



**THE ATTORNEY GENERAL
OF TEXAS**

October 13, 1986

**JIM MATTOX
ATTORNEY GENERAL**

Mr. James R. Raup
McGinnis, Lochridge & Kilgore
1300 Capitol Center
919 Congress Avenue
Austin, Texas 78701

Open Records Decision No. 441

Re: Whether names of school personnel who have not passed TECAT examination are available under the Open Records Act, article 6252-17a, V.T.C.S.

Dear Mr. Raup:

The Austin Independent School District (AISD) has received a request for the following information:

The names, ages, races, colleges and school assignments of all AISD personnel who have not applied their passing TECAT [Texas Examination of Current Administrators and Teachers] stickers to their professional certificates in your office as of the date of receipt of this letter.

As attorney for the district, you have asked if the Open Records Act, article 6252-17a, V.T.C.S., requires the district to release this information. In your request letter, you stated:

[A]n attorney for two teachers threatened AISD with a lawsuit for injunctive relief if the information was released, as the school district had planned to do.

Therefore, I am asking your opinion concerning whether the information requested should be released. I suppose that the teachers will rely on a privacy exception . . . [but] I note that in Attorney General Opinion Nos. H-483 and H-242 (1974) and in Open Records Decision No. 154 (1977), all of which seem to me to be analogous, the attorney general held that the scores made on certifying examinations given by the Board of Examiners in the Basic Sciences, by the Board of Vocational Nurse Examiners, and by civil service examiners, respectively, were public and disclosable. I also note that the attorney who telephoned

me informed me that his clients are challenging the TECAT examination in litigation filed in Austin. I do not know whether these teachers disclosed that they failed the examination in this litigation.

The attorney to whom you referred has submitted a brief to this office. Accompanying this brief is a copy of a protective order issued in a lawsuit styled John Doe and Jane Roe, et al v. Central Education Agency and William Kirby, Commissioner of Education, Cause No. 402975, pending in the 53rd District Court of Travis County. Various teachers and teachers' representatives have submitted affidavits to the court in connection with this lawsuit, which seeks to have the TECAT examination invalidated, and the protective order states

that the Affidavits submitted in this Cause shall be held for in camera inspection by the Court and that no parties release such Affidavits or the names of the persons executing such Affidavits to any persons whatsoever other than the attorneys in this cause.

Although the teachers' attorney was not entirely clear on this point, his argument appears to be that this order is a "judicial decision" within section 3(a)(1) of the Open Records Act, article 6252-17a, V.T.C.S., which prohibits the disclosure of information "deemed confidential by . . . judicial decision."

The protective order prohibits "parties" from releasing either the affidavits submitted to the court or the "names of the persons executing such Affidavits. . . ." In releasing the names of school district personnel who have not applied their TECAT stickers to their professional certificates, however, the district will not be revealing the identities of anyone who executed an affidavit. No one, in other words, will be able to inspect a list of school personnel who have not applied their TECAT stickers to their certificates and ascertain which personnel, if any, filed an affidavit in the pending lawsuit. This order, therefore, does not prevent the district from releasing the requested information.

The teachers' attorney also contended that section 3(a)(2) of the act, which prohibits the disclosure of information which, if released, would cause a "clearly unwarranted invasion of personal privacy," protects the identities of the district personnel in question. We disagree. Hubert v. Harte-Hanks Texas Newspapers, Inc., 652 S.W.2d 546 (Tex. App. - Austin 1983, writ ref'd n.r.e.), establishes that section 3(a)(2) excepts personnel file information only if its release would cause an invasion of privacy tort under Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668 (Tex.

1976). Under IAB, information may be withheld on privacy grounds only if it is highly intimate or embarrassing, such that a reasonable person would object to its release, and it is of no legitimate concern to the public. 540 S.W.2d at 685.

The law does not require personnel who pass the TECAT to have stickers applied to their teaching certificate; it merely provides that personnel who have not had such stickers applied are not eligible to teach until they do. A failure to have a sticker applied does not necessarily indicate that the TECAT was failed. But assuming it did so indicate, it cannot be reasonably argued that the public has no legitimate interest in knowing who failed this examination. The inability to pass the TECAT is not a private fact, the disclosure of which would unlawfully intrude on a person's seclusion, solitude, or private affairs. See Open Records Decision No. 372 (1983) (section 3(a)(1) prevents disclosure of purely private facts about a person). On the contrary, such inability relates directly to the person's qualifications to teach. The public obviously has a genuine interest in knowing who among those individuals who have been teaching in the public schools lack the basic skills thought to be needed to be an effective teacher. Moreover, given the fact that some of these teachers might secure temporary waivers which would allow them to continue to teach, the public has an equally obvious interest in knowing which of those teachers who did not pass the TECAT examination might remain in the district's employ in the future. Because the public has a legitimate interest in knowing the identities of school personnel who did not pass the TECAT examination, the Hubert v. Harte-Hanks case establishes that this information is not within section 3(a)(2), regardless of whether it is highly intimate or embarrassing.

Prior decisions and opinions of this office also support the conclusion that this information should be released. You referred to some of these authorities in your request letter. Other such authorities include Open Records Decision Nos. 329 (1982) and 278 (1981), which establish that in the usual instance, the circumstances of an employee's resignation are available to the public; Open Records Decision Nos. 350 (1982) and 208 (1978), which held that information concerning disciplinary action taken against a public employee is open to the public; and Open Records Decision Nos. 342, 329 (1982) and 298 (1981), which concluded that the qualifications of a public employee, including his experience, licenses and certificates, professional awards and recognition, tenure, salary, educational level, membership in professional organizations, and previous employment are available to the public. If this kind of information concerning a public employee is open to public inspection, it logically follows that an employee's inability to pass an examination designed to measure the extent to which he has mastered the basic skills thought necessary to perform his job adequately should also be a matter of public record.

Because neither section 3(a)(1) nor section 3(a)(2) of the act protects the identities of these personnel from required public disclosure, and because the school district has asserted no other basis for withholding this information, the district must comply with this request for information.

Very truly yours,

A handwritten signature in black ink that reads "Jim Mattox". The signature is written in a cursive style with a large, prominent "J" and "M".

J I M M A T T O X
Attorney General of Texas

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Prepared by Jon Bible
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