



March 27, 2001

Mr. Jeffrey J. Horner  
Bracewell & Patterson, L.L.P.  
711 Louisiana Street, Suite 2900  
Houston, Texas 77002-2781

OR2001-1207

Dear Mr. Horner:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 145353.

The Newton Independent School District (the "district"), which you represent, received a request for any and all documents relating to a specified employee's dismissal, all documents relating to the investigation of the employee's conduct as well as the employee's personnel file. You claim that some of the requested information is excepted from disclosure under sections 552.102, 552.103, 552.107, 552.114, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also reviewed the comments submitted on behalf of the requestor. *See Gov't Code § 552.304* (providing for submission of public comments).

Pursuant to section 552.301(e)(1), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A)-(D). Although you state the exceptions that apply, you have not provided any written comments stating the reasons why the stated exceptions apply to the submitted information as required by section 552.301(e).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301(e) results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See Gov't Code § 552.302; Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome

presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). You state that sections 552.103 and 552.107 apply to the submitted information. Sections 552.103 and 552.107(1) are discretionary exceptions and do not provide a compelling reason to overcome the presumption of openness. *See* Open Records Decision No. 473 at 2 (1987) (discretionary exceptions under the Act can be waived). However, your remaining asserted exceptions may provide a compelling reason to overcome the presumption of openness. *See* 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). Therefore, we will address the applicability of sections 552.102, 552.114, and 552.117 of the Government Code as well as other statutes that make portions of the submitted information confidential.

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 for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Government Code. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information protected by the common law right of privacy. *Id.* The doctrine of common law privacy protects information that contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and the information must be of no legitimate concern to the public. *Id.* Prior decisions of this office have found that financial information relating to an individual ordinarily satisfies the first requirement of the test for common law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. Open Records Decision Nos. 545 (1990), 373 (1983). A public employee's allocation of his salary to a voluntary investment program offered by his employer is a personal investment decision, and information about it is excepted from disclosure by a common law right of privacy. Open Records Decision No. 545 (deferred compensation plan). Information revealing that an employee participates in a group insurance plan funded partly or wholly by the governmental body is not excepted from disclosure by a common law right of privacy. Open Records Decision No. 600 at 10 (1992). The submitted information contains a paycheck stub that reveals payroll deductions. You must withhold any deductions that are voluntary and not funded partly or wholly by the district under section 552.101 in conjunction with common law privacy. Further, you must withhold the marked bank account numbers under section 552.101 in conjunction with common law privacy. The remaining submitted information is not protected under section 552.102 or section 552.101 in conjunction with common law privacy. *See, e.g.*, Open Records Decision Nos. 470 (1987), 455 (1987), 444 (1986).

Further, the submitted information contains college transcripts of the former employee. Section 552.102(b) of the Government Code provides:

Information is excepted from [public disclosure] if it is a transcript from an institution of higher education maintained in the personnel file of a professional public school employee, except that this section does not exempt from disclosure the degree obtained or the curriculum on a transcript in the personnel file of the employee.

The submitted transcripts are maintained in the personnel file of a professional public school employee. As such, the district must withhold all information on the submitted transcripts, except for the degree obtained and the curriculum. We have marked the information that is not excepted by section 552.102(b) and must be released. You must withhold the remaining information in the transcripts.

You also contend that the information is excepted under section 552.114 of the Government Code. The Family Educational Rights and Privacy Act of 1974 (“FERPA”) provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student’s education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student’s parent. *See* 20 U.S.C. § 1232g(b)(1). “Education records” means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990).

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

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 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.

Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." See Open Records Decision Nos. 332 (1982), 206 (1978). We note that the names of students have been redacted in portions of the submitted information. In other portions, initials have been used in place of the student's name. We have also marked the names of students and parents that must be withheld under FERPA. Accordingly, we have marked the types of information that may reveal or tend to reveal information about a student that must be withheld pursuant to FERPA.

The submitted information also contains evaluations of teachers and the principal. Section 552.101 also encompasses information protected by other statutes. Section 21.355 of the Education Code provides, "A document evaluating the performance of a teacher or administrator is confidential." This office interprets this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. See Open Records Decision No. 643 (1996). In that decision, 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.* We also concluded that the word "administrator" in section 21.355 means a person who is required to and does in fact hold an administrator's certificate under subchapter B of chapter 21 of the Education Code and is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.* Based on the reasoning set out in Open Records Decision No. 643, we conclude that some of the documents submitted to this office are confidential under section 21.355 of the Education Code. We have marked the documents the district must withhold under section 552.101 in conjunction with section 21.355 of the Education Code.

We also note that the submitted information contains a medical record that is subject to the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002(b) of the Occupations Code protects from disclosure "[a] record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician." Medical records may only be released as provided by chapter 159 of the Occupations Code. Open Records Decision No. 598 (1991). The Occupations Code provides for both the confidentiality of medical records and certain statutory access requirements. *Id.* at 2.<sup>1</sup> We have marked the information that falls within the protection of chapter 159 of the Occupations Code and may be released only in accordance with the MPA's access provisions. Because none of the MPA's access provisions appear to apply in this instance, the district must withhold the marked information.

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<sup>1</sup>The medical records must be released upon the patient's signed, written consent, provided that the 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. Occ. Code §§ 159.004, .005.

Further, we note that the submitted information contains the transcript of an executive session. Section 551.104(c) of the Government Code provides that “[t]he certified agenda or tape of a closed meeting is available for public inspection and copying *only under a court order issued under Subsection (b)(3).*” (emphasis added). In Attorney General Opinion JM-840 (1988), this office determined that a certified agenda encompassed a verbatim transcript of an executive session. *See also* Open Records Decision No. 60 (1974) (finding that meeting minutes of an executive session are confidential under the predecessor to section 551.104). Therefore, you must withhold the transcript of the executive session under section 552.101 in conjunction with section 551.104(c) of the Government Code. *See also* Open Records Decision No. 495 (1988) (providing that information protected under predecessor to section 551.104 cannot be released to a member of the public in response to an open records request).

You also state that section 552.117 applies to the submitted information. Section 552.117(1) exempts from disclosure information that relates to the home addresses, home telephone numbers, social security numbers, and family member information of current or former employees of a governmental body who request that this information remain confidential under section 552.024. You do not indicate whether or not the subject employees made the election under section 552.024 to prohibit the release of section 552.117 information. Please note that whether a particular piece of information is protected by section 552.117(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a proper election must be made *prior* to the request for information. If the employees did not elect prior to the request to keep their home addresses, telephone numbers, social security numbers, or family member information confidential under section 552.024, this information may not be withheld from public disclosure based on section 552.117(1) of the Government Code. If the employees did make such an election, this information must be withheld. We have marked the types of information that may be subject to section 552.117(1) of the Government Code.

We also note that social security numbers are excepted from required public disclosure under section 552.101 of the Government Code in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if the social security numbers were obtained or are 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). It is not apparent to us that the social security numbers contained in the records at issue were obtained or are maintained by the district pursuant to any provision of law enacted on or after October 1, 1990. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the district to obtain or maintain a social security number. Therefore, we have no basis for concluding that the social security numbers at issue were obtained or are maintained pursuant to such a statute and are, therefore, confidential under section 405(c)(2)(C)(viii)(I). We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing the social security numbers, the district should ensure that these numbers were not obtained or maintained by the district pursuant to any provision of law enacted on or after October 1, 1990.

In conclusion, you must withhold voluntary payroll deductions and bank account numbers under section 552.102 and section 552.101 in conjunction with common law privacy. You must also withhold the submitted transcripts with the exception of the curriculum and the degree obtained which we have marked to be released. Further, you must withhold student-identifying information including the information we have marked under FERPA. The marked medical record may only be released in accordance with the MPA. You must also withhold the teacher and administrator evaluations we have marked under section 21.355 of the Education Code. Pursuant to section 551.104 of the Government Code, you must withhold the transcript of the executive session. Further, you must withhold the section 552.117(1) information if the employees made a timely section 552.024 election. Social security numbers may also be confidential pursuant to federal law. You must release the remaining information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

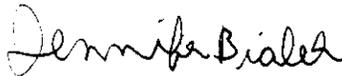
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jennifer H. Bialek  
Assistant Attorney General  
Open Records Division

JHB/er

Ref: ID# 145353

Encl: Marked documents

cc: Mr. Danny Robbins  
*Houston Chronicle*  
P.O. Box 4260  
Houston, Texas 77210  
(w/o enclosures)

Mr. Joseph R. Larsen  
Ogden, Gibson, White & Broocks, L.L.P.  
2100 Pennzoil South Tower  
711 Louisiana  
Houston, Texas 77002  
(w/o enclosures)