



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

January 21, 2003

Mr. Therold I. Farmer
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
P.O. Box 2156
Austin, Texas 78752

OR2003-0415

Dear Mr. Farmer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 175282.

The Hallsville Independent School District (the "district"), which you represent, received a written request for the following information:

any documents pertaining to [a former district employee's] departure from [the district], including his letter of resignation and any correspondence, including e-mails and memos, to or from [the employee], the superintendent, school board members or other school officials pertaining to his departure, job performance or job satisfaction.

I also request any correspondence, including memos or e-mail, prepared by or to [the employee], the superintendent or school board members regarding preparations for this year's budget or the district's financial situation during the 2001-02 and 2002-03 fiscal years.

You indicate that some of the responsive information will be released to the requestor. You contend, however, that the remaining information coming within the scope of the request is excepted from required disclosure pursuant to sections 552.101, 552.102, and 552.111 of the Government Code.

Initially, we note that information at issue is not confidential under the Public Information Act (the "Act") simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied* 430 U.S. 931 (1977). In other words, a governmental body cannot, through a contract, overrule or repeal provisions of the Act. Open Records Decision

No. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”); Open Records Decision No. 514 (1988); Attorney General Opinion JM-672 (1987). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any agreement between the district and former district employee specifying otherwise.

We next note that the “Settlement Agreement” you submitted to this office under “Group Four” is subject to section 552.022. Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. *See* Gov’t Code § 552.022(a)(3), (a)(18) (making public “information in [a] . . . contract relating to the receipt or expenditure of public or other funds by a governmental body” and “a settlement agreement to which a governmental body is a party,” respectively). We therefore conclude that the “Settlement Agreement” must be released under section 552.022 unless the information is expressly made confidential under other law.

You contend that the “Settlement Agreement” is excepted from public disclosure pursuant to sections 552.102 and 552.111 of the Government Code. However, section 552.111 of the Government Code is a discretionary exception under the Public Information Act and does not constitute “other law” for purposes of section 552.022. *See, e.g.,* Open Records Decision No. 470 (1987) (governmental body may waive section 552.111). Consequently, the district may not withhold any portion of the “Settlement Agreement” pursuant to section 552.111. However, because section 552.102 of the Government Code excepts from public disclosure information deemed confidential by law, we will address the applicability of this exception to the “Settlement Agreement.”

Section 552.102(a) of the Government Code excepts from public disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy” Section 552.102 is designed to protect public employees’ personal privacy. The scope of section 552.102 protection, however, is very narrow. *See* Open Records Decision No. 336 (1982); *see also* Attorney General Opinion JM-36 (1983). The test for section 552.102 protection is the same as that for information protected by common-law privacy under section 552.101: the information must contain 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. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref’d n.r.e.). The “Settlement Agreement” reflects the terms and conditions under which the former district employee submitted his resignation to the district, and as such cannot be deemed to be outside the realm of public interest. *See* Open Records Decision No. 444 (1986) (public has a legitimate interest in knowing the reasons for the dismissal, demotion, promotion, or resignation of public employees). Section 552.102 was not intended to protect the type of information at issue here.

You express concern that the release of the "Settlement Agreement" would violate the employee's liberty interests under the Fourteenth Amendment of the United States Constitution. We note, however, that

[t]o establish a liberty interest, an employee must demonstrate that his governmental employer has brought *false charges* against him that 'might seriously damage his standing and associations in his community,' or that impose a 'stigma or other disability' that forecloses 'freedom to take advantage of other employment opportunities.' *Board of Regents v. Roth*, 408 U.S. 564 (1972).

Wells v. Hico Indep. Sch. Dist., 736 F.2d 243, 256 (5th Cir. 1984) (emphasis added; parallel citations deleted). The "Settlement Agreement" does not contain any "false charge" against the employee who resigned. Consequently, the release of this information would not implicate the employee's Fourteenth Amendment interests. Accordingly, the district must release the "Settlement Agreement" to the requestor.

We now address the applicability of the exceptions you raised to the remaining submitted information. You contend that the documents you submitted to this office under Groups One, Two, and Three are made confidential under section 21.355 of the Education Code and thus must be withheld from the public pursuant to section 552.101 of the Government Code.¹ Section 21.355 of the Education Code makes confidential "[a]ny document evaluating the performance of a teacher or administrator." This office has 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). However, based on our review of the submitted documents, we conclude that only the memorandum dated August 5, 2002 contained in Group One constitutes an "evaluation" for purposes of section 21.355 of the Education Code. Consequently, this is the only document that the district must withhold pursuant to section 21.355.

You also contend that the documents you submitted under Groups One, Two, and Three are excepted from public disclosure under section 552.102 of the Government Code and in conjunction with the Fourteenth Amendment. However, for the same reasons discussed above, we conclude that no portion of these documents is excepted from public disclosure under those bases.

Finally, you contend that the documents you submitted under Groups One, Two, and Three are excepted from public disclosure under section 552.111 of the Government Code, which excepts from required public disclosure interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use

¹Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

in the entity's policymaking process. Open Records Decision No. 615 at 5 (1993). The purpose of this section 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); *see also City of Garland v. Dallas Morning News*, 969 S.W.2d 548 (Tex. App.--Dallas 1998), *aff'd*, 22 S.W.3d 351 (Tex. 2000). In Open Records Decision No. 615 at 5, this office held that

to come within the [section 552.111] exception, information must be related to the *policymaking* functions of the governmental body. An agency's policymaking functions do not encompass routine internal administrative and personnel matters [Emphasis in original.]

After reviewing the records you submitted to this office, we conclude that none of this information constitutes advice, opinion, or recommendation intended for use in the district's policymaking process. *See* Open Records Decision Nos. 439 (1986) (section 552.111 protects information, disclosure of which would inhibit essential "give-and-take" of decision-making process); 137 (1976) (discussing pre-decisional and post-decisional documents). Rather, these records pertain to a personnel matter not protected from disclosure under section 552.111. Accordingly, we conclude that none of the information at issue is protected from public disclosure under section 552.111.

Because you have raised no applicable exception to required public disclosure, we conclude that the district must release the submitted information in its entirety. 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,


V.G. Schimmel
Assistant Attorney General
Open Records Division

VGS/RWP/seg

Ref: ID# 175282

Enc: Submitted documents

c: Ms. Jo Lee Ferguson
Longview News-Journal
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(w/o enclosures)