



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 21, 2010

Mr. Fortunato G. Paredes
Escamilla & Poneck Cruz, LLP
Village Plaza
216 West Village Boulevard, Suite 202
Laredo, Texas 78041

OR2010-14275

Dear Mr. Paredes:

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# 394373.

The San Marcos Consolidated Independent School District (the "district"), which you represent, received a request for information regarding the resignation of a named district employee and complaints made against the employee during his employment with the district. You state the district released some information to the requestor. We note you redacted a social security number under section 552.147(b) of the Government Code.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed 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. Section 552.101 encompasses section 21.355 of the Education Code, which provides, "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. This office has interpreted this section to apply to any

¹Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. *See* Gov't Code § 552.147(b).

document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). This office has determined 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.* The Third Court of Appeals has held a written reprimand constitutes an evaluation for purposes of section 21.355. *See Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

You seek to withhold the submitted evaluations of the district's former Associate Director of Food Services. You state this employee is licensed as a dietician by the Texas State Board of Examiners of Dietitians. However, you do not state or provide documentation showing this former employee held an administrator's certificate under subchapter B of chapter 21 of the Education Code and was performing the functions of an administrator at the time of the evaluations. Thus, if the former employee at issue held an administrator's certificate and was performing the functions of an administrator at the time of the evaluations, the evaluations and letters of reprimand we marked are confidential under section 21.355, and the district must withhold them under section 552.101. To the extent the former employee did not hold an administrator's certificate or was not performing the functions of an administrator at the time of the evaluations, the district may not withhold the evaluations and letters of reprimand we marked under section 552.101 in conjunction with section 21.355. In that event, we will address your remaining arguments against disclosure of the evaluations and letters of reprimand, as well as the remaining information.

Section 552.102(a) 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 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 by section 552.101 of the Government Code.

Common-law privacy protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found.*, 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. We note the public generally has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decisions Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 542 (1990), 470 at 4 (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for

dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find you have failed to demonstrate how any portion of the information at issue is highly intimate or embarrassing and not of legitimate public interest. Accordingly, none of this information is confidential under the doctrine of common-law privacy, and it may not be withheld under section 552.102(a) on that basis.

You raise section 552.102(b) of the Government Code for the submitted transcript. 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). This exception further provides, however, “the degree obtained or the curriculum on a transcript in the personnel file of the employee” are not excepted from disclosure. *Id.*; *see also* Open Records Decision No. 526 (1989). Thus, with the exception of the former employee’s name, courses taken, and degree obtained, the district must withhold the submitted transcript pursuant to section 552.102(b).

You claim the remaining information is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from 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. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 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, 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 section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, and opinions that reflect the policymaking processes of the governmental body. *See* ORD 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). Moreover, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. If factual information, however, is so inextricably intertwined with material involving advice, opinion, or recommendation

as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You state the remaining information reflects the advice, opinions, and recommendations of the district in regards to the named former employee involving policymaking matters. However, we note the remaining information pertains solely to the former employee's work conduct. Accordingly, we find the remaining information pertains to a routine personnel matter that does not rise to the level of policymaking. Accordingly, the district may not withhold any of the remaining information under section 552.111.

We note a portion of the remaining information may be excepted under section 552.117(a)(1) of the Government Code.² 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 of the Government Code. Gov't Code § 552.117(a)(1). 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 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 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 information. Accordingly, if the former employee timely elected confidentiality under section 552.024, the district must withhold the information we marked under section 552.117(a)(1).

In summary, if the former employee at issue held an administrator's certificate and was performing the functions of an administrator at the time of the evaluations, the district must withhold the evaluations and letters of reprimand we marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. With the exception of the former employee's name, courses taken, and degree obtained, the district must withhold the submitted transcript pursuant to section 552.102(b) of the Government Code. If the former employee timely elected to keep his personal information confidential, then the district must withhold the information we marked under section 552.117(a)(1) of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 394373

Enc. Submitted documents

c: Requestor
(w/o enclosures)