



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 2, 2004

Mr. Jacques Treviño  
Gorena & Treviño, Attorneys at Law  
420 West University Drive  
Edinburg, Texas 78539

OR2004-10215

Dear Mr. Treviño:

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# 214099.

The Edinburg Consolidated Independent School District (the "district"), which you represent, received a request for the following: (1) the personnel file of a named teacher formerly employed by the district, excluding documents pertaining to the former teacher's use of sick and vacation leave; (2) established guidelines for advertising employment opportunities; (3) established guidelines for posting notices of vacancies; (4) the vacancy notice and announcement for a specified teaching position; and (5) the job description for the specified teaching position. You state that you have released some information to the requestor. You claim that the remaining requested information, or portions thereof, are excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the district's obligations under the Act. Under section 552.301(b), a governmental body that wishes to withhold information from public disclosure must request a ruling from this office not later than the tenth business day after the date of receiving the written request. Within fifteen days of receiving the request, the governmental body must submit to this office (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific

information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A)-(D). The submitted request for information reflects that the district received the request on August 24, 2004. You did not request a ruling from this office or submit the information required by section 552.301(e) until September 23, 2004. Based on the foregoing, we conclude that you failed to comply with section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Sections 552.101 and 552.102 provide compelling reasons to overcome the presumption of openness. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). Because the assertion of sections 552.101 and 552.102 provide compelling reasons to overcome the presumption of openness, we will address your arguments.

Section 552.101 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 information protected by other statutes. Section 1324a of title 8 of the United States Code provides that an Employment Eligibility Verification Form I-9 "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). In this instance, the release of the Form I-9 that we have marked would be "for purposes other than for enforcement" of the applicable federal law. A Form I-9 may be released only for purposes of compliance with the federal laws and regulations governing the employment verification system. Therefore, the marked Form I-9 must be withheld from disclosure under section 552.101 in conjunction with section 1324a of title 8 of the United States Code.

Section 21.355 of the Education Code 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 concluded 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 his or her 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 administering at the time of his or her evaluation. *Id.* Based on the reasoning set out in Open Records

Decision No. 643, we conclude that the documents you have labeled as Exhibits HH through UU are confidential under section 21.355 of the Education Code. Therefore, pursuant to section 552.101 of the Government Code, the district must withhold these documents.

Next, we address your privacy claim under section 552.102 for the information you have labeled as Exhibits VV through HHH. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common law privacy as incorporated into the Act by section 552.101. We will therefore consider your claims regarding section 552.101 and section 552.102 together.

Information is protected from disclosure under the common law right to privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See* 540 S.W.2d 668. 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 reviewing your arguments and the remaining submitted information, we find that no portion of this information is protected from disclosure under the common law right to privacy. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (statutory predecessor applicable when information would reveal intimate details of highly personal nature), 405 at 2 (1983) (manner in which employee performed his job cannot be said to be of minimal public interest), 400 at 5 (1983) (statutory predecessor protected information only if its release would lead to clearly unwarranted invasion of privacy). Accordingly, we conclude that the district may not withhold any portion of the remaining submitted information under section 552.101 or 552.102 on the basis of common law privacy.

We note, however, that Exhibit WW contains information that is confidential under the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"). *See* 20 U.S.C. § 1232g. 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 id.* § 1232g(b)(1); *see also* 34 C.F.R.

§ 99.3 (defining personally identifiable information). FERPA is incorporated into the Act by section 552.026, which provides that the Act “does not require the release of information contained in education records of an educational agency or institution, except in conformity with [FERPA].” 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). We have marked information that identifies students of the district. The district must withhold this information pursuant to section 552.101 in conjunction with FERPA.

We also note that Exhibits VV through HHH contain information that is subject to section 552.117 of the Government Code.<sup>1</sup> Section 552.117(a)(1) excepts from public disclosure the present and former 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 such information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 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). Therefore, pursuant to section 552.117(a)(1), the district must withhold the section 552.117 information of a current or former official or employee who elected under section 552.024, prior to the district’s receipt of this request, to keep that information confidential. The district may not withhold such information under section 552.117(a)(1) for an individual who did not make a timely election. We have marked the information that is subject to section 552.117. Further, we have marked some additional information contained in Exhibits A through GG that is also subject to section 552.117 and we have noted where we disagree with your markings within these documents.

- Finally, you indicate that portions of Exhibits W, X and Y are excepted from disclosure pursuant to section 552.102(b) of the Government Code. Section 552.102(b) provides that a transcript from an institution of higher education maintained in the personnel file of a professional public school employee is excepted from disclosure pursuant to section 552.102(b), except for the information in the transcript pertaining to the degree obtained or the curriculum. *See* Gov’t Code § 552.102(b). Based on our review of the Exhibits W, X and Y, we conclude that you must withhold the submitted transcripts pursuant to section 552.102(b) of the Government Code, except for the information concerning the employee’s curriculum and degree obtained.

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<sup>1</sup>The Office of the Attorney General will raise a mandatory exception like section 552.117 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the marked Form I-9 must be withheld from disclosure under section 552.101 in conjunction with section 1324a of title 8 of the United States Code. The district must withhold the evaluations under section 552.101 in conjunction with section 21.355 of the Education Code. The district must withhold the information we have marked accordingly under section 552.101 in conjunction with FERPA. If the current or former employees at issue timely elected to keep their personal information confidential, the district must withhold the information that it has marked, as well as the information we have marked, under section 552.117. The district must withhold the submitted transcripts pursuant to section 552.102(b) of the Government Code, except for the information concerning the employee's curriculum and degree obtained. All 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).

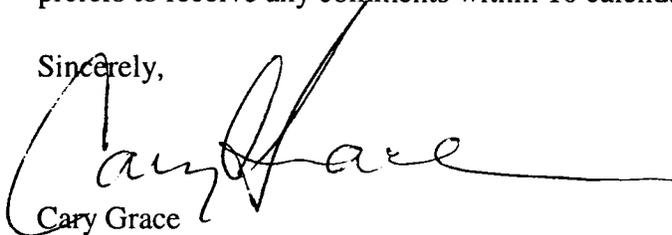
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,

A handwritten signature in black ink, appearing to read "Cary Grace", written over a horizontal line.

Cary Grace  
Assistant Attorney General  
Open Records Division

ECG/jev

Ref: ID# 214099

Enc. Submitted documents

c: Mr. Morris E. Muñoz  
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(w/o enclosures)