THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

June 2, 1989

Mr. Blake Hansen
McMahon, Tidwell, Hansen & Atkins, P.C.
Attorney for Ector County
Independent School District
P. O. Box 1311
Odessa, Texas 79760

Dear Mr. Hansen:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 5930; this decision is OR89-153.

Under the Open Records Act, all information held by governmental bodies is open unless the information falls within one of the act's specific exceptions to disclosure. The act places on the custodian of records the burden of proving that records are excepted from public disclosure. If a governmental body fails to claim an exception, the exception is ordinarily waived unless the information is deemed confidential under the act. See Attorney General Opinion JM-672 (1987). The act does not require this office to raise and consider exceptions that you have not raised.

The Ector County Independent School District (ECISD) received a request from a reporter with the Bryan-College Station Eagle for the release of (1) the personnel records of a former employee within ECISD, specifically, the employee's letter of resignation and any documents pertaining to disciplinary actions, reprimands, commendations, and the termination of his employment, and (2) a copy of the employee's resume.

While you agree that information such as a public employee's resume is subject to public disclosure, you inform us that no resume was found in the employee's personnel file. The Open Records Act does not require that a governmental body create new information, see Open Records Decision No. 342 (1982), or obtain information that is not within its possession. Open Records Decision Nos. 445

(1986); 317 (1982). Consequently, if the school district does not possess the former employee's resume, and the resume is not held by a consultant acting as an agent by the school district, the school district is not required to produce it. See Open Records Decision No. 462. (1987).

You argue that the remainder of the information contained in the employee's file is protected from required disclosure under sections 3(a)(1) and 3(a)(2) of the Open Records Act. You cite Texas State Employees Union v. Texas Dep't of Mental Health and Mental Retardation, 746 S.W.2d 203 (Tex. 1987), as support for your argument.

Section 3(a)(1) of the Open Records Act excepts "information deemed confidential by law" and protects from required disclosure information relating to matters within the constitutional right of privacy or the common-law tort right of privacy as recognized in judicial decisions. Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976), cert. denied 430 U.S. 930 (1977). Section 3(a)(2) protects personnel file information only if its release would constitute "a clearly unwarranted invasion of personal privacy." Section 3(a)(2) does not except more information than that excepted under section 3(a)(1). See Hubert v. Harte-Hanks Texas Newspapers, Inc., 652 S.W.2d 546 (Tex App. - Austin 1983, writ ref'd n.r.e.). This exception was designed to prevent disclosure of intimate details of a highly personal nature. Open Records Decision Nos. 224 (1979); 168 (1977).

Whether section 3(a)(2) applies depends on two factors -- an invasion of personal privacy and a finding that the invasion is clearly unwarranted. Open Records Decision No. 223 (1979). Some of the information at issue includes the employee's qualifications for employment, salary, and correspondence between the employee and the school district superintendent. The name, position, salary, age, education, experience, licenses and certificates, professional awards and recognition, and prior employment of public employees cannot be withheld under section 3(a)(2). See Open Records Decision Nos. 298, 264 (1981). The information in this employee's personnel file is not the type of information section 3(a)(2) was designed to protect; it is not information of a highly personal nature. You must release all information that relates to the employee's employment qualifications, except for the individual's college transcript. See S.B. 404, 71st Leg. (1989) (passed May 17, 1989, effective immediately).

Previous attorney general decisions have held that information concerning the circumstances surrounding the termination of employment may in some instances be withheld under section 3(a)(2). See Open Records Decision Nos. 119 (1976); 106, 93, 91, 68 (1975). However, even though some privacy interest may exist concerning the termination of employment, such information may not always be withheld. See Open Records Decision No. 278 (1981) (an employee's letter of resignation is not excepted per se from public disclosure; such a determination requires case-by-case analysis).

Your concern is that some of the information contained in this employee's file regarding the reasons for his suspension and resignation from ECISD trigger these privacy interests. However, a public employee's job performance, particularly how a public school teacher relates to students in his class, is of significant public concern. The public has a legitimate interest in information concerning the conduct and job performance is of public employees. See Open Records Decision Nos. 470, 464 (1987); 441 (1986).

The decision in Texas State Employees Union v. Texas Dep't of Mental Health and Mental Retardation, supra, is not applicable to the disclosure of information contained in a public school employee's personnel file that relates to the employee's job performance. Disclosing an employee's qualifications for employment, job performance, and conduct is not the equivalent of asking public employees the intrusive type of questions at issue in the Texas State Employees Union case, i.e., whether their parents use drugs or whether they beat their children. Therefore, information such as job qualifications and performance may not be withheld under Texas' constitutional rights incorporated in section 3(a)(2).

Section 3(a)(14) of the act excepts "student records at educational institutions funded wholly, or in part, by state revenue." A small portion of the information contained in the personnel file you have submitted identifies students who have been involved in a criminal investigation resulting in the employee's resignation. Because of the relatively small number of students to which this information could be applicable, you may delete any references in the personnel file that identifies students. We have marked the documents that may be withheld under section 3(a)(14).

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR89-153.

Yours very truly,

Open Government Section
of the Opinion Committee

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Prepared by Jennifer S. Riggs
Chief, Open Government Section

JSR/FAF/bc

cc: Jenny Butler
Education Writer
P. O. Box 3000
Bryan, Texas 77805

Ref.: ID# 5930

Enclosures