



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

July 10, 2003

Mr. T. Berry  
Director of Human Resources  
Elgin Independent School District  
P.O. Box 351  
Elgin, Texas 78621

OR2003-4775

Dear Mr. Berry:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 184056.

The Elgin Independent School District (the "district") received a request for (1) the job description for high school counselors; (2) the last performance appraisal prepared for a named high school counselor; and (3) the named counselor's college degrees obtained and courses of study. You state that you have released some of the requested information. You claim, however, that the requested performance appraisal is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and have reviewed the information you submitted.

We initially note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, the submitted performance appraisal constitutes a completed evaluation made of, for, or by a governmental body. Therefore, the district must release the submitted information under section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 or expressly confidential under other law.

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. You contend that the submitted information is confidential under 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.*

In this instance, you inform us that the submitted evaluation relates to a school counselor rather than a teacher or an administrator. You contend, however, that the counselor qualifies as a teacher for purposes of section 21.355 of the Education Code. You rely on a definition of the word "teacher" found in section 21.201 of the Education Code. Section 21.201 provides in part:

In this subchapter:

- (1) "Teacher" means a superintendent, principal, supervisor, classroom teacher, counselor, or other full-time professional employee who is required to hold a certificate issued under Subchapter B or a nurse.[]

Educ. Code § 21.201(1). We note that, by its express language, the definition of "teacher" in section 21.201(1) applies only "[i]n this subchapter[.]" Section 21.201 is found in subchapter E of chapter 21 of the Education Code, "Term Contracts." Section 21.355, which provides for the confidentiality of an evaluation of a teacher or administrator, is found in subchapter H, "Appraisals and Incentives." Thus, section 21.201 does not define the word

“teacher” for the purposes of section 21.355.<sup>1</sup> Consequently, we find that section 21.355 of the Education Code is not applicable to the submitted evaluation of a school counselor, unless the counselor in question holds a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055, and was engaged in the process of teaching at the time of her evaluation, or an administrator’s certificate under subchapter B of chapter 21 of the Education Code and was performing the functions of an administrator at that time. *See* Educ. Code § 21.355; Open Records Decision No. 643 at 4. You do not inform us that the counselor to whom the submitted evaluation pertains holds any of these credentials or that she was performing the functions of a teacher or administrator at the time of the evaluation. We therefore conclude that you have not demonstrated that the submitted evaluation is confidential under section 21.355 of the Education Code, and thus the evaluation is not excepted from disclosure under section 552.101 of the Government Code. *See also* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 649 at 3 (1996) (language of confidentiality provision controls scope of its protection), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public).

You also believe that the submitted evaluation may contain information that implicates the privacy interests of the counselor to whom it pertains.<sup>2</sup> Section 552.101 of the Government Code also encompasses the common-law right to privacy. Common-law privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) of no legitimate public interest. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy encompasses the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has since

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<sup>1</sup>We also note that section 21.356, which immediately follows section 21.355 in subchapter H of the Education Code, separately provides for evaluations of school counselors. Section 21.356 states that “[t]he commissioner [of education] shall develop and periodically update a job description and an evaluation form for use by school districts in evaluating school counselors. The commissioner shall consult with state guidance counselor associations in the development and modification of the job description and the evaluation form.” Educ. Code § 21.356. Neither section 21.356 nor any other provision of subchapter H of the Education Code provides for the confidentiality of an evaluation of a school counselor.

<sup>2</sup>You inform us that you notified the individual to whom the appraisal pertains of this request for information and of her right to submit arguments to this office as to why the information should not be released. *See* Gov’t Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released). As of the date of this decision, we have received no correspondence from the individual who is the subject of the submitted information.

concluded that other types of information also are private under section 552.101. *See* Open Records Decision Nos. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to a drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress).

You assert that evaluations by their very nature are personal. In this instance, however, the subject of the submitted evaluation is the job performance of a public employee. This office has often noted that the public has a legitimate interest in the official conduct of public employees. *See* Open Records Decision Nos. 405 at 2 (1983) (manner in which public employee performed his or her job cannot be said to be of minimal public interest), 470 at 4 (1987) (public employee's job performance does not generally constitute his or her private affairs), 473 at 3 (1987) (fact that public employee receives less than perfect or even very bad evaluation not protected by common-law privacy). We therefore conclude that none of the information contained in the submitted evaluation is excepted from disclosure under section 552.101 in conjunction with common-law privacy. As the district claims no other exception to the disclosure of the submitted information, it must be released in its entirety under section 552.022(a)(1).

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

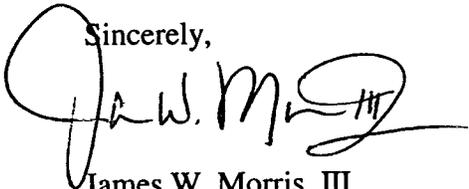
fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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 "J.W. Morris III". The signature is fluid and cursive, with a large initial "J" and "W".

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

JWM/sdk

Ref: ID# 184056

Enc: Submitted documents

c: Ms. Shannon Lollar  
Farm Credit Bank of Texas  
1120 North Main Street  
Elgin, Texas 78621  
(w/o enclosures)