



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 5, 1996

Mr. T. Chris Robson
Henslee, Fowler & Hepworth
816 Congress Avenue, 8th Floor
Austin, Texas 78701-2443

OR96-1388

Dear Mr. Robson:

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 ID# 10181.

The Sonora Independent School District (the "district"), which you represent, received a request for a copy of certain board update memoranda prepared for the district's board of trustees by the district's superintendent. You state the district does not object to providing much of the requested information, but assert that certain information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. You also assert that certain information is made confidential by the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. You have provided this office with a copy of the information at issue.¹

First, you assert that certain information is excepted from disclosure under common-law privacy and section 552.101 of the Government Code. Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and includes the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld under section 552.101

¹The district also states that some of the requested information is "no longer in existence and thus cannot be produced for disclosure." Chapter 552 of the Government Code applies only to information that exists at the time a request for information is received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed w.o.j.); Open Records Decision No. 452 (1986); *but cf.* Local Gov't Code § 202.002(b); Open Records Decision No. 505 (1988) (governmental body may not dispose of records, even pursuant to statutory authority, while records are subject of open records request).

in conjunction with the common-law right of privacy if: (1) the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person, and (2) the information is of no legitimate concern to the public. *Id.* at 683-85; Open Records Decision No. 628 (1994).

Certain information you have marked concerns the job performance and actions of certain district employees. The information relates to the actions of public employees and matters of public business and therefore is of legitimate public interest. *See, e.g.*, Open Records Decision No. 444 (1986) at 4 (legitimate public interest in information relating to public employees). Additionally, the information is not of a highly intimate or embarrassing nature about a person's private affairs. Therefore, the information may not be withheld pursuant to common-law privacy under section 552.101.

You also assert that certain information is excepted under common-law privacy because it concerns the personal health of an individual. Although not all medically related information is protected by common-law privacy, Open Records Decision No. 478 (1987), specific medical information regarding serious illnesses is protected by common-law privacy. Attorney General Opinion JM-229 (1984); Open Records Decision No. 455 (1987). We have marked the medical information that is protected by common-law privacy.

You also assert that information concerning allegations of sexual harassment is protected under common-law privacy. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

In the information at issue, the identities of witnesses or victims in sexual harassment matters are excepted from disclosure under common-law privacy and section 552.101. *Ellen*, 840 S.W.2d at 525. However, the district may not withhold under section 552.101 information that reveals the identity of the person accused of sexual harassment, or general information regarding the alleged sexual harassment. *Ellen*, 840 S.W.2d at 525.

Section 552.101 also excepts from disclosure information that is made confidential by a specific statute. The Seventy-fourth Legislature enacted Senate Bill 1, which added section 21.355 to the Education Code. Section 21.355 provides, "Any

document evaluating the performance of a teacher or administrator is confidential.” This office recently interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, this office concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* Similarly, an administrator is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is administering at the time of his or her evaluation. *Id.*

Although the district did not raise section 21.355, section 552.352 of the Government Code prohibits the release of confidential information. Therefore, this office will generally raise statutory confidentiality provisions and consider whether information is confidential by statute. Based on the reasoning set out in Open Records Decision No. 643 (1996), we have marked certain information that is confidential pursuant to section 21.355 of the Education Code because it is information evaluating the performance of a teacher or an administrator.² Therefore, pursuant to section 552.101 of the Government Code, the district must withhold this information.

You also assert that certain information is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) protects information that reveals client confidences to an attorney, including facts and requests for legal advice, or that reveals the attorney's legal advice. See Open Records Decision No. 574 (1990). We have marked certain information that may be withheld because it reveals client confidences to an attorney and an attorney's legal advice.

You also assert that certain information is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure “only those internal agency 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. This exception is intended to protect advice and opinions given on policy matters and to encourage frank and open discussions within an agency in connection with the agency's decision-making processes. *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 412 (Tex. App.--Austin 1992, no writ) (citing *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.)). This section does not protect information regarding routine administrative and personnel matters, nor does it protect facts or written observations of facts. Open Records Decision No. 615 (1993) at 5; see also Open Records Decision No. 631 (1995) (section 552.111 excepts policymaking information of

²This conclusion is based on the assumption that the individuals that are evaluated are teachers or administrators as those terms are defined in the Education Code. See Open Records Decision No. 643 (1996). If any of these individuals is not a teacher or administrator, the information evaluating that individual is not confidential under section 21.355 of the Education Code.

broad scope that affects governmental body's policy mission). Some of the information that you claim is exempted under section 552.111 is factual information or information that concerns specific administrative and personnel matters. This information does not fall within the scope of this exception. We have marked the information that you may withhold under section 552.111.

Finally, you assert that certain information is confidential under FERPA, 20 U.S.C. § 1232g. In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and exempted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is exempted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. Open Records Decision No. 634 (1995) applies only to "education records" which are defined under FERPA as records that

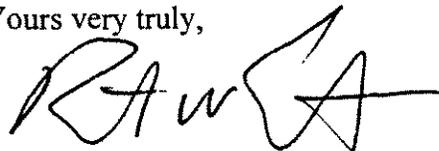
- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A). See also Open Records Decision Nos. 462 (1987), 447 (1986). Information must be withheld from required public disclosure under FERPA to the extent "reasonable and necessary to avoid personally identifying a particular student." See Open Records Decision No. 224 (1979).

Because you have submitted to this office records which identify particular students, we have marked the portions of the documents that must be withheld under FERPA to avoid personally identifying the student. The remainder of these documents may not be withheld under FERPA.

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 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Robert W. Schmidt
Assistant Attorney General
Open Records Division

RWS/rho

Ref.: ID# 101081

Enclosures: Marked documents

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