



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 17, 2003

Ms. Lydia L. Perry
Law Offices of Robert E. Luna, P.C.
4411 North Central Expressway
Dallas, Texas 75205

OR2003-7435

Dear Ms. Perry:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 189611.

The Coppel Independent School District (the "district"), which you represent, received a request for information concerning two district employees. Specifically, the requestor asks for information relating to "the 'appropriate personnel action,' as described in the superintendent's report of level 2 conference dated July 28, 2003 regarding [a district basketball coach]." In addition, the requestor asks for the personnel file of another named district employee, any information relating to an investigation of the employee, and documents relating to the district's decision to terminate the employee. By letter dated August 28, 2003, you informed this office of your intent to withdraw your request for an attorney general decision regarding the first part of the request, pertaining to the specified personnel action document. Based on your representation that you have released the document requested in the first part of the request, we consider this part of the matter closed. Accordingly, the present ruling only addresses the request for the personnel file, investigation information, and termination information relating to the second named district employee. You claim that portions of the information at issue are excepted from disclosure under sections 552.101, 552.102, 552.114, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses the doctrine of 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. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included 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. 540 S.W.2d at 683.

Upon review, we find that Exhibit 5 relates solely to the qualifications and job performance of the employee at issue. Consequently, the public has a legitimate interest in the information in Exhibit 5. *See* Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and the circumstances of his resignation or termination), 423 at 2 (1984) (scope of public employee privacy is narrow), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101 or 552.102), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under either the constitutional or common-law right of privacy). Consequently, the information in Exhibit 5 is not protected by common-law privacy. Accordingly, the district may not withhold any of the information in Exhibit 5 pursuant to section 552.101 in conjunction with common-law privacy.

We next address your claim under 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); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). Section 552.026 of the Government Code incorporates FERPA into chapter 552 of the Government Code. *See* Open Records Decision No. 634 at 6-8 (1995). 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.

Gov't Code § 552.026. "Education records" under FERPA are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A).

Section 552.114(a) of the Government Code exempts from disclosure "information in a student record at an educational institution funded wholly or partly by state revenue." This office generally has treated "student record" information under section 552.114(a) as the equivalent of "education record" information that is protected by FERPA. *See* Open Records Decision No. 634 at 5 (1995). FERPA protects information to the extent "reasonable and necessary to avoid personally identifying a particular student," or "one or both parents of such a student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). Moreover, all handwritten documents created by students must be withheld in their entirety. *See* Open Records Decision No. 224 (1979) (student's handwritten comments would make identity of student easily traceable and such comments are therefore excepted by statutory predecessor to section 552.114).

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 of the Government Code 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 of the Government Code 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. *See* Open Records Decision No. 634 at 6-8 (1995). In this instance, you have submitted information that you contend is confidential under FERPA. Accordingly, we will address your claim.

You indicate that the documents you have submitted as Exhibit 4 and Exhibit 5 contain personally identifiable information of district students. Upon review, we agree that most of the information in Exhibits 4 and 5 consists of education records of current or former district students, and that the information you have highlighted in these records reveals the identities of students. Thus, we agree that most of the information you have highlighted in Exhibits 4 and 5 is confidential under FERPA as personally identifiable information contained in student education records and therefore must be withheld. We have also marked a small amount of additional information in Exhibit 4 and a handwritten document created by a student in Exhibit 5 that must be withheld under FERPA.

We note, however, that some of the documents in Exhibits 4 and 5 are not education records of current or former district students. Accordingly, the information you have highlighted in these documents is not confidential under FERPA and may not be withheld on that basis. We have marked the information in Exhibits 4 and 5 that may not be withheld pursuant to FERPA.

With respect to the remaining information, you contend that portions of the transcripts you have submitted as Exhibit 1 are confidential under section 552.102 of the Government Code. Section 552.102 exempts most information on a transcript from an institution of higher

education maintained in the personnel files of professional public school employees. Gov't Code §552.102(b). Section 552.102 excepts from disclosure all information from transcripts other than the employee's name, the courses taken, and the degree obtained. Open Records Decision No. 526 (1989). Thus, with the exception of the employee's name, the courses taken, and the degree obtained, the district must withhold the information in the transcripts you have submitted as Exhibit 1 pursuant to section 552.102(b).

Exhibit 2 contains a copy of the employee's Texas driver's license. Information relating to a Texas motor vehicle driver's license and information relating to a Texas motor vehicle title or registration is excepted from disclosure under section 552.130 of the Government Code. The district must withhold Exhibit 2 under section 552.130 of the Government Code.

You also contend that evaluations of the employee, submitted as Exhibit 3, are confidential under section 21.355 of the Education Code. Section 21.355 provides, "A document evaluating the performance of a 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). In that opinion, this office also determined 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 the 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 serving as an administrator at the time of the evaluation. *Id.* We have marked a portion of the information in Exhibit 3 that does not evaluate the performance of a teacher for purposes of section 21.355 and therefore is not confidential under that section. With respect to the remaining information in Exhibit 3, we make the following determination: if the employee at issue was teaching at the time the information in Exhibit 3 was created, and was required to hold and did hold a certificate or permit under chapter 21 of the Education Code, the remaining documents in Exhibit 3 are confidential under section 21.355 of the Education Code and must be withheld pursuant to section 552.101 of the Government Code.

In summary, we have marked the information in Exhibits 4 and 5 that is not confidential under FERPA. The remainder of the information you have highlighted in Exhibits 4 and 5 is confidential under FERPA and must be withheld. We have also marked additional information in Exhibits 4 and 5 that must be withheld under FERPA. With the exception of the employee's name, the courses taken, and the degree obtained, the district must withhold the transcripts in Exhibit 1 pursuant to section 552.102(b) of the Government Code. Exhibit 2 must be withheld under section 552.130 of the Government Code. With the exception of the information we have marked, the district must withhold the documents in Exhibit 3 under section 552.101 in conjunction with section 21.355, provided the employee at issue was teaching at the time the information in Exhibit 3 was created and was required to hold and did hold a certificate or permit under chapter 20 of the Education Code. Otherwise, the

district must release Exhibit 3 to the requestor. The remainder of the submitted 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 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 'D. Saldivar', with a long, sweeping horizontal stroke extending to the right.

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 189611

Enc: Submitted documents

c: Mr. José M. Portela
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(w/o enclosures)