



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 9, 2004

Ms. Ann Manning
McWhorter, Cobb and Johnson, L.L.P.
P.O. Box 2547
Lubbock, Texas 79408

OR2004-2885

Dear Ms. Manning:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 199107.

The Lubbock Independent School District (the "district"), which you represent, received a request for information relating to an employee of the district. You inform us that the district has released some of the requested information. You claim that other responsive information is excepted from disclosure under sections 552.101, 552.102, and 552.117 of the Government Code. We have considered the exception you claim and have reviewed the information you submitted.

We first note that some of the submitted documents do not appear to have been in existence when the district received this request for information. The Public Information Act (the "Act"), chapter 552 of the Government Code, does not require the district to release information that did not exist when it received this request or to create responsive information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). To the extent that the submitted documents did not exist when the district received this request, this decision does not address the public availability of any such documents, and the district need not release any such documents in response to this request for information.

Next, we address the district's claims under section 552.101 of the Act. This section excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101

encompasses information that other statutes make confidential. The Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, 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). FERPA is incorporated into chapter 552 of the Government Code by section 552.026, which 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). Generally, FERPA requires that information be withheld from the public only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 at 3 (1982), 206 at 2 (1978).¹

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. *See* Open Records Decision No. 634 at 5 (1995).

You state that the documents submitted as Exhibit E contain information that identifies students of the district. We have marked the information in Exhibit E that is confidential under FERPA. *See* Open Records Decision Nos. 332 at 3 (1982), 206 at 2 (1978); *see also* 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"); Open Records Decision No. 224 (1979) (release of document in student's handwriting would make student's identity easily traceable).

¹In Open Records Decision No. 634 (1995), this office concluded that: (1) an educational agency or institution may withhold from the public information that is protected by FERPA and excepted from required public disclosure under sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) a state-funded educational agency or institution may withhold from the public information that is excepted from required public disclosure under 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. *See* Open Records Decision No. 634 at 6-8 (1995).

We note that “directory information” may be released to the public under FERPA if the educational institution or agency complies with section 1232g(a)(5)(B) of title 20 of the United States Code. “Directory information” includes the student’s name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student. *See* 20 U.S.C. § 1232g(a)(5)(A). Under section 1232g(a)(5)(B):

Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent’s prior consent.

Id. § 1232g(a)(5)(B). Thus, in the event that the district has designated any of the submitted information that is subject to FERPA as directory information, the district must release any such information after complying with federal notice requirements for the release of directory information. *See id.*; *see also* 34 C.F.R. § 99.37. Otherwise, the district must not release any of the submitted information that is subject to FERPA unless the district has authorization under FERPA to do so.

You also contend that some of the submitted information is confidential under section 21.355 of the Education Code. This section 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 state that the documents submitted as Exhibit D include employee evaluations. You do not inform us, however, as to whether any of these documents relate to an individual who held a teaching certificate or permit or an administrator’s certificate under chapter 21 of the Education Code and was performing the functions of a teacher or administrator at the time of the evaluations. Therefore, we are unable to conclude whether any of the submitted

evaluation documents are confidential under section 21.355 of the Education Code. Nevertheless, to the extent that these documents pertain to an employee who held a teaching certificate or permit or an administrator's certificate under chapter 21 of the Education Code and was performing the functions of a teacher or administrator at the time of the evaluation, the district must withhold any such documents under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. To the extent that the employee in question did not hold a teaching certificate or permit or an administrator's certificate under chapter 21 of the Education Code or was not performing the functions of a teacher or administrator at the time of the evaluation, the documents that relate to any such evaluation are not confidential under section 21.355 and may not be withheld under section 552.101.

Section 552.102(b) excepts from public disclosure "a transcript from an institution of higher education maintained in the personnel file of a professional public school employee." Gov't Code § 552.102(b). Section 552.102(b) further provides, however, that "the degree obtained or the curriculum on a transcript in the personnel file of the employee" are not excepted from disclosure. Thus, except for the information that reveals the degree obtained and the courses taken, you must withhold the transcripts submitted as Exhibit C under section 552.102(b).

Section 552.117(a)(1) excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who timely requests that this information be kept confidential under section 552.024. Whether section 552.117(a)(1) protects a particular item of information must be determined at the time of the governmental body's receipt of the request for that information. *See* Open Records Decision No. 530 at 5 (1989). Therefore, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee of the district who made a request for confidentiality under section 552.024 prior to the date of the district's receipt of this request for information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely elect under section 552.024 to keep the current or former employee's section 552.117 information confidential. We have marked information in Exhibit D that the district may be required to withhold under section 552.117(a)(1).

Lastly, we note that a social security number is confidential under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if a governmental body obtained or maintains the social security number under any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that the social security number contained in Exhibit D is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, and we are aware of no law, enacted on or after October 1, 1990 that requires or authorizes the district to obtain or maintain a social security number. Thus, we have no basis for concluding that the social security number in question was obtained or is maintained under such a law and is therefore confidential under the federal

law. We caution you, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, before releasing a social security number, the district should ensure that it was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

In summary: (1) the district must not release the submitted information that is confidential under FERPA unless the district has authorization under FERPA to do so; (2) the evaluation documents must be withheld under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code to the extent that the employee to whom they pertain held a teaching certificate or permit or an administrator's certificate under chapter 21 of the Education Code and was performing the functions of a teacher or administrator at the time of the evaluations; (3) except for the information that reveals the degree obtained and the courses taken, the transcripts must be withheld under section 552.102(b); (4) the district must withhold the section 552.117 information of a current or former district employee who timely elected under section 552.024 to keep that information confidential; and (5) the district may also be required to withhold a social security number under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. The district must release the rest of the submitted information.

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

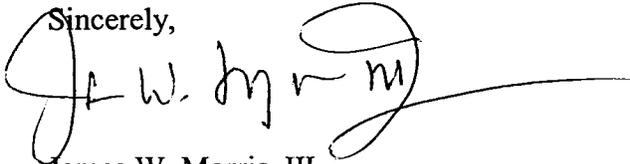
should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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", with a long horizontal line extending to the right.

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

JWM/sdk

Ref: ID# 199107

Enc: Submitted documents

c: Ms. Lena G. Roberts
Attorney at Law
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(w/o enclosures)