



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 7, 2006

Mr. Jose R. Guerrero
Montalvo & Ramirez
900 North Main
McAllen, Texas 78501

OR2006-05984

Dear Mr. Guerrero:

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# 250818.

The La Joya Independent School District (the "district"), which you represent, received a request for information relating to a former employee of the district. You inform us that the district will release some of the requested information. You also state that some of the requested information is the subject of a prior open records letter ruling. You have submitted information that you claim is excepted from disclosure under sections 552.101, 552.102, and 552.117 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.¹

Initially, we address your assertion that Open Records Letter No. 2005-6137 (2005) constitutes a previous determination with respect to some of the requested information. That ruling concluded, in part, that the district was required to withhold certain investigative records that relate to students of the district ("the student records") under the Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of title 20 of the United States Code. You assert that Open Records Letter No. 2005-6137 constitutes a

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the district to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

previous determination with respect to the student records. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)).

We disagree. 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.² *See* 20 U.S.C. § 1232g(b)(1). "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 id.* § 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). Open Records Letter No. 2005-6137 concluded, however, that the student records could not be redacted to the extent reasonable and necessary to avoid identifying the students involved, because the requestor's client knew the students' identities. We therefore concluded that the district was required to withhold the student records in their entirety under FERPA. In this instance, there is no indication that the requestor knows the identities of the students to whom the student records pertain. Thus, as the instant facts and circumstances are not the same as those that prompted our decision under FERPA in Open Records Letter No. 2005-6137, the prior ruling is not a previous determination with respect to the student records. *See* Open Records Decision No. 673 at 6-7 (attorney general decision constitutes first type of previous determination if, among other things, there has been no change in law, facts, and circumstances on which prior ruling was based).

We note, however, that Open Records Decision No. 634 (1995) authorizes an educational agency or institution to withhold from the public information that is protected by FERPA and excepted from disclosure under sections 552.026 and 552.101 of the Government Code without the necessity of requesting an attorney general decision as to those sections.³ *See id.* at 6-8. Open Records Decision No. 634 also authorizes a state-funded educational agency or institution to withhold from the public information that is excepted from disclosure under 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

²Section 552.026 of the Government Code incorporates FERPA into the Act. *See* Gov't Code § 552.026 (Act does not require release of information contained in education records of educational agency or institution, except in conformity with FERPA).

³Open Records Decision No. 634 is the second type of previous determination. *See* Open Records Decision No. 673 at 7-8 (2001) (listing elements of second type of previous determination).

decision as to that exception.⁴ *Id.* Therefore, the district may withhold any information in the student records that is encompassed by the present request and that identifies students under FERPA in accordance with Open Records Decision No. 634. *See also* 34 C.F.R. § 99.3 (defining personally identifiable information); Open Records Decision Nos. 332 at 3 (1982), 206 at 2 (1978); *but see* Open Records Decision No. 224 (1979) (release of document in student's handwriting would make student's identity easily traceable).

We next note that another aspect of Open Records Letter No. 2005-6137 may encompass some of the information that you have submitted to this office in seeking this decision. In Open Records Letter No. 2005-6137, we also concluded that the district could withhold certain information that was at issue as Exhibit C under section 552.108(a)(1) of the Government Code, except for basic information under section 552.108(c). To the extent that our prior ruling under section 552.108 encompasses any of the information that is presently at issue, the district may continue to rely on that ruling as a previous determination, provided that there has been no change in the law, facts, and circumstances on which the prior ruling was based. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7.

We also note that the district did not submit some of the information that is presently at issue within the fifteen-business-day period prescribed by section 552.301 of the Government Code. *See* Gov't Code § 552.301(e)(1)(D). A governmental body's failure to comply with section 552.301 results in a legal presumption that the information at issue is public and must be released. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). You claim, however, that the information in question is excepted from disclosure under section 552.117 of the Government Code. As the applicability of this exception can provide a compelling reason for non-disclosure under section 552.302 of the Government Code, we will address section 552.117 along with your claims under sections 552.101 and 552.102.

Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with section 21.355 of the Education Code. 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 Open Records Decision No. 643, we determined that for purposes of section 21.355, the word "teacher" means a person who is required to and does in fact hold a teaching certificate under

⁴Section 552.114 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 under FERPA. *See* Open Records Decision No. 634 at 5 (1995).

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 determined 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 assert that the information submitted as Exhibit B is confidential under section 21.355. You indicate, and have provided documentation reflecting, that the information in question relates to an individual who was employed and certificated as a teacher when the information in Exhibit B was created. Based on your representations, the submitted documentation, and our review of the information at issue, we conclude that most of the information in Exhibit B is confidential under section 21.355 of the Education Code. The district must withhold that information, which we have marked, under section 552.101 of the Government Code. We conclude that the remaining information in Exhibit B is not an evaluation of a teacher or administrator, for the purposes of section 21.355, and may not be withheld on that basis under section 552.101.

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. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. A compilation of an individual’s criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual’s privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one’s criminal history). Furthermore, a compilation of a private citizen’s criminal history is generally not of legitimate concern to the public.

You contend that the document submitted as Exhibit E contains criminal history information that is protected by common law privacy. We find, however, that Exhibit E neither constitutes nor contains a compilation of an individual’s criminal history. We therefore conclude that the district may not withhold any of the information in Exhibit E under section 552.101 in conjunction with common law privacy.

Next, we address your claim under section 552.102 of the Government Code. Section 552.102(b) excepts from 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). This section 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. Therefore, except for the information that reveals the degree obtained and the courses taken, the district must withhold the college transcript in Exhibit D under section 552.102(b).

Section 552.117(a)(1) of the Government Code excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body’s receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body’s receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential.

You state, and have provided documentation reflecting, that the former employee to whom the submitted information pertains timely requested confidentiality for his home address and telephone number, social security number, and family member information. Based on your representation and the submitted documentation, we have marked the information that the district must withhold under section 552.117(a)(1) of the Government Code.

We note that section 552.130 of the Government Code is applicable to some of the remaining information at issue.⁵ This section excepts from disclosure information that relates to a motor vehicle operator’s or driver’s license or permit issued by an agency of this state. *See* Gov’t Code § 552.130(a)(1). We have marked Texas driver’s license information that the district must withhold under section 552.130.

We also note that the remaining information includes an e-mail address. With respect to that information, section 552.137 of the Government Code provides in part:

- (a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

⁵Unlike other exceptions to disclosure, this office will raise section 552.130 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov’t Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137(a)-(b).⁶ Section 552.137 excepts from public disclosure certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked an e-mail address that the district must withhold under section 552.137, unless the owner of the e-mail address has affirmatively consented to its public disclosure.

In summary: (1) the district may withhold any information in the student records that is encompassed by the present request and that identifies students under FERPA in accordance with Open Records Decision No. 634; (2) to the extent that any of the submitted information is the subject of our ruling under section 552.108 of the Government Code in Open Records Letter No. 2005-6137, the district may continue to rely on that ruling, provided that there has been no change in the law, facts, and circumstances on which it was based; (3) the district must withhold the marked information in Exhibit B under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code; (4) except for the information that reveals the degree obtained and the courses taken, the district must withhold the college transcript in Exhibit D under section 552.102(b) of the Government Code; (5) the district must withhold the information that we have marked under section 552.117(a)(1) of the Government Code; (6) the district must withhold the marked Texas driver's license information under section 552.130 of the Government Code; and (7) the district must withhold the marked e-mail address under section 552.137 of the Government Code, unless the owner of the e-mail address has affirmatively consented to its public disclosure. The rest of the submitted information must be released.

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

⁶ Section 552.137 also is a mandatory exception that may not be waived. Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001).

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).

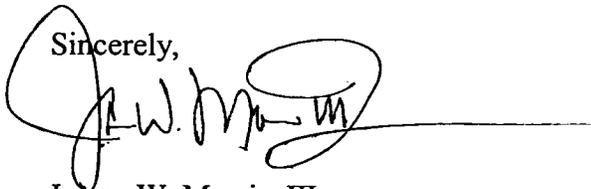
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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); *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 Office of the Attorney General 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. 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 horizontal line extending to the right from the end of the signature.

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

JWM/sdk

Ref: ID# 250818

Enc: Submitted documents

c: Mr. David Garcia
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(w/o enclosures)