



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 19, 2003

Ms. Diane J. Cordova
Assistant General Counsel
Houston Independent School District
3830 Richmond Avenue
Houston, Texas 77027-5838

OR2003-8298

Dear Ms. Cordova:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 191433.

The Houston Independent School District (the "district") received a request for: 1) a specified reprimand letter; 2) a specified investigation report and the "cost of the services paid by the [district] to [a named business entity]"; and 3) the "names and salaries of all personnel assigned to administrative district and charter offices." You indicate that some responsive information has been or will be released to the requestor to the extent that it exists.¹ You claim, however, that the remaining requested information is excepted from disclosure pursuant to sections 552.026, 552.101, and 552.114 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

You claim that portions of the submitted information are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 21.355 of the

¹ We note that it is implicit in several provisions of the Public Information Act (the "Act") that the Act applies only to information already in existence. See Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. See Attorney General Opinion H-90 (1973); see also Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 452 at 2-3 (1986), 416 at 5 (1984), 342 at 3 (1982), 87 (1975); *Economic Opportunities Dev. Corp. of San Antonio v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App. -San Antonio 1978, writ dism'd). A governmental body must only make a good faith effort to relate a request to information which it holds. See Open Records Decision No. 561 at 8 (1990).

Education Code.² 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 id.* 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. *See id.*

After careful consideration of your arguments and our review of the submitted information, it appears that these portions of the submitted information relate to allegations of misconduct on the part of employees of the district and do not concern evaluations as that term is commonly understood. Thus, in this instance, we find that section 21.355 is inapplicable to the submitted information. Accordingly, we conclude that the district may not withhold any portion of this particular information under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

You also claim that portions of the submitted information are excepted from disclosure pursuant to sections 552.026 and 552.114 of the Government Code. Section 552.026 incorporates the federal Family Educational Rights and Privacy Act of 1974 (“FERPA”) into chapter 552 of the Government Code. *See* Open Records Decision No. 634 at 6-8 (1995). Section 552.026 provides:

[t]his 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. 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). Under FERPA,

² Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov’t Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes.

“education records” 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) excepts from disclosure “information in a student record at an educational institution funded wholly or partly by state revenue.” Gov’t Code § 552.114(a). 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.³ *See* Open Records Decision No. 634 at 5 (1995).

Generally, FERPA requires that information be withheld only to the extent “reasonable and necessary to avoid personally identifying a particular student.” *See* 34 C.F.R. § 99.3 (“personally identifiable information” under FERPA includes, among other things, “[o]ther information that would make the student’s identity easily traceable”); *see also* Open Records Decision Nos. 332 at 3 (1982), 206 at 2 (1978). Based on your arguments and our review of these portions of the submitted information, we have marked the information that is confidential under FERPA. *See* Open Records Decision Nos. 539 (1990), 332 (1982), 206 (1978). Accordingly, we conclude that the district must withhold this particular marked information pursuant to section 552.114 of the Government Code and FERPA.

In addition, you claim that the remaining portions of the submitted information which you claim are protected from disclosure under FERPA are excepted from disclosure pursuant to section 552.101 in conjunction with the common-law right to privacy. Information is protected from disclosure under the common-law right to privacy, as encompassed by section 552.101, if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (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. *See id.* at 683. After carefully considering your arguments and reviewing the information at issue, we find that the release of this information would not implicate the common-law privacy interests of any individual associated with the information because no such individual is identified in conjunction with the information. Accordingly,

³ We note that in Open Records Decision No. 634 (1995), this office concluded that: (1) an educational agency or institution may withhold from disclosure information that is protected by FERPA and excepted from 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 disclosure information that is excepted from 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). However, since in this instance you have requested our decision on the public availability of these portions of the submitted information under sections 552.026 and 552.114 of the Government Code, as well as under FERPA, we will address your claims.

we conclude that the district may not withhold any portion of this particular information under section 552.101 of the Government Code in conjunction with the common-law right to privacy.

We note that portions of the submitted information may be excepted from disclosure pursuant to section 552.117(a)(1) of the Government Code. Section 552.117(a)(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 timely request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). However, information that is responsive to a request may not be withheld from disclosure under section 552.117(a)(1) if the employee did not request confidentiality for this information 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 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 received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). We assume for purposes of this ruling that the information that we have marked within the submitted reprimand letter constitutes the former or current home address of the district employee who was reprimanded. Given that assumption, we conclude that to the extent that the individuals with whom the marked section 552.117(a)(1) information is associated elected confidentiality for this information prior to the date that the district received this request, the district must withhold this information pursuant to section 552.117(a)(1) of the Government Code.

In summary, the district must withhold the portions of the submitted information that we have marked pursuant to section 552.114 of the Government Code and FERPA. To the extent that the individuals with whom the marked section 552.117(a)(1) information is associated elected confidentiality for this information prior to the date that the district received this request, the district must withhold this information pursuant to section 552.117(a)(1) of the Government Code. The district must release the remaining submitted information that previously was not provided 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 191433

Enc. Marked documents

c: Dr. Jay Spruck
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(w/o enclosures)