



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 25, 1997

Mr. Therold I. Farmer
Walsh, Anderson, Underwood, Schulze & Aldridge, P.C.
P.O. Box 2156
Austin, Texas 78768

OR97-0426

Dear Mr. Farmer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 33997.

The Lago Vista Independent School District (the "district") received a request for the records of Mr. Jerry Davis, a teacher previously employed by the district. Dr. Jess Butler, the district superintendent, initially sought an open records decision from this office asking only that we advise him as to which records he "can provide" to the requestor. As attorney for the district, you then supplemented Dr. Butler's letter with your own letter specifically invoking several exceptions to required public disclosure and explaining why the requested records should not be released. However, you note that you did not submit your letter to this office within the ten day limit prescribed by section 552.301 of the Government Code.

Chapter 552 of the Government Code imposes a duty on a governmental body seeking an open records decision pursuant to section 552.301 to submit that request to the attorney general within ten days after the governmental body's receipt of the request for information. The time limitation found in section 552.301 is an express legislative recognition of the importance of having public information produced in a timely fashion. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ). When a request for an open records decision is not made within the time period prescribed by section 552.301, the requested information is presumed to be public. *See* Gov't Code § 552.302. This presumption of openness can only be overcome by a compelling demonstration that the information should not be made public. *See, e.g.*, Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests).

In accordance with sections 552.301 and 552.302, the records at issue are presumed public. You contend that the handwritten notes contained in the requested records are excepted

from disclosure under section 552.111 of the Government Code. However, section 552.111 is a discretionary exception that a governmental body waives by its failure to raise the exception within the time period prescribed in section 552.301. Open Records Decision No. 470 (1987). Thus, none of the requested records are excepted from disclosure under section 552.111.

You also contend that some of the information in the requested records is excepted from disclosure under section 552.101 of the Government Code in conjunction with the informer's privilege. The informer's privilege is actually a governmental entity's privilege to withhold from disclosure the identities of those persons who report violations of law. *See Roviato v. United States*, 353 U.S. 53, 59 (1957). The informer's privilege is waivable by a governmental body, and the district has waived the privilege by failing to raise it timely. Open Records Decision No. 549 (1990).

On the other hand, all of the other exceptions to disclosure that you have raised are mandatory exceptions because they either protect the interests of third parties or recognize sources of law other than the Open Records Act that protect information from disclosure.¹ Where information is made confidential by other law or where third party interests are at issue, a compelling reason exists to overcome the presumption that information is open. *See Open Records Decision No. 150 (1977)*. We must, therefore, consider whether any of the information contained in the requested records is excepted from disclosure under the mandatory exceptions to disclosure that you have raised.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 552.102(a) excepts information in personnel files only if it meets the test articulated under section 552.101 for common-law invasion of privacy. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Accordingly, we will consider your section 552.101 and section 552.102(a) claims together.

For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685. The court considered intimate and embarrassing information such as that relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

¹In addition to section 552.111, you have also invoked sections 552.026, 552.101, 552.102, and 552.114 of the Government Code.

You contend that Mr. Davis has a privacy interest in some of the material contained in his personnel records. We also must consider whether any of the information contained in Mr. Davis' personnel records implicates the privacy interests of other individuals. We note that information about the qualifications of public employees, such as Mr. Davis, is of legitimate concern to the public. Open Records Decision Nos. 542 (1990), 470 (1987), 467 (1987). Having reviewed the records at issue, we find only one document that is highly intimate and embarrassing and of no legitimate interest to the public. This document is marked accordingly and must be withheld from disclosure.

You claim that portions of the requested records are excepted from disclosure under sections 552.026 and 552.114 of the Government Code. In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, 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. In this instance, however, you have submitted to this office records containing student names and other identifying information. "Education records" under FERPA 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).

Some of the requested records are education records under FERPA. Prior to releasing the records to the requestor, FERPA requires the district to delete information from the records to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982), 206 (1978). We have marked the information in the records that appears to identify students. This identifying information is confidential under FERPA and must be withheld from disclosure.

The requested records also contain the home addresses, telephone numbers, and social security numbers of current or former district employees. Section 552.117 of the Government Code exempts from disclosure the home addresses and telephone numbers and social security numbers² of current or former officials or employees of a governmental body who request that

²Additionally, we note that a social security number is excepted from required public disclosure under section 552.101 of the act in conjunction with 1990 amendments to the federal Social Security Act, § 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). Thus, if any of the social security

this information be kept confidential under section 552.024 of the Government Code. Section 552.117 also protects *former* home addresses and telephone numbers from disclosure. See Open Records Decision No. 622 (1994). The district may not, however, withhold this information for a current or former official or employee who made a request for confidentiality under section 552.024 after the request for this 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. The district may determine which employees made a timely request for confidentiality and withhold the appropriate information on behalf of those employees.

We note that one of the records you submitted to this office for review is an Employment Eligibility Verification, Form I-9. The disclosure of I-9 forms is governed by title 8, section 1324a of the United States Code, which provides that the form "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); see 8 C.F.R. § 274a.2(b)(4). We conclude that the I-9 form is excepted from disclosure under section 552.101 of the Government Code as information made confidential by law. The I-9 form may only be released in compliance with the federal laws and regulations governing employment verification system.

Among the requested records are teacher evaluations that are also confidential by law. 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 the teacher evaluations submitted to this office are confidential under section 21.355 of the Education Code. Therefore, pursuant to section 552.101 of the Government Code, the district must withhold these documents from disclosure.

Finally, the submitted records include Mr. Davis's college transcripts. Section 552.102(b) 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. Therefore, prior to releasing the transcripts, the district must redact from the transcripts all information other than the employee's name, the degree obtained, and the courses taken. Open Records Decision No. 526 (1989) at 2-3.

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

numbers contained in the requested records were obtained by the district pursuant to any provision of law enacted on or after October 1, 1990, the district must withhold these social security numbers from disclosure under section 552.101 as information made confidential by law.

regarding any other records. If you have any questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref: ID# 33997

Enclosures: Submitted documents

cc: Dr. Jess Butler, Superintendent
Lago Vista Independent School District
P.O. Box 4929
Lago Vista, Texas 78645
(w/o enclosures)