



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 28, 1995

Mr. Tom Dirickson
Hayes, Coffey & Berry
1710 Westminster
P.O. Box 51049
Denton, Texas 76206

OR95-906

Dear Mr. Dirickson:

On behalf of the Denton Independent School District (the "district"), you ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. We assigned your request an identification number, ID# 33993.

The district has received a request from the spouse of a school teacher employed by the district for eleven informational items. The district appears to have received the written request for information on May 24, 1995. In your initial letter to this office, dated June 1, 1995, you claimed the district may withhold the information requested in items 6, 10, and 11 under section 552.111 of the Government Code and the information requested in items 4, 6, and 7 because the information is unavailable in the form the requestor seeks. You further contended the requestor, simply because of his status as the school teacher's spouse, does not have a special right of access to the requested information by virtue of section 552.023 and 552.102 of the Government Code.

In a subsequent letter, dated June 16, 1995, you additionally claimed that the information requested in item 5 is excepted from required public disclosure by sections 552.023, 552.102, and 552.111. Furthermore, you claimed that the requested evaluations of Ms. Barrera are confidential pursuant to section 21.355 of the Education Code, *see* Act of May 27, 1995, 74th Leg., R.S., ch. 260, § 1, 1995 Tex. Sess. Law Serv. 2207, 2277.¹ Because you raised these exceptions later than ten days after the district received the request letter, you have waived your section 552.111 argument as to item 5. *See*

¹Section 21.355 became effective on May 30, 1995. *See* Act of May 27, 1995, 74th Leg., R.S., ch. 260, § 86, 1995 Tex. Sess. Law Serv. 2207, 2505.

Gov't Code §§ 552.301, .302; Open Records Decision No. 470 (1987) at 2-3. Thus, we will not consider whether section 552.111 protects the information responsive to item 5. We will, however, consider your arguments that the information is confidential by law because release of confidential information is a misdemeanor offense. See Gov't Code § 552.352.

You have raised no exceptions to disclosure with respect to the information requested in items 1, 2, 3, 8, and 9. Consequently, we assume that the district has released or will release the information to the requestor.

Items 4, 6, and 7 seek the following information:

4. A copy of the following policies/procedures:

- a. Grievance/Complaint process
- b. Transfer process
- c. Hiring process
- d. Travel & reimbursement policy
- e. Nepotism policy
- f. Evaluation process
- g. Policy on changing student's grades

6. A break down of staff hired, terminated or transferred (to or from) within the last three years where Strickland Middle School was involved. This should be presented by race and sex and reason why.

7. A break down of staff by race and sex who are on or have been on a "Growth Plan" over the last three years.

As we stated above, you claim the district does not maintain the items requested in 4, 6, and 7 in the form sought. You further contend that, to respond to these questions, the district must perform legal research.

The Open Records Act does not require a governmental body to perform legal research, see Open Records Decision No. 563 (1990) at 8, or to prepare information in a form requested by a member of the public, see Open Records Decision No. 467 (1987) at 2.² A governmental body must, however, make a good faith effort to relate a request

²The Seventy-fourth Legislature amended the Open Records Act by adding section 552.131 to the Government Code. See Act of May 29, 1995, 74th Leg., R.S., ch. 1035, § 15, available in Westlaw, Tx-Legis 1035 (1995) (copies available at House Document Distribution Office). Section 552.231 provides for a governmental body's response to a request for information that requires programming or manipulation of data. Section 552.231 states that, in response to such a request, the governmental body must furnish the requestor with a written statement indicating, among other things, the information is unavailable in the requested form and a description of the form in which the information is available; the estimated cost of providing the information in the requested form; and the anticipated time required to provide the information in the requested form. Section 552.231 applies only to a request for information

to information in the governmental body's possession. Open Records Decision No. 561 (1990) at 8. Accordingly, the district need not release to the requestor information sought in items 4, 6, and 7 so long as the district cannot locate any responsive information.³

You contend that the information requested in item 5 is excepted from required public disclosure by section 552.102 of the Government Code. In item 5 the requestor seeks "[a] complete copy of Mrs. Brown's records at Strickland including all letters and notes maintained by Mrs. Fischer." Section 552.102(a) excepts from required public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, except that all information in the personnel file of an employee of a governmental body is to be made available to that employee or the employee's designated representative as public information is made available under" chapter 552.⁴ We agree that the requestor has made no showing that he is the employee's designated representative in this case.

In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.), the Texas Court of Appeals determined that the statutory predecessor to section 552.102(a) protects personnel file information only if its release would cause an invasion of privacy under the two-pronged test the Texas Supreme Court articulated in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), cert. denied, 430 U.S. 931 (1977), to determine whether information was private under the doctrine of common-law privacy incorporated into section 552.101. Under the two-pronged *Industrial Foundation* test, information is confidential if (1) it contains highly intimate or embarrassing facts about an individual's private affairs such that the release of the information would be highly offensive to a reasonable person and (2) the public has no legitimate interest in it. *Industrial Found.*, 540 S.W.2d at 685. Of course, information also is confidential if a constitutional or statutory provision deems it so.

Information responsive to item 5 contains some highly intimate medical information about an individual's private affairs, and we do not believe the public has any legitimate interest in it. We therefore conclude that some of the medical information is confidential under the common law. For your convenience, we have marked a sample of the medical information that satisfies this two-pronged test and is therefore confidential under the common law.

(Footnote continued)

a governmental body receives on or after September 1, 1995. See *id.* § 26. Because the district received this request for information in May 1995, section 552.231 is inapplicable.

³Although we must accept your assertions as true, we find it difficult to believe that the district does not have printed policies, perhaps in an employee handbook, responsive to the information requested in item 4.

⁴The Seventy-fourth Legislature amended section 552.102(a) of the Government Code, but the amendment is not applicable to requests for information made prior to September 1, 1995. See Act of May 29, 1995, 74th Leg., R.S., ch. 1035, § 26, available in Westlaw, Tx-Legis 1035 (1995) (copies available at House Document Distribution Office).

We found, among the information, several records referring to particular students. Section 552.026 of the Government Code governs the release of student records by an education institution that receives federal funds under programs the federal government administers. *See* Open Records Decision No. 480 (1987) at 3 (quoting Open Records Decision No. 427 (1985)). Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974.

We assume that the district receives federal funds under at least one program that the federal government administers. We therefore must consider whether the district may release the requested documents under the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g.

FERPA provides that no federal funds will be made available under an applicable program to an educational agency or institution that releases to anyone but certain enumerated federal, state, and local officials and institutions personally identifiable information (other than directory information⁵) contained in a student's education records unless the student's parent has authorized otherwise. *See* 20 U.S.C. § 1232g(b)(1). "Education records" consist of those records that contain information directly related to a student and that an educational agency or institution or a person acting for such agency or institution maintains. *Id.* § 1232g(a)(4)(A).

In our opinion, some of the information responsive to item 5 consists of education records containing personally identifiable information related to particular students. Pursuant to FERPA and section 552.026 of the Government Code, the district may not release this personally identifiable information. For your convenience, we have marked a sample of the information confidential under FERPA and section 552.026 of the Government Code.

Finally, information responsive to item 5 contains several documents "evaluating the performance of a teacher." Such documents are confidential pursuant to section 21.355 of the Education Code. Section 21.355 does not indicate that a teacher's spouse may examine copies of otherwise confidential documents. Consequently, the district may not release to the requestor the evaluations of Mrs. Brown's performance. For your convenience, we have marked a sample of performance evaluations the district must withhold.

⁵For the purposes of FERPA, the term "directory information" relating to a student includes: the student's name, address, telephone number, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height if the student is a member of an athletic team, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution the student attended. 20 U.S.C. § 1232g(a)(5)(A). An educational agency or institution that makes public directory information must comply with the notice provisions in section 1232g(a)(5)(B).

Item 10 seeks “[a] copy of all travel reimbursement approved by Mrs. Fischer since September 1994.” You contend section 552.111 authorizes the district to withhold the requested information. Section 552.111 of the Government Code authorizes a governmental body to withhold from required public disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” This office construed the statutory predecessor to section 552.111 to except only “internal communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body at issue.” Open Records Decision No. 615 (1993) at 5.

Forms requesting travel reimbursement, approval of travel reimbursement requests, and copies of reimbursement checks are not advice, recommendation, or opinion reflecting the district’s policymaking process. We therefore conclude that section 552.111 does not authorize the district to withhold the information responsive to item 10.

Item 11 requests a “copy of evaluation results . . . on [Ms. Barrera].” We understand, from our review of the documents you submitted, that Ms. Barrera is a teacher. As we have stated above, section 21.355 of the Education Code deems confidential “[a] document evaluating the performance of a teacher.” Thus, the district must withhold information responsive to item 11. For your convenience, we have marked the information.

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 request⁶ and may not be relied upon as a previous determination under section 552.301 of the Government Code regarding any other records. If you have questions about this ruling, please contact this office.

Yours very truly,



Kymberly K. Oltrogge
Assistant Attorney General
Open Government Section

KKO/RHS/rho

Ref.: ID# 33993

Enclosures: Marked documents

⁶We understand you have submitted only representative samples of material that you believe are excepted from required public disclosure. This open records letter does not reach, and therefore does not authorize the withholding of, any other requested information to the extent that information contain types of information substantially different from that submitted to this office.

cc: Mr. Barrett K. Brown
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Denton, Texas 76201
(w/o enclosures)