



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 27, 1993

Mr. Donald Walheim
Schulman, Walheim, Beck & Heidelberg, Inc.
745 E. Mulberry, Suite 700
San Antonio, Texas 78212

OR93-550

Dear Mr. Walheim:

The San Antonio Independent School District (the "school district"), which you represent, received a request for information regarding applications for the position of microcomputer support specialist and asked whether such information is subject to required public disclosure under the Texas Open Records Act (the "act"), Government Code chapter 552.¹ You agreed to disclose some of the requested information. You claimed that the remaining information is excepted from required public disclosure by sections 552.101, 552.102, 552.104, 552.111, and 552.122. Because the decision in *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ) required reexamination of the section 552.111 exception, we allowed you an additional 15 days to submit arguments in accordance with the *Gilbreath* decision. We now address your claim that some of the requested information is protected by sections 552.101, 552.102, 552.104, 552.111, and 552.122 of the act. We have assigned your request ID# 18664.

You have submitted to us for review educational transcripts contained in the requested applications for the position of microcomputer support specialist (Exhibit 1). You claim that section 552.102 excepts this information from required public disclosure. Section 552.102 excepts a "transcript from an institution of higher education maintained in the personnel file of a professional public school employee." The act does not define the term "professional public school employee." We do not, however, understand the

¹We note that V.T.C.S. article 6252-17a was repealed by the 73d Legislature. Acts 1993, 73d Leg. ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

term "professional public school employee" to encompass microcomputer support specialists, because microcomputer support specialists are not subject to the professional certification requirements which typically govern the career placement of professional school teachers, supervisors, counselors, principals, and superintendents. *See generally* Acts 1993, ch. 510 (alternative teacher certification).² Accordingly, we conclude that Exhibit 1 does not fall within the ambit of section 552.102 and must be released. *See also* Open Records Decision No. 455 (1987) at 8-9 (holding that the public has a legitimate interest in the job qualifications, including educational training, of public employees).³

Next, you claim that certain personal reference replies, which you have submitted to us for review (Exhibits 2 and 3) are excepted from required public disclosure by section 552.101 in conjunction with a confidentiality agreement purportedly entered into between the school district and the applicants for employment. The school district's application form provides that the applicant "understand[s] that the references and personal information which become part of this application are regarded as confidential and shall not be revealed to me." Governmental bodies, however, may not enter into agreements to keep information confidential, except where specifically authorized to do so by statute. *See, e.g.*, Open Records Decision Nos. 514 (1988); 484 (1987); 444 at 6, 437 (1986); 414 (1983); 283 (1980). You have referred us to no statute that makes the information contained in Exhibits 2 and 3 confidential, nor are we aware of any such statute. Accordingly, we conclude that the personal reference replies may not be withheld under section 552.101 as confidential information.

You also claim that section 552.102 excepts the letters contained in Exhibits 2 and 3 from required public disclosure. Section 552.102, in addition to excepting educational transcripts maintained in the personnel files of professional public school employees, excepts "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The court in *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.), found that section 552.102 (former section 3(a)(2)) protects personnel file information only if its release would cause an invasion of privacy under the test that the Texas Supreme Court articulated for section 552.101 (former section 3(a)(1)) of the act in *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Under *Industrial Foundation*, a

²Section 21.912 of the Education Code, repealed by Acts 1993, ch. 347, § 8.33, generally applied to school districts and discussed the duties of "professional employees." It defined this term to include "superintendents, principals, classroom teachers, supervisors, counselors, and any other person whose employment requires certification and an exercise of discretion." Educ. Code § 21.912 (repealed). We do not understand this definition of "professional employee" to encompass a microcomputer support specialist.

³Of course, the educational transcripts of individuals who were not selected for employment are not excepted by section 552.102 as these individuals are not employees of the school district. *See* Open Records Decision No. 455 at 8.

governmental body may withhold information on common-law privacy grounds only if the information is highly intimate or embarrassing and is of no legitimate concern to the public. Actions associated with a person's public employment generally do not constitute that person's private affairs. See Open Records Decision No. 470 (1987) at 4. This office has specifically held that common-law privacy does not protect an applicant's educational training; names and addresses of former employers; dates of employment; kind of work, salary, and reasons for leaving; names, occupations, addresses and phone numbers of character references; job preferences or abilities; or names of friends or relatives the governmental body employs. See Open Records Decision No. 455 at 9.

The information contained in Exhibits 2 and 3 was gathered by the school district as part of the employee selection process and relates to the qualifications of an applicant for governmental employment. We conclude that these documents contain no information that is intimate or embarrassing. Moreover, the information is of legitimate interest to the public. Thus, the information contained in Exhibits 2 and 3 does not meet the test for common-law privacy under *Industrial Foundation*, and you may not withhold it from required public disclosure under section 552.102 of the act.

Next, you claim that Exhibits 2 and 3, and Exhibit 4, which contains an interview composite report, constitute "interagency or intraagency memorandum[s] or letter[s] that would not be available by law to a party in litigation with the agency" under section 552.111 of the act and, therefore, are excepted from public disclosure. In Open Records Decision No. 615 (1993) (copy enclosed), this office recently reexamined the section 552.111 exception and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body at issue. An agency's policymaking functions, however, do not encompass routine personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *Id.* at 5-6. As the information submitted to us for review relates solely to a routine personnel matter, we conclude that section 552.111 does not except it from required public disclosure. Accordingly, the school district must release in their entirety Exhibits 2, 3, and 4.⁴

Finally, you claim that a microcomputer support specialist written exercise (Exhibit 5) and microcomputer support specialist interview questions (Exhibit 6) are excepted from required public disclosure by section 552.122, which excepts "test item[s] developed by an educational institution that is funded wholly or in part by state revenue" and "test item[s] developed by a licensing agency or a governmental body." Section

⁴You also claim that section 552.101 excepts Exhibit 4 from required public disclosure. You do not indicate, however, nor is it otherwise apparent, that this information is made confidential by law.

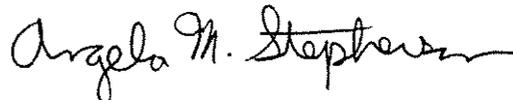
552.122 was intended to codify the policy expressed in past open records decisions dealing with test questions. Open Records Decision No. 543 (1990) at 3. Section 552.122 provides authority to withhold copies of exam questions and answer keys. See Open Records Decision No. 537 (1990).

We have examined the information contained in Exhibits 5 and 6. Exhibit 5 contains a completed written multiple-choice test. You advise us that this test "is used throughout the school year as positions become available, and is currently in use." You claim that release of the test would reveal test questions. We agree. Accordingly, Exhibit 5 may be withheld in its entirety under section 552.122 of the act.

Exhibit 6 differs from Exhibit 5 in that it contains questions and evaluation criteria created for use during the oral interview phase of the employee selection process. Some of the questions in Exhibit 5 are general and highly subjective in nature, while some of the questions are of a highly specific and technical nature. The documents contained in Exhibit 6 also appear to reflect the interviewer's evaluations of the applicants before him and contain notations reflecting the applicants' responses to questions. Whether section 552.122 encompasses employee evaluations in the employee interview process is currently under consideration in the context of a pending formal open records decision that we have designated RQ-576. In the meantime, we have severed Exhibit 6 from your request for a ruling and assigned it ID# 21651. We will address the availability of ID# 21651 upon issuance of our opinion in RQ-576.⁵

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 contact this office.

Very truly yours,



Angela M. Stepherson
Assistant Attorney General
Open Government Section

AMS/GCK/rho

⁵As we resolve the applicability of the act to Exhibits 5 and 6 on other grounds, we need not address your contention that these exhibits are excepted from required public disclosure by sections 552.104 and 552.111 of the act.

Enclosures: Open Records Decision No. 615
Documents submitted

Ref: ID# 18664

cc: Mr. Saade Samaan
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(w/o enclosures)