



OFFICE of *the* ATTORNEY GENERAL
GREG ABBOTT

May 23, 2003

Ms. Jennifer Scott, Ph.D.
Assistant Superintendent for Administrative/Pupil Services
Longview Independent School District
P.O. Box 3268
Longview, Texas 75606

OR2003-3496

Dear Ms. Scott:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181588.

The Longview Independent School District (the "district") received a request for five categories of information, including complaints, pertaining to a district employee. You state that you have produced some responsive information. You claim that portions of the requested information are excepted from disclosure under sections 552.101, 552.102, 552.114, and 552.135 of the Government Code, and under the Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of Title 20 of the United States Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

You contend that a portion of the submitted information is confidential under section 552.101 in conjunction with section 21.355 of the Education Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information protected by other statutes. Section 21.355 of the Education Code provides, "A document evaluating the performance of a

¹While you claim that some of the requested information is excepted under section 552.131 of the Government Code, former section 552.131, "Exception: Certain Information Held by School District," was renumbered as section 552.135 by the Seventy-seventh Legislature, effective September 1, 2001. See Act of May 22, 2001, 77th Leg., R.S., H.B. 2812, ch. 1420, § 21.001(54). The revision was non-substantive. Therefore, we will address your section 552.131 claim under section 552.135 of the Government Code.

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). After reviewing the information at issue, we find that it does not constitute a teacher evaluation for the purpose of section 21.355 of the Education Code. Therefore, the district may not withhold this information under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

We next note that you have redacted some information within the submitted documents pursuant to FERPA. 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). An “educational agency or institution” is defined as “any public or private agency or institution which is the recipient of funds under any applicable program.” *Id.* § 1232g(a)(3). The term “student” includes “any person with respect to whom an agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.” *Id.* § 1232g(a)(6); *see also* 34 C.F.R. § 99.3 (“student” is individual who is or has been in attendance at educational agency or institution and regarding whom agency or institution maintains education records). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990).

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.

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may 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 may 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.

In this instance, the district has submitted the responsive information that it believes to be subject to FERPA. Therefore, we will address the applicability of FERPA to that information. Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." See Open Records Decision Nos. 332 (1982), 206 (1978). This includes information that directly identifies a student, as well as information that, if released, would allow the student's identity to be easily traced. See Open Records Decision No. 224 (1979) (finding student's handwritten comments protected under FERPA because identity of student would be easily traceable through handwriting, style of expression, or particular incidents related in comments).

We agree that, to the extent the information you have redacted identifies particular students, it must not be disclosed unless the district has authority to release the information under the federal law. Further, the district must withhold the handwritten statements of students in their entirety, as well as some additional information, in order to avoid identifying particular students. We have marked the additional types of information that must be withheld under FERPA. As all of the information identifying students is subject to FERPA, we need not address your claim for this information under section 552.135 of the Government Code.

You also contend that the remaining documents contain information that is excepted from disclosure under section 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 683-85 (Tex. 1976), cert.

denied, 430 U.S. 931 (1977), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Act. Accordingly, we will consider your claim under 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. 540 S.W.2d at 685. We find that the information at issue is subject to a legitimate public interest because it relates to the work behavior and job performance of city employees. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Based on our review of the information, we determine that the information that you have marked is not protected from disclosure under section 552.102.

In summary, to the extent the information you have redacted identifies particular students, it must not be disclosed unless the district has authority to release the information under FERPA. We have marked the additional types of information that must be withheld under FERPA. The district must release the remaining submitted information 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 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

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CN/jh

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Enc. Submitted documents

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