



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

January 15, 2003

Mr. Philip Marzec
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P.O. Box 200
San Antonio, Texas 78291-0200

OR2003-0297

Dear Mr. Marzec:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 174999.

The San Antonio Independent School District (the "district"), which you represent, received a request for information regarding a named district teacher. You state that you have released some responsive information to the requestor. You claim, however, that a portion of the requested 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.

Initially, we must address the district's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply to the requested information not later than the tenth business day after the date of receiving the written request for information. *See Gov't Code* § 552.301(b). You state that the district received the present request for information on October 8, 2002. Therefore, the district was required to submit its request for a decision from this office no later than October 22, 2002. We received your request for a decision on November 4, 2002. Although you state that the district and the requestor agreed to treat the request as if received on October 21, 2002, we note that a governmental body and a requestor cannot agree to circumvent the procedural requirements of the Public Information Act. *See Gov't Code* § 552.301 (describing ten and fifteen business day requirements in requesting attorney general decision). Consequently, we determine that the district failed to comply with the ten business day deadline mandated by section 552.301(b) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 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). Section 552.101 provides a compelling reason to overcome the presumption of openness. *See* Open Records Decision No. 630 (1994) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). We will therefore address your arguments under section 552.101.

Section 552.101 of the Government Code 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 has 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 determined 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 inform us that the teacher at issue held a teaching certificate under chapter 21 and was engaging in teaching at the time of the evaluations at issue. Based on your representation and our review, we determine that the documents submitted as Exhibit C consist of evaluations of a certified teacher and are confidential under section 21.355 of the Education Code. Therefore, pursuant to section 552.101 of the Government Code, the district must withhold the documents in Exhibit C from disclosure.

We next address the remaining submitted documents. 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); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). "Education records" are 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 relating to a student must be withheld from required public disclosure under FERPA to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). Moreover, all handwritten documents created by students must be withheld in their entirety. *See* Open

Records Decision No. 224 (1979) (student's handwritten comments would make identity of student easily traceable and such comments are therefore excepted by statutory predecessor to section 552.114).

One of the submitted documents consists of a communication from the Texas Department of Protective and Regulatory Services to a district administrator concerning a named district student. We determine that this document is an education record for purposes of FERPA. However, we note that the requestor in this case is an attorney who represents this student's parent. Under FERPA, a student's parent has the right to inspect and review the education records of that student. *See* 20 U.S.C. § 1232g(a)(1)(A). Subsection (b)(2) provides that a written consent from the student's parents must specify the "records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents." 20 U.S.C. § 1232g(b)(2); *see Belanger v. Nashua, New Hampshire, Sch. Dist.*, 856 F. Supp. 40 (D.N.H. 1994) (district records relating to student's juvenile court proceedings were "education records" which parent was entitled to access irrespective of state confidentiality law). Thus, you must release this student's records to the requestor upon receipt of a proper written consent as required by section 1232g(b)(2). We have marked the information that you must release to the requestor upon receipt of proper written consent.

You state, and the documents reflect, that some of the remaining submitted documents relate to another student's sexual harassment complaint against the teacher at issue. These documents pertain to the student complainant and make reference to other district students. Therefore, this information directly relates to district students and constitutes education records for the purpose of FERPA. Thus, information in the submitted documents that identifies particular students must be withheld under FERPA. Furthermore, the documents at issue include several handwritten documents created by students that must be withheld in their entirety. In addition to the student identifying information you have marked, we have marked information that the district must withhold under FERPA.

Next, a portion of the information not protected under FERPA is protected by common-law privacy. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The district argues that the investigation at issue pertains to an allegation of sexual harassment. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to

the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.* Some of the submitted documents reveal the identities of district employee witnesses in the investigation of the sexual harassment complaint at issue. Pursuant to *Ellen*, the district must withhold the identities of witnesses from disclosure. We have marked the information that must be withheld under *Ellen* and common-law privacy.

You contend that other information in the submitted documents is also protected by common-law privacy. This office has found that personal financial information is generally excepted from required public disclosure under common-law privacy. Open Records Decision Nos. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, are protected under common-law privacy), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common-law privacy). This office has also ruled, however, that the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision No. 600 (1992) (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure). Upon review, we find that the submitted personnel records contain a document, which we have marked, that reflects personal financial decisions that are not of legitimate public interest. Accordingly, the district must withhold the document we have marked under section 552.101 and common-law privacy.

We also note, however, that you have redacted the name of the ex-wife of the teacher at issue as information protected by common-law privacy. We determine that this individual's name is not highly intimate or embarrassing. Accordingly, the district may not withhold the name under section 552.101 in conjunction with common-law privacy.

Next, the submitted personnel records contain information that may be excepted from disclosure under section 552.117 of the Government Code. Section 552.117 excepts from disclosure 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 timely elect to keep this information confidential pursuant to section 552.024. Whether information is protected by section 552.117 must be determined at the time the request for information is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the district may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior

to the date on which the request for this information was made. Consequently, if the teacher at issue timely elected to keep his social security number, home address and telephone number, and family member information confidential, the district must withhold this information from the remaining documents under section 552.117 of the Government Code. If the teacher did not timely elect to keep this information confidential, the district may not withhold the information under section 552.117 of the Government Code.

We note, however, that if the teacher did not timely elect to keep his social security number confidential pursuant to section 552.024, the social security number may be confidential 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 or 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 documents is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing the teacher's social security number, the district should ensure that the social security number was not obtained and is not maintained by the school district pursuant to any provision of law, enacted on or after October 1, 1990.

Finally, the submitted personnel documents also contain a copy of the teacher's Texas driver's license. Driver's license and motor vehicle registration information issued by an agency of this state are excepted from disclosure under section 552.130 of the Government Code. We have marked driver's license information that the district must withhold pursuant to section 552.130.

In summary, the district must withhold the teacher evaluations submitted as Exhibit C pursuant to section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. We have marked a document relating to the child of the requestor's client, which the district must release upon receipt of the parent's proper written consent as required by FERPA. In addition to the student identifying information you have marked in the documents, we have marked information that the district must withhold under FERPA. We have marked information that the district must withhold under section 552.101 in conjunction with common-law privacy. If the teacher at issue timely elected to keep his home address and telephone number, social security number, and family member information confidential pursuant to section 552.024 of the Government Code, then the district must withhold the information we have marked pursuant to section 552.117 of the Government Code. Otherwise, this information must be released. The teacher's social security number may be confidential under section 552.101 in conjunction with federal law. Driver's license information must be withheld under section 552.130 of the Government Code. The remainder of the submitted 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. 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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 174999

Enc: Submitted documents

c: Mr. Raul A. Rios
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(w/o enclosures)