



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 20, 2005

Ms. Marianna M. McGowan
Abernathy, Roeder, Boyd & Joplin, P.C.
P. O. Box 1210
McKinney, Texas 75070-1210

OR2005-04394

Dear Ms. McGowan:

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# 224528.

The Plano Independent School District (the "district"), which you represent, received a request for information regarding the investigation of a named former district employee. You state that the district has released some responsive information, but you claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.111, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the attorneys of the requestor and the named former employee. *See* Gov't Code § 552.304 (providing that person may submit comments stating why information should or should not be released).

Initially, we note that you have redacted some personal information of the former employee at issue. You do not assert, and our review of our records does not indicate, that you have been authorized to withhold any such information without seeking a ruling from this office. *See* Open Records Decision 673 (2000). Because we can discern the nature of the information that has been redacted, being deprived of this information does not inhibit our ability to make a ruling in this instance. Nevertheless, be advised that a failure to provide this office with requested information generally deprives us of the ability to determine whether information may be withheld, and leaves this office with no alternative other than ordering that the redacted information be released. *See* Gov't Code §§ 552.301(e)(1)(D) (governmental body must provide this office with copy of "specific information requested" or representative sample), 552.302.

Next, we note that in Open Records Decision No.634 (1995), this office concluded that (1) an educational agency or institution may withhold information that is protected from disclosure by the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (“FERPA”) and that is 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 to disclosure, and (2) an educational agency or institution that is state-funded may withhold 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 to disclosure. You indicate that the district has redacted student names and other identifying information from the requested documents prior to submitting them to this office for review. Thus, in accordance with Open Records Decision No. 634, you must withhold the redacted information from disclosure. We have also marked additional information that the district must withhold under FERPA.

We now turn to your arguments regarding the submitted information. 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 information made confidential by other statutes. Section 21.355 of the Education Code provides that “[a] document evaluating the performance of a teacher or administrator is confidential.” This office has 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). Upon review of the submitted documents, we agree that a portion of the information at issue consists of teacher evaluations. Thus, provided the employee at issue was required to hold and did hold the appropriate certificate and was teaching at the time of the submitted teaching evaluations, the information we have marked under section 21.355 of the Education Code is confidential, and the district must withhold it under section 552.101 of the Government Code. We find, however, that none of remaining documents “evaluate the performance of a teacher” as contemplated by section 21.355 of the Education Code. Therefore, you may not withhold any of the remaining documents under section 552.101 of the Government in conjunction with section 21.355 of the Education Code.

Section 552.102(a) of the Government Code 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(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). Accordingly, we will consider your sections 552.101 and 552.102(a) privacy claims together.

Section 552.101 of the Government Code also encompasses the doctrine of common law privacy, which 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. *Id.* at 683. This office has found that the following types of information are excepted from required public disclosure under common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

We have marked the information that must be withheld under sections 552.101 and 552.102 of the Government Code in conjunction with common law privacy. The remaining information does not contain highly intimate or embarrassing facts. Furthermore, we note that the remaining information pertains directly to the workplace behavior of a former district employee. As this office has often noted, the public has a legitimate interest in information that relates to public employees and their conduct in the workplace. Thus, the district may not withhold any of the remaining information under sections 552.101 and 552.102 of the Government Code in conjunction with common law privacy. *See* Open Records Decision Nos. 405 at 2 (1983) (manner in which public employee performed his or her job cannot be said to be of minimal public interest), 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and circumstances of his resignation or termination), 470 at 4 (1987) (public employee's job performance does not generally constitute private affairs), 473 at 3 (1987) (fact that public employee receives less than perfect or even very bad evaluation not protected by common law privacy), 542 at 5 (1990) (information regarding public employee's qualifications is of legitimate concern to public).

Section 552.111 of the Government Code excepts from public disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. The purpose of this exception is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that this

exception protects only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5.

A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* Open Records Decision No. 615 at 5. If, however, the factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information may also be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

In this instance, you state that the submitted information consists of "the draft investigation report regarding [the former employee at issue] and accompanying exhibits." Because the former employee at issue resigned prior to the completion of the investigation by the district, you claim that "the draft documents necessarily consists of advice, opinion, recommendations regarding a policy matter." Upon review, however, we find that the submitted information pertains solely to routine personnel matters; therefore, no portion of the submitted information may be withheld under section 552.111 of the Government Code.

Section 552.135 of the Government Code provides in pertinent part:

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure.]

Gov't Code § 552.135. Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under section 552.135 must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See* Gov't Code § 552.301(e)(1)(A).

You state that portions of the submitted information identify employees and students who “reported possible violations of law including, but not limited to, falsification of government records, inappropriate physical contact and violations of the Texas Penal Code.” The documents at issue reflect that you have redacted most of the student-identifying information pursuant to FERPA. In addition, as noted earlier, we have marked additional student-identifying information that the district must withhold pursuant to FERPA. Thus, we need not reach your claim under section 552.135 as it pertains to these students. Furthermore, while you contend that the identities of district employees are excepted from disclosure under section 552.135, you have not identified which employees you seek to protect under section 552.135, nor have you adequately explained why section 552.135 should apply to any such individuals in this instance. We therefore determine that the district has failed to establish that section 552.135 of the Government Code is applicable to any of the information in the documents at issue. Accordingly, the district may not withhold any of the information at issue pursuant to section 552.135 of the Government Code.

We note that portions of the submitted information may be subject to section 552.117 of the Government Code.¹ 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 request that this 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 made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the district may only withhold information under section 552.117 on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for information was received. If the former employee at issue timely elected to keep the information we have marked confidential, the district must withhold this information under section 552.117(a)(1) of the Government Code. The district may not withhold the marked information under section 552.117(a)(1) of the Government Code if the former employee at issue did not make a timely election to keep the information confidential.

In the event that the former employee’s social security number is not excepted from disclosure under section 552.117(a)(1), we note that it may be confidential under section 552.101 of the Government Code in conjunction with federal law. The 1990 amendments to the Social Security Act make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state under any provision of law enacted on or after October 1, 1990. *See* 42 U.S.C. § 405(c)(2)(C)(viii)(I); Open Records Decision No. 622 at 2-4 (1994). We have no basis for concluding that the social security number at issue is confidential under section 405(c)(2)(C)(viii)(I) and therefore excepted from disclosure on the basis of that federal law.

¹This office 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).

We caution, however, that the Act prescribes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Prior to releasing social security number information, the district should ensure that no such information was obtained or is maintained by the district under any provision of law enacted on or after October 1, 1990.

In summary, the district must withhold student identifying information under FERPA. The marked evaluations must be withheld under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must withhold the marked information under sections 552.101 and 552.102 of the Government Code in conjunction with common law privacy. If the former employee at issue made a timely election under section 552.024 of the Government Code to keep the information we have marked confidential, this information must be withheld under section 552.117(a)(1) of the Government Code. Even if the former employee at issue did not make a timely election under section 552.024 of the Government Code, his social security number may nonetheless be confidential under federal law. 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/jev

Ref: ID# 224528

Enc. Submitted documents

c: Ms. Kim Breen
Staff Writer
The Dallas Morning News
P. O. Box 655237
Dallas, Texas 75265
(w/o enclosures)

Mr. Daniel A. Ortiz
Ortiz & Associates
715 West Abram
Arlington, Texas 76013
(w/o enclosures)

Mr. Paul C. Watler
Jenkins & Gilchrist
1445 Ross Avenue, Suite 3200
Dallas, Texas 75202
(w/o enclosures)