



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 29, 1997

Mr. Robert A. Schulman
Schulman, Walheim & Heidelberg, Inc.
112 East Pecan, Suite 3000
San Antonio, Texas 78205

OR97-1974

Dear Mr. Schulman:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 108125.

The Alamo Community College District (the "college") in San Antonio, which you represent, received an open records request for "[t]he annual evaluation by 1) students and 2) the Department Chair for James Wogstad, . . . , for the following academic years: 1991-1992; 1992-1993; and 1996-1997." Subsequent to the first request the requestor submitted an addendum requesting the information set out in the first request, including the years 1994-1995. In response to the request, you submitted to this office for review the information which you assert is responsive. You claim the requested information is subject to common-law privacy and excepted from required public disclosure under section 552.101 of the Government Code, as well as in conjunction with section 21.355 of the Education Code.¹ We have considered the exception you claim and have reviewed the documents at issue.

Initially, we note that you assert that "the student evaluations are not public information subject to Chapter 552 of the Government Code," since the evaluations are not maintained by the college. You further claim that "these records may be kept or disposed of at the discretion of the instructor," and the records are "voluntarily created by the students

¹Although you initially asserted that the submitted information at issue is excepted from required public disclosure pursuant to sections 552.026, 552.101, 552.102, 552.103, 552.104, 552.105, 552.107, 552.108, 552.109, 552.111, 552.114, 552.117, and 552.305 of the Government Code, you did not explain how most of the claimed exceptions apply to any of the submitted records. The Government Code places on the custodian of records the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). Therefore, in this ruling we only consider the exceptions for which you have offered arguments.

and not the district.” However, the student evaluations were submitted by the college. Therefore, we assume that the records were collected or maintained by the college. Section 552.002(a) defines the term “public information” to include information that is “collected, assembled, or maintained . . . (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it.” Gov’t Code § 552.002(a) (emphasis added). Furthermore, in reviewing the submitted records, it is apparent that although the requested information may eventually be returned to the instructor and disposed of, in this instance the college still retains possession of the records at issue. *See generally* Open Records Decision No. 558 (1990) (where governmental body has right of access to or ownership of information prepared by outside entity, information is subject to Open Records Act). Thus, it appears to us that the information at issue is “collected, assembled, or maintained” by the college, and the college has access to some, if not all, of the requested information. Finally, we note that governmental bodies are required to make public information available to the public, *see* Gov’t Code § 552.221, unless it falls within one of the exceptions enumerated in subchapter C of the Open Records Act. We conclude that the requested evaluations must be released to the requestor, unless you establish that they are excepted from disclosure.

We first address section 21.355 of the Education Code. Section 552.101 excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section excepts from disclosure information that is made confidential by statute. You contend that the annual evaluations, performed by the students and the department chairperson, are made confidential by Education Code section 21.355. Section 21.355 of the Education Code provides, “A document evaluating the performance of a teacher or administrator is confidential.” You assert that this provision is applicable to junior and community colleges 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 believe a statute that makes certain information confidential, such as section 21.355 of the Education Code, bears on the

trustees' direction of a junior college or in any way confers power on those trustees. Thus, section 21.355 does not effect the college's authority to direct the junior college.

Furthermore, we do not believe section 21.355 is a general law that is "applicable" to junior colleges 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. We believe subchapter H is applicable only to public school districts and not to junior college districts.

Moreover, 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.* We do not believe Mr. Wogstad is a "teacher" or an "administrator" as those terms are used in section 21.355.

Thus, we believe that section 21.355 is inapplicable to a junior college district through section 130.084 of the Education Code. Accordingly, the college may not withhold the requested evaluations from the public pursuant to section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.²

We next address whether the submitted records are subject to the common-law right of privacy. Section 552.101 encompasses the common-law right to privacy. 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. *Industrial Found. of the South 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.).

The records at issue relate to the job performance and work behavior of a public employee. There is a legitimate public interest in the work behavior of a public employee and how he or she performs job functions. Open Records Decision Nos. 470 (1987) at 4 (public has legitimate interest in job performance of public employees), 423 (1984) at 2

²We also note that in Open Records Letter No. 96-0698 (1996), this office determined that section 21.355 is inapplicable to a junior college district through section 130.084 of the Education Code.

(scope of public employee privacy is narrow). Thus, to the extent the submitted information relates to a public employee's job performance, we conclude that the public has a legitimate right to this information. Therefore, having reviewed the information at issue, we did not find any information which is protected from disclosure by the common-law right to privacy pursuant to sections 552.101 or 552.102. As you raise no other exception to the release of the requested information, we conclude that the college must release the requested evaluations.

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,



Sam Haddad
Assistant Attorney General
Open Records Division

SH/ulg

Ref.: ID# 108125

Enclosures: Submitted documents

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(w/o enclosures)