § 1232g(b)(1). If the student is 18 years of age or older or attends a postsecondary educational institution, the student must give written consent to allow the release of education records. *Id.* § 1232g(d).

Information must be withheld from disclosure if it serves to identify or tends to

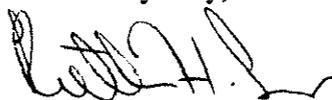
³The term "student record" in section 552.114 has been generally construed to be the equivalent of "education record." *See generally* Attorney General Opinion H-447 (1974); Open Records Decision Nos. 539 (1990), 477 (1987), 332 (1982).

identify a student. Open Records Decision Nos. 332 (1982) at 3, 294 (1981). In Open Records Decision No. 224 (1979) at 2, this office concluded that the release of a student's handwritten comments could reveal the student's identity through the handwriting, style of expression, or particular incidents related through the comments. We have marked the information in the submitted records that may not be disclosed except in accordance with FERPA.⁴

We also agree that some of the information at issue may be confidential under section 552.117 of the Government Code. Sections 552.024 and 552.117 provide that a public employee or official can opt to keep private his or her home address, home telephone number, social security number, or information that reveals that the individual has family members. You must withhold this information if, as of the time of the request for the information, an employee had elected to keep this information private.⁵ Open Records Decision Nos. 530 (1989) at 5, 482 (1987) at 4, 455 (1987).

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 have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/ch

Ref.: ID# 102403

Enclosures: Submitted documents

cc: Russell Gold
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(w/o enclosures)

⁴We note that, in Open Records Decision No. 634 (1995), this office concluded that an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure without the necessity of requesting an attorney general decision as to those exceptions.

⁵We note that a social security number obtained or maintained by the district pursuant to any provision of law enacted on or after October 1, 1990 may also be confidential by federal law. 42 U.S.C. § 405(c)(2)(C)(viii); see also Open Records Decision No. 622 (1994).