



April 5, 2001

Mr. Juan J. Cruz
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Laredo, Texas 78041

OR2001-1376

Dear Mr. Cruz:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 145651.

The Mathis Independent School District (the “district”), which you represent, received a request for the personnel file of a former district coach; any and all records relating to the coach’s departure from the district; any and all records stemming from any district investigation of the coach’s conduct; and any and all correspondence between the district and the State Board of Educator Certification relating to the coach. You claim that the requested information is excepted from disclosure pursuant to sections 552.101, 552.102, 552.107, 552.111, 552.114, and 552.131 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information. We have also considered the arguments submitted by the requestor pursuant to section 552.304 of the Government Code.

We note at the outset that section 552.022 of the Government Code makes certain information expressly public, and therefore, not subject to discretionary exceptions to disclosure. Such information is “not excepted from required disclosure under [chapter 552 of the act] unless [it is] expressly confidential under other law.” Gov’t Code § 552.022(a). One category of expressly public information under section 552.022 is “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108[.]” Gov’t Code § 552.022(a)(1). The information in Exhibit B involves a completed investigation. Therefore, unless the information in Exhibit B is “expressly confidential under other law,” it must be released to the requestor. You claim

that some of the information in Exhibit B is excepted from disclosure pursuant to section 552.111 of the Government Code. Because our office has previously concluded that section 552.111 is a discretionary exception, it is not "other law" that expressly makes information confidential. *See* Open Records Decision No. 470 (1987) (statutory predecessor to section 552.111 is a discretionary exception). Therefore, we will not consider the applicability of section 552.111 of the Government Code to any of the documents in Exhibit B.

You also claim that information in Exhibits B, E, and F is excepted from public disclosure pursuant to section 552.114 of the Government Code and the Family Educational Rights and Privacy Act of 1974 ("FERPA"). 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). 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).

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. However, since you submitted the documents for our review, we will consider whether any of the information in Exhibits B, E, and F is protected by FERPA. After careful review, we agree that some of the information in Exhibits B, E, and F may reveal or tend to reveal personally identifiable information directly related to a student that must be withheld pursuant to section 552.114 of the Government Code and FERPA. *See also* Open Records Decision No. 224 (1979) (student's handwritten comments that would make identity of student easily traceable through handwriting, style of expression, or particular incidents related in comments protected under FERPA). We have marked a representative sample of the information that is protected by FERPA.

You also claim that information in Exhibit B is excepted from disclosure pursuant to section 552.131 of the Government Code. Section 552.131 provides:

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

(d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or prosecutor upon proper request made in compliance with applicable law and procedure.

(e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be constitutional, statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.

Gov't Code § 552.131. Because the legislature limited the protection of section 552.131 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under that exception must clearly identify the specific civil, criminal, or regulatory law that is alleged to have been violated. *See* Gov't Code § 552.301(e)(1)(A). You state that the documents submitted to the State Board of Educator Certification "chronicle the alleged abuse by a former School District employee against the School District students." After careful review, we have marked the information that would substantially reveal the identities of "informers" associated with this matter. You may withhold this information from disclosure pursuant to section 552.131 of the Government Code.

the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Consequently, the district may only withhold the marked information under section 552.117 on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. The district may not withhold this information under section 552.117 if the employee did not make a timely election to keep the information confidential. *See* Open Records Decision No. 530 at 5 (1989) (stating whether particular piece of information is protected by section 552.117 must be determined at time request for it is made).

If the employee did not elect to withhold his social security number as prescribed by section 552.024, the social security number may nevertheless be confidential under federal law. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* 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 social security numbers. Therefore, we have no basis for concluding that the social security number at issue is confidential under section 405(c)(2)(C)(viii)(I). We caution the district, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing the social security number at issue, you should ensure that the number was not obtained or are maintained by the district pursuant to any provision of law enacted on or after October 1, 1990.

You also claim that Exhibits B and I are excepted from disclosure pursuant to the common law right of privacy. The common law right to privacy is incorporated into the Public Information Act by section 552.101, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Information is protected by common law privacy 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. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); *see also* Open Records Decision No. 611 at 1 (1992). The documents in Exhibit B relate solely to the work behavior and job performance of a district employee. Since there is a legitimate public interest in the work behavior of public employees and the conditions for their continued employment, the district may not withhold the information Exhibit B from public disclosure based on the common law right to privacy. *See* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in having access to information concerning the performances of governmental employees), 444 (1986) (public has legitimate

interest in knowing reasons for public employee's demotion, dismissal, or resignation), 423 at 2 (1984) (scope of public employee privacy is narrow).

You also seek to withhold under common law privacy several documents in Exhibit I which relate to the former employee's health insurance coverage.¹ Previous decisions of this office have found that financial information relating only 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. 600 (1992), 545 (1990), 373 (1983). After examining the documents in Exhibit I, we are unable to determine whether the insurance information involves a financial transaction between the former employee and the district. Therefore, if the employee's insurance is funded in whole or in part by public monies, the documents must be released. If, however, the insurance is paid solely by the employee, the documents must be withheld under section 552.101 in conjunction with the common law right of privacy.

Section 552.101 also encompasses information protected by other statutes. You claim that Exhibit H is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. Section 21.355 of the Education Code provides, "[a] document evaluating the performance of a teacher or administrator is confidential." This office interpreted 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 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, we conclude that Exhibit H is confidential pursuant to section 21.355 of the Education Code. Therefore, Exhibit H must be withheld in its entirety pursuant to section 552.101

Exhibit I contains a medical record, access to which is governed by the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. The MPA provides that "a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter." Occupations Code § 159.002(b). Thus, the submitted medical record may only be released in accordance with chapter 159 of the Occupations Code. See Occ. Code §§ 159.002(c), 159.004, 159.005; see also Open Records Decision No. 598 (1991)

¹See *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (stating that test to be applied to information claimed to be protected under section 552.102 is the same as test formulated by Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under doctrine of common law privacy as incorporated by section 552.101).

(in governing access to specific subset of information, Medical Practice Act governs over more general provisions of the Public Information Act).

You also claim that Exhibit C is excepted from disclosure by section 552.111 of the Government Code. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. See *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); see also *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, No. 03-00-00219-CV, 2001 WL 23169, at * 5 (Tex. App.--Jan. 11, 2001, no pet. h.). The purpose of section 552.111 is “to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes.” *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). An agency’s policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. See Open Records Decision No. 615 at 5-6 (1993). The document in Exhibit C relates solely to a personnel matter of the district. Consequently, Exhibit C is not excepted from disclosure under section 552.111 and must, therefore, be released.

You also argue that information in Exhibits D, E, and G is excepted from disclosure pursuant to section 552.107 of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only “privileged information,” that is, information that reflects either confidential communications from the client to the attorney or the attorney’s legal advice or opinions; it does not apply to all client information held by a governmental body’s attorney. See Open Records Decision No. 574 at 5 (1990). Purely factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id* at 3. After careful review, we agree that the information in Exhibits D and G constitute either a client confidence or an attorney’s legal advice or opinion. Therefore, Exhibits D and G are excepted in their entirety from disclosure pursuant to section 552.107 of the Government Code. See Tex. R. Evid. 503(a)(2), (5); see also *In re Monsanto Co.*, 998 S.W.2d 917, 922 (Tex. App. - Waco 1999, orig. proceeding) (finding that communication received by client’s representative is confidential if received for purpose of effectuating legal representation for client). You have not, however, demonstrated that any of the information in Exhibit E is protected by the attorney-client privilege. Accordingly, the district may not withhold Exhibit E under section 552.107 of the Government Code.

In summary, we have marked the type of information in Exhibits B, E, and F that must be withheld from disclosure in accordance with FERPA. Additionally, we have marked information in Exhibit B that is excepted from disclosure pursuant to section 552.131 of the Government Code. The district must withhold the employee's section 552.117 information in Exhibit B if the employee made a timely election under section 552.024. The social security numbers may also be excepted from disclosure under federal law. Exhibit H must be withheld from disclosure in its entirety pursuant to section 552.101 in conjunction with section 21.355 of the Education Code. One of the documents in Exhibit I is a medical record subject to the MPA. If the employee pays entirely for his health insurance, then the remaining documents submitted as Exhibit I must be withheld under common law privacy. Exhibits D and G are excepted in their entirety from disclosure pursuant to section 552.107. The remaining information in the submitted documents must, however, be released to the requestor.

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).

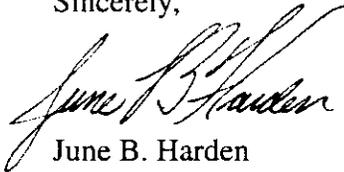
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

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,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/RJB/seg

Ref: ID# 145651

Encl. Marked documents

cc: Mr. Danny Robbins
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(w/o enclosures)