



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 5, 2004

Ms. Sara S. Koehn
Schwartz & Eichelbaum
7400 Gaylord Parkway, Suite 200
Frisco, Texas 75034

OR2004-3660

Dear Ms. Koehn:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 200792.

The Mission Consolidated Independent School District (the "district"), which you represent, received a request for various types of information relating to the applicants for a specified position and district hiring policies. You indicate that you will release some responsive information to the requestor. However, you claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.114, and 552.122 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

We first note that you have raised section 552.114 of the Government Code. Section 552.114 of the Government Code excepts from disclosure student records at an educational institution funded completely or in part by state revenue. This office generally applies the same analysis under section 552.114 and the Family Educational Rights and Privacy Act of 1974 ("FERPA"). Open Records Decision No. 539 (1990). 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,

¹ Although you also raise section 552.107 of the Government Code, you have not presented arguments explaining how section 552.107 applies to the submitted information. Therefore, we presume you have withdrawn your argument under this exception. See Gov't Code §§ 552.301, .302.

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). Section 552.026 of the Government Code provides that "information contained in education records of an educational agency or institution" may only be released under the Act in accordance with FERPA. Upon review of the submitted documents, we conclude that the submitted information does not contain "education records" for purposes of FERPA. Therefore, the district may not withhold any portion of the submitted information under section 552.114 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses confidentiality provisions of other statutes. You argue that the names of employees who have retired from the district and been rehired are confidential under section 855.115 of the Government Code. Section 855.115(a) protects certain information contained in records that are in the custody of the Texas Municipal Retirement System concerning an individual member, retiree, annuitant, or beneficiary. The documents at issue here are in the custody of the district, not the retirement system. Thus, we conclude that the district may not withhold any records pursuant to section 552.101 of the Government Code in conjunction with section 855.115(a) of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from 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 of the Government Code. Whether a particular item of information is excepted from disclosure under section 552.117(a)(1) must be determined at the time the governmental body receives the request for information. *See* Open Records Decision No. 530 at 5 (1989). Thus, the district may only withhold information under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the city's receipt of this request for information. The district may not withhold information under section 552.117(a)(1) on behalf of a current or former employee who did not make a timely election under section 552.024 to keep the information confidential. You must withhold the information that we have marked under section 552.117(a)(1) if the individuals to whom the marked information pertains are current or former employees who timely elected under section 552.024 to keep the information confidential.

We also note that the district may be required to withhold some of the submitted information pursuant to section 552.1175 of the Government Code. Section 552.1175 applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure and provides in pertinent part:

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(b). The submitted records contain personal information concerning individuals who appear to be peace officers. If these individuals are still peace officers and elect to restrict access to their personal information in accordance with section 552.1175, the district must withhold the information we have marked. Otherwise, the district must release this information.

The social security numbers of those applicants who are not current or former district employees may be excepted from disclosure under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the district pursuant to any provision of law enacted on or after October 1, 1990.

Section 552.122(b) of the Government Code excepts from disclosure test items developed by a licensing agency or governmental body. In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated, but does not encompass evaluations of an employee's overall job performance or suitability. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. Open Records Decision No. 626 at 6 (1994). Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Additionally, when answers to test questions might reveal the questions themselves,

the answers may be withheld under section 552.122(b). *See* Open Records Decision No. 626 at 8 (1994).

You contend that most of the submitted interview questions and responses are excepted from disclosure under section 552.122(b) of the Government Code. After reviewing the information, we agree that interview question nine tests an individual's knowledge in a particular area and thus constitutes a "test item" as contemplated by section 552.122(b). Accordingly, the district may withhold interview questions nine and ten, and the corresponding responses, pursuant to section 552.122(b) of the Government Code. We find, however, that the remaining questions are not test items for purposes of section 552.122. Thus, the district may not withhold the remaining questions, or the submitted responses corresponding to those questions, pursuant to section 552.122 of the Government Code.

In summary, you must withhold the information that we have marked under section 552.117(a)(1) of the Government Code if the individuals to whom the marked information pertains are current or former employees who timely elected under section 552.024 of the Government Code to keep the information confidential. We have also marked information that must be withheld under section 552.1175 if the individuals at issue are peace officers who elect to keep such information confidential. Social security numbers may be confidential under federal law. You may withhold questions nine and ten and the corresponding responses as test items under section 552.122 of the Government Code. The remaining 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,



Jennifer E. Berry
Assistant Attorney General
Open Records Division

JEB/sdk

Ref: ID# 200792

Enc: Submitted documents

c: Mr. Robert A. Salinas
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(w/o enclosures)