



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

April 28, 1995

Mr. Robert E. Luna  
Law Offices of Earl Luna, P.C.  
4411 Central Building  
4411 North Central Expressway  
Dallas, Texas 75205

OR95-242

Dear Mr. Luna:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 29968.

The Allen Independent School District (the "district"), which you represent, received an open records request for, among other things, the personnel file of a district employee.<sup>1</sup> You state that the district has released much of the requested information. You seek to withhold, however, certain portions of the personnel file pursuant to sections 552.101, 552.102, and 552.111 of the Government Code.

You contend that most of the information you seek to withhold is protected by common-law and constitutional privacy as incorporated into sections 552.101 and 552.102(a). Because the tests for privacy under these two sections are the same, we will discuss these two sections in tandem. To be protected from required disclosure under common-law privacy, information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.).

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<sup>1</sup>You informed this office in subsequent correspondence that since the time of your request, the district has terminated the employment of this individual.

Section 552.102(a) is specifically designed to protect public employees' personal privacy. The scope of section 552.102(a) protection, however, is very narrow. See Open Records Decision No. 336 (1982); see also Attorney General Opinion JM-36 (1983). Contrary to your assertion that the disciplinary materials contained in the personnel file constitute "highly personal" actions, the information you have marked as coming under the protection of common-law privacy pertains solely to the former employee's actions as a public servant, and as such cannot be deemed to be outside the realm of public interest. See Open Records Decision No. 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees).

You also contend that the information at issue implicates the former employee's constitutional right to privacy. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 678 (Tex. 1976), cert. denied, 430 U.S. 931 (1977) (Gov't Code § 552.101 also embraces constitutional privacy). The constitutional right to privacy consists of two related interests: (1) the individual interest in independence in making certain kinds of important decisions, and (2) the individual interest in independence in avoiding disclosure of personal matters. The first interest applies to the traditional "zones of privacy" described by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), and *Paul v. Davis*, 424 U.S. 693 (1976). These "zones" include matters related to marriage, procreation, contraception, family relationships, and child rearing and education and are clearly inapplicable here.

The second interest, in nondisclosure or confidentiality, may be somewhat broader than the first. Unlike the test for common-law privacy, the test for constitutional privacy involves a *balancing* of the individual's privacy interests against the public's need to know information of public concern. Although such a test might appear more protective of privacy interests than the common-law test, the scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." See Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985)). As noted above, the records at issue, including the employee's evaluations and letters of reprimand, do not concern intimate aspects of the former employee's private affairs, but rather directly pertain to his actions as a public servant. The district may not withhold any of these records under either constitutional or common-law privacy.<sup>2</sup>

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<sup>2</sup>We note that document # 232 makes reference to one of the district's students. We need not determine here whether the information in that memorandum implicates that student's privacy interests because the student is not identifiable. Cf. Open Records Decision Nos. 332 (1982); 206 (1978) (information regarding students must be withheld in compliance with Gov't Code § 552.026 only to extent "reasonable and necessary to avoid personally identifying a particular student").

We especially note that the former employee's social security number is not protected by privacy. Open Records Decision Nos. 226 (1979); 169 (1977) at 7-8. However, as noted above, section 552.101 also protects information deemed confidential by statute. This office recently concluded in Open Records Decision No. 622 (1994) at 3 that amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(vii), make confidential any social security number obtained or maintained by any "authorized person" pursuant to any provision of law enacted on or after October 1, 1990, and that any such social security number is therefore excepted from required public disclosure by section 552.101 of the Government Code. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the district to obtain or maintain social security numbers. Therefore, we have no basis for concluding that the employee's social security number was obtained or is maintained pursuant to such a statute and is therefore confidential under section 552.101 of the Government Code in conjunction with section 405(c)(2)(C)(vii).<sup>3</sup>

It is also not clear to this office whether document # 59 may be made confidential by statute. The Medical Practice Act, V.T.C.S. article 4495b provides:

Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician *that are created or maintained by a physician* are confidential and privileged and may not be disclosed except as provided in this section.

V.T.C.S. art. 4495b, § 5.08(b) (emphasis added). If the district determines that this record meets the definition of a "medical record" as defined by section 5.08(b) of article 4495b, it may release document # 59 only as provided by the Medical Practice Act. *See id.* § 5.08(c), (j)(3). Otherwise, this document must be released.

You also seek to withhold portions of the former employee's college transcripts contained in his personnel file. Section 552.102(b) of the Government Code protects from public disclosure

a transcript from an institution of higher education maintained in the personnel file of a professional public school employee, except that this section does not exempt from disclosure the degree obtained or the curriculum on a transcript in the personnel file of the employee.

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<sup>3</sup>We caution the district, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing the social security number, the district should ensure that it has not obtained or maintained the social security number pursuant to any provision of law enacted on or after October 1, 1990.

In Open Records Decision No. 526 (1989) at 2-3, this office concluded that

governmental bodies must edit from professional public school employees' [college] transcripts information other than the employee's name, the degree obtained, and the courses taken. For example, grades must be deleted as well as any extraneous information, such as religious preference, appearing on the transcripts.

Open Records Decision No. 526 (1989) governs your request. The district must release those portions of the transcript that reveal the employees' name, degree obtained, and "courses taken." Except for the employee's name, which must be released, we agree that the information you have highlighted on the transcript must be withheld pursuant to section 552.102(b).

Finally, we address your contentions regarding section 552.111 of the Government Code. Section 552.111 excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. Open Records Decision No. 615 (1993). The purpose of this section is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). In Open Records Decision No. 615 (1993) at 5, this office concluded that:

to come within the [section 552.111] exception, information must be related to the *policymaking* functions of the governmental body. An agency's policymaking functions do not encompass routine internal administrative and personnel matters . . . .

Most of the information at issue here does not rise to the level necessary to invoke the protection of section 552.111. In particular, the personnel evaluations contained in the requested file and most of the intra-office memoranda pertain solely to personnel and internal administrative matters that do not directly implicate the policy mission of the district, that is, the education of the district's students. *Compare with* Open Records Decision No. 631 (1995) (university's affirmative action policy). Even assuming, *arguendo*, that the subject matter of many of the memoranda did concern policy matters, we note that rather consisting of "advice, opinion, or recommendation" intended for use in the deliberative process, most of the information you have marked is more in the nature of directives from a superior to a subordinate. Section 552.111 was not intended to protect this type of information. Accordingly, the district may not withhold any of the information in the documents at issue under this section.

In summary, the district must withhold the employee's social security number only if it determines that it has obtained or maintained the number pursuant to a provision of law enacted on or after October 1, 1990. Document # 59 may only be released pursuant to the Medical Practice Act if the district determines that it is a "medical record" as defined in section 5.08(b) of article 4495b, V.T.C.S. Except for the employee's name, which must be released, the information you have highlighted on the employee's college transcript must be withheld from the public pursuant to section 552.102(b) of the Government Code. All remaining information in the personnel file is public and must be released to the requestor.<sup>4</sup>

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay  
Assistant Attorney General  
Open Government Section

LRD/RWP/rho

Ref.: ID# 29968

Enclosures: Marked documents

cc: Ms. Brenda L. Welchlin  
The Allen American  
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(w/o enclosures)

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<sup>4</sup>We note, however, that if the employee in question has elected to make his home address and telephone number confidential in accordance with section 552.024 of the Government Code, the district must withhold this information pursuant to section 552.117(1)(A).