



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 23, 1997

Ms. Kaye DeWalt
School Attorney
Houston Independent School District
3830 Richmond Avenue
Houston, Texas 77027-5838

OR97-0134

Dear Ms. DeWalt:

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# 36056.

The Houston Independent School District (the "district") received an open records request for certain records pertaining to the employees of the district's Payroll Department. You state that you have released to the requestor most of the requested information. You seek to withhold, however, certain records pursuant to section 21.355 of the Education Code in conjunction with section 552.101 of the Government Code. You also contend that certain information contained in some "Absence of Duty" forms is excepted from required public disclosure pursuant to section 552.102 of the Government Code.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. In the last legislative session, Senate Bill 1 was passed, 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 also 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.*

You state that there are at least four current and former employees in the Payroll Department that are or have been either administrators and teachers. You have submitted to this office for review the evaluation of only one Payroll Department employee. The evaluation assesses the employee's performance while serving as director of the department. We do not believe that the director of the Payroll Department is an administrator for purposes of chapter 21 of the Education Code. Pursuant to the State Board of Educator Certification, an administrative officer I-VIII is required to hold only a bachelor's degree so long as his responsibilities do not include assignments in instructional programs. His responsibilities may include coordinating or supervising groups or major functions in personnel, business, accounting, planning, or research. This appears to describe the director of payroll's functions. Therefore, as the director of payroll is not required to hold an administrator's certificate and is not an administrator for the purposes of Open Records Decision No. 643 (1996), the district may not withhold this individual's performance evaluation under section 21.355 of the Education Code.¹

You next contend that certain information that you have marked in the "Absence of Duty" forms that reveals employees' medical condition, as well as other reasons for missing work, is excepted from required public disclosure pursuant to section 552.102 of the Government Code. Section 552.102(a) excepts from public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 552.102(a) is 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). The test for section 552.102(a) protection is the same as that for information protected by common-law privacy under section 552.101: to be protected from required disclosure the 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 Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App. - Austin 1983, writ ref'd n.r.e.).

This office has held that section 552.102(a) may be invoked only when information reveals "intimate details of a highly personal nature." Open Records Decision No. 315 (1982) and authorities cited therein. None of the information you have marked comports with this standard. Consequently, the district may not withhold any portion of the employee leave forms pursuant to section 552.102.

This does not, however, end our discussion of these records. Although the attorney general will not ordinarily raise an exception that might apply but that the governmental

¹You also contend that the "assessment and growth plans" of three other employees are confidential under section 21.355. You have not, however, submitted those documents to this office for review. Consequently, it is impossible for this office to determine whether those evaluations are confidential under the Education Code. However, those documents are excepted from required public disclosure only if those documents evaluate the three individuals' performance as teachers or administrators for purposes of section 21.355.

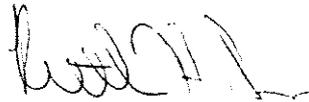
body has failed to claim, *see* Open Records Decision No. 325 (1982) at 1, we will raise section 552.117 of the Government Code because the release of confidential information could impair the rights of third parties and because the improper release of confidential information constitutes a misdemeanor. *See* Government Code § 552.352.

Section 552.117(1) of the Government Code was amended in the past legislative session to except from required public disclosure, among other things, information that reveals whether a public employee has family members, but only if the employee elected to have that type of information withheld from the public in accordance with section 552.024.

The effective date of the amendment to section 552.117 was September 1, 1995. *See* Acts 1995, 74th Leg., R.S., ch. 1035, § 29, at 5142. You do not indicate that any Payroll Department employee had made the election to have this information withheld pursuant to section 552.024 as of the date of the open records request. Whether a particular piece of information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 (1989) at 5 (governmental body may not solicit section 552.024 election from employees in response to pending open records request). Consequently, the district must release to the requestor information about family members contained in the employee leave forms unless the employee had elected to have that information withheld from the public prior to the district's receipt of the open records request.

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,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/RWP/ch

Ref.: ID# 36056

Enclosures: Submitted documents

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(w/o enclosures)

