OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

February 18, 2003

Ms. Mia M. Martin
General Counsel
Richardson Independent School District
400 South Greenville Avenue
Richardson, Texas 75081-4198

OR2003-1059

Dear Ms. Martin:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 176626.

The Richardson Independent School District (the "district") received, from the same requestor, four requests for information relating to a named district employee's personnel file, information furnished to certain individuals pertaining to teachers and substitute teachers, documents relating to the job duties of the named employee, and information relating to student discipline at a certain high school. You claim that portions of the submitted information are excepted from disclosure under sections 552.026, 552.101, 552.102, and 552.114 of the Government Code, and the Family Educational Rights and Privacy Act ("FERPA"). 20 U.S.C. § 1232(g). We assume that any other responsive information that existed on the date of the receipt of the request has been released. If not, the district must do so now. *See* Gov't Code §§ 552.301(a), .302. However, the district need not release information that did not exist when it received the request or create responsive information. *See* Open Records Decision Nos. 452 at 2-3 (1986) (document is not within the purview of the Public Information Act (the "Act") if, when a governmental body receives a request for it, it does not exist), 342 at 3 (1982) (Act applies only to information in existence, and does not require the governmental body to prepare new information). With respect to the information you seek to withhold, we have considered the exceptions you claim and reviewed the submitted representative sample of information.[1] We have also considered the comments submitted by the requestor. *See* Gov't Code § 552.304 (providing for submission of public comments.)

[1]We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

You assert that the submitted information must be withheld pursuant to sections 552.026, 552.101, and 552.114 of the Government Code. 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). 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.

This office generally applies the same analysis under section 552.114 and FERPA. *See* Open Records Decision No. 539 (1990).

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution must 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 must 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. You indicate that you have withheld education records from disclosure in accordance with Open Records Decision No. 634 (1995). Accordingly, we need not address the applicability of sections 552.026 and 552.114 and FERPA to that information.

We next note that the requestor asserts that the district offices were open during one of the days the district claims its offices were closed. Thus, we are faced with a factual dispute between the district and the requestor regarding whether the district complied with the requirements under section 552.301(b) of the Government Code. *See* Gov't Code § 552.301(b) (governmental body must submit request for information to this office within ten business days). We cannot resolve disputes of fact in the open records process, and therefore, we must rely on the representations of the governmental body requesting our opinion. Open Records Decision Nos. 554 (1990), 552 (1990). Based on the district's representations that its "operations" were closed November 27, 28, and 29, we conclude that the district complied with the requirements of section 552.301(b). Moreover, even if the

district failed to timely submit its request for this decision as required by section 552.301, sections 552.101 and 552.102 can provide compelling reasons for overcoming the presumption of openness created by section 552.302. Open Records Decision No. 586 (1991). Accordingly, we turn now to the district's assertions under sections 552.101 and 552.102.

In addressing the district's arguments under section 552.101, we note that the submitted information contains a completed evaluation which generally must be released pursuant to section 552.022(a)(1) of the Government Code. Section 552.022 makes "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body" public information unless expressly made confidential under other law and "except as provided by [s]ection 552.108[.]" As you argue that the submitted evaluation is excepted from disclosure under section 552.101, we will address your arguments with respect to the entirety of the submitted information.

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 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). 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.* Similarly, an administrator is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is administering at the time of his or her evaluation. *Id.* Based on your arguments and our review of the submitted information, we find that the submitted performance evaluation must be withheld from the public in its entirety pursuant to section 21.355 of the Education Code.

You also indicate that a social security number contained in the submitted information is confidential under section 552.101. Section 56.001 of the Occupations Code provides as follows:

> The social security number of an applicant for or holder of a license, certificate of registration, or other legal authorization issued by a licensing agency to practice in a specific occupation or profession that is provided to the licensing agency is confidential and not subject to disclosure under Chapter 552, Government Code.

Occ. Code § 56.001.[2] You indicate that the social security number at issue here belongs to an applicant for or holder of a license issued by the State Board of Education. However, you do not inform us, nor does it otherwise appear, that the district is a licensing agency. Accordingly, we find that you may not withhold the social security number at issue under section 56.001 of the Occupations Code, as encompassed by section 552.101.

However, the social security number at issue may be confidential under section 552.117(1). Section 552.117(1) 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 request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(1). However, information that is responsive to a request may not be withheld from disclosure under section 552.117(1) if the employee did not request confidentiality in accordance with section 552.024 or if the request for confidentiality under section 552.024 was not made until after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Accordingly, we conclude that the district must withhold the social security number from disclosure pursuant to section 552.117(1), if the individual made a request for confidentiality under section 552.024 of the Government Code for this information prior to the date on which the present request was received by the district.

If the individual did not timely elect to withhold from disclosure 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 may be withheld from disclosure in some circumstances 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 information is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Act 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, you should ensure that no such information was obtained or is maintained by the district pursuant to any provision of law enacted on or after October 1, 1990.

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[2]The language of section 56.001 of the Occupations Code corresponds in substance to the language of the former note to section 51.251 of the Occupations Code. House Bill No. 2812, which enacted section 56.001, also repealed the note to section 51.251. *See* Act of May 22, 2001, 77th Leg., R.S., § 14.001(b), 2001 Tex. Sess. Law Serv. 3970, 4098 (Vernon's) (repealing section 1, chapter 314, Acts of the 76th Legislature, Regular Session, 1999).

Finally, you claim that the academic transcripts contained in the named district employee's personnel file are excepted from disclosure pursuant to section 552.102(b) of the Government Code. Section 552.102(b) states:

> 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.

Gov't Code § 552.102(b). Based on our review of your arguments and the submitted transcripts, we conclude that the district must withhold all portions of the submitted transcripts from disclosure pursuant to section 552.102(b) of the Government Code, except for information concerning the named district employee's curriculum and degree obtained. The individual's curriculum and degree that he obtained must be released to the requestor.

In summary, you must withhold from disclosure the submitted performance evaluation under section 552.101 in conjunction with section 21.355 of the Education Code. You must withhold the named district employee's social security number under section 552.117(1) to the extent that this employee made a timely election for confidentiality in accordance with section 552.024. If he did not, the social security may be confidential under federal law. Finally, you must withhold all portions of the submitted transcripts from disclosure pursuant to section 552.102(b) of the Government Code, except for information concerning the named district employee's curriculum and degree obtained. This and all 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 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/sdk

Ref: ID# 176626

Enc: Submitted documents

c: Mr. James Umoren
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(w/o enclosures)