



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

April 24, 2003

Mr. S. Stephen Hilmy
Gary, Thomasson, Hall & Marks, P.C.
P.O. Box 2888
Corpus Christi, Texas 78403-2888

OR2003-2743

Dear Mr. Hilmy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 180070.

The Corpus Christi Independent School District (the "district"), which you represent, received a request for information relating to the evaluation of the superintendent, including the final evaluation and each of the board members' comments. You believe that some of the requested information is not subject to the Public Information Act (the "Act"), chapter 552 of the Government Code. You also claim that all of the requested information is excepted from disclosure under sections 552.101, 552.102, and 552.109 of the Government Code. We have considered your arguments and have reviewed the information you submitted.¹

Initially, we address your contention that some of the submitted information is not subject to the Act. The Act is applicable to "public information." *See* Gov't Code § 552.021. "Public information" is defined 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.

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the district to withhold any information that is substantially different from the submitted information. *See* Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Gov't Code § 552.002(a). Thus, virtually all information in the physical possession of a governmental body is public information that is encompassed by the Act. *Id.* § 552.022(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). Likewise, the Act is applicable to information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for a governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see also* Open Records Decision No. 462 at 4 (1987) (Act applies to information collected or maintained by consultant if information relates to governmental body's official duties or business, consultant acts as agent of governmental body in collecting information, and governmental body has or is entitled to access to information). However, the Act does not require a governmental body to release information if the governmental body that receives the request has neither possession of the information nor a right of access to it. *See* Open Records Decision Nos. 534 at 2-3 (1989), 518 at 2-3 (1989).

You assert that the information submitted as Exhibit II is not subject to the Act. You inform us that the information in question consists of the personal notes of individual members of the board of trustees and is not maintained by the district. You state that the district does not require the creation of the notes; that the notes are used, if at all, by the board members as references or memory aids in discussing the superintendent's evaluation; that the notes are solely possessed by each individual board member and made solely for their own use; and that the notes are not submitted to the district or maintained in any district files or records. This office has stated that certain factors are relevant, although not exhaustive, in deciding whether a document is essentially governmental or personal information: 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. *See* 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 subject to Act), 450 (1986) (notes of appraisers taken in course of teacher appraisals subject to Act), 120 (1976) (faculty members' written evaluations of doctoral student's qualifying exam subject to Act); *but see* Open Records Decision Nos. 635 (1995) (calendar purchased and maintained by governmental employee who had sole access to it not subject to Act), 77 (1975) (personal notes made by individual faculty members for personal use as memory aids not subject to Act).

Having considered your arguments and reviewed the information submitted as Exhibit II, we conclude that the Act is applicable to this information. The board members' notes are clearly related to the official business of the district and the board of trustees. Such information is not beyond the scope of the Act simply because the information is in the possession of a particular official or employee of a governmental body, rather than the governmental body as a whole. *See* Open Records Decision No. 635 at 3 (1995). On the contrary, information that clearly relates to a governmental body's official business is subject to the Act, regardless of whether the information is held by a particular official or employee, the governmental body's administrative offices, or the custodian of records. *Id.*; *see also* Open Records

Decision No. 425 at 1-2 (1985) (overruled on other grounds by Open Records Decision No. 439 (1986)) (information relating to selection of new school superintendent sent by consulting firm to board members' home addresses subject to Act). Accordingly, we conclude that the information submitted as Exhibit II constitutes "public information" under section 552.002 of the Act. Therefore, the district must release that information unless it comes within an exception to public disclosure.

Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that another statute makes confidential. The district raises section 552.101 in conjunction with section 21.355 of the Education Code. Section 21.355 provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. *See* Open Records Decision No. 643 (1996). In that decision, we determined that the word "teacher," for purposes of section 21.355, is a person who is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See* Open Records Decision No. 643 at 4. We also concluded that the word "administrator" in section 21.355 means a person who is required to and does in fact hold an administrator's certificate under subchapter B of chapter 21 of the Education Code and is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.*

You assert that all of the submitted information is confidential under section 21.355 of the Education Code. You state that this information relates to the board's evaluation of the district superintendent. You inform us that the superintendent is a certified administrator under chapter 21 of the Education Code. Based on your representations and our review of the information at issue, we conclude that this information is excepted from disclosure in its entirety under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code as information made confidential by law. As we are able to make this determination, we need not address your other arguments against disclosure.

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).

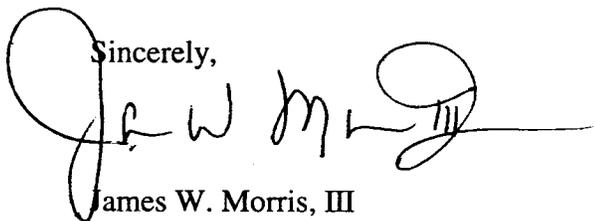
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dep't of Pub. 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,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is written in a cursive style with a large initial "J" and a long horizontal stroke at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 180070

Enc: Submitted documents

c: Mr. Tim Eaton
Corpus Christi Caller-Times
820 North Lower Broadway
Corpus Christi, Texas 78401
(w/o enclosures)