



April 18, 2001

Mr. Juan J. Cruz
Escamilla & Poneck, Inc.
Attorneys and Counselors
603 Navarro, Suite 1200
San Antonio, Texas 78205

OR2001-1531

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# 146184.

The Mathis Independent School District (the "district"), which you represent, received a request for the personnel file for John Alan Garner, as well as all records relating to Mr. Garner's hiring by the district. You state that the responsive documents not submitted to this office have been released to the requestor. You claim, however, that the submitted information is not information subject to the Public Information Act (the "Act") under section 552.002 and, alternatively, that the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

First, you argue that the handwritten notes on the submitted document are not considered public information pursuant to section 552.002 of the Government Code. Section 552.021 of the Government Code provides for public access to "public information." Section 552.002 defines "public information" as

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(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. This office has additionally observed that certain factors are relevant, although not exhaustive, in deciding whether a document is essentially a governmental or personal document: who prepared the document; the nature of its contents; its purpose or use; who possessed it; who had access to it; whether the governmental body required its preparation; and whether its existence was necessary to or in furtherance of official business. Open Records Decision No. 635 (1995). *see also* Open Records Decision Nos. 626 (1994) (handwritten notes taken during oral interview by Texas Department of Public Safety promotion board members public are public information), 450 (1986) (notes of appraisers taken in the course of teacher appraisals were public information), 120 (1976) (faculty members' written evaluations of doctoral student's qualifying exam are subject to act). *But see* Open Records Decision Nos. 635 (1995) (calendar purchased and maintained by a commission employee who had sole access to it was not subject to the act), 77 (1975) (personal notes made by individual faculty members for their own use as memory aids were not subject to the act).

You state that the submitted document "contains the personal notes of a District employee who conducted a reference check on Mr. Garner." You further state that these notes "were meant to serve as a notation device and memory-jogger" and that they "were intended to be private in nature." We conclude, however, that the notes contained in the submitted document deal with a governmental employee's official business as they relate to the hiring of a teacher by the district. Therefore, based on our review of the submitted information, we believe that the handwritten notes consist of "information that is collected, assembled or maintained under a law or ordinance or in connection with the transaction of official business." *See* Gov't Code § 552.002. Consequently, we conclude that the handwritten notes in the submitted document are public information subject to the Act.

Next, you argue that the handwritten notes are excepted from disclosure under section 552.101 of the Government Code in conjunction with section 21.355 of the Texas Education Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 21.355 of the Education Code provides that "[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. 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.* You have not indicated, nor are we able to determine from the submitted documents, whether the applicant in question held an appropriate teacher's certificate or permit at the time he applied for the position with the district. If he did not, the submitted documents are not confidential under section 21.355. However, if the applicant did hold an appropriate teacher's certificate or permit, the next question we must address is whether the submitted documents "evaluat[e] the performance of a teacher" under section 21.355.

You state that the handwritten notes on the submitted document contain “an opinion of Mr. Garner’s job performance/appraisal by his former supervisor.” We find that some of the information contained therein does “evaluate” the applicant’s prior employment performance and must be withheld if the applicant held the appropriate teacher’s certificate or permit at the time he applied for employment with the district. The remaining information does not evaluate the applicant’s previous employment and is therefore not excepted from disclosure under section 552.101 in conjunction with section 21.355 of the Education Code. We have marked the document accordingly.

Lastly, we note that section 552.117 may be applicable to some of the submitted information. Section 552.117 excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the school district may only withhold information under section 552.117 on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was received. For any employee who timely elected to keep his or her personal information confidential, the school district must withhold the employee’s home address and telephone number, social security number, and any information that reveals whether the employee has family members. The school district may not withhold this information under section 552.117 for an employee who did not make a timely election to keep the information confidential. We have marked the information that is excepted from disclosure under section 552.117 if the employee has made a timely election under section 552.024.

If the employee did not timely 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.* We have no basis for concluding that the social security number in the submitted document is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, the district should ensure that no such information was obtained or is maintained pursuant to any provision of law, enacted on or after October 1, 1990.

In summary, the submitted information is subject to the Act. Moreover, if the applicant was not a "teacher" at the time he applied for employment, the submitted information is not confidential under section 21.355 of the Education Code. If the applicant did hold the appropriate teacher's certificate or permit at the time he applied for employment with the district, the district must withhold the marked information under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. In addition, if the employee made a timely election under section 552.024, the district must withhold the employee's home address and social security number under section 552.117. If the employee failed to make a timely election under section 552.024, his home address and social security number will not be excepted from disclosure under section 552.117. Prior to releasing the employee's social security number, however, the district should ensure that it was not obtained or maintained pursuant to any provision of law enacted on or after October 1, 1990. The remaining information must 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,



Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/rr

Ref: ID# 146184

Encl: Submitted documents

cc: Mr. Danny Robbins
Houston Chronicle Sports
801 Texas Avenue
Houston, Texas 77002
(w/o enclosures)