



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 28, 1997

Ms. Merri Schneider-Vogel
Bracewell & Patterson, L.L.P.
South Tower Pennzoil Place
711 Louisiana Street, Suite 2900
Houston, Texas 77002-2781

OR97-0644

Dear Ms. Schneider-Vogel:

You seek reconsideration of Open Records Letter No. 97-0298 (1997), in which this office determined that the Pasadena Independent School District (the "district"), which you represent, had not met its burden under chapter 552 of the Government Code and that the requested information was presumed to be public. We have assigned your request for reconsideration ID# 105399.

When a request for an open records decision is not made within the time period prescribed by section 552.301, the requested information is presumed to be public. Gov't Code § 552.302. This presumption of openness can only be overcome by a compelling demonstration that the information should not be made public. *See, e.g.*, Open Records Decision No. 150 (1977) (presumption of openness overcome by showing that information is made confidential by another source of law or affects third party interests). Here, you claim that a statute, section 21.355 of the Education Code, makes the requested information confidential. Therefore, we consider your arguments.

You claim that the teacher's evaluations are made confidential by law; however, you ask whether the documents remain confidential after the death of the subject of the records. 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.* Based on the reasoning set out in Open Records Decision No. 643 (1996), we conclude that the documents you have submitted are evaluations as contemplated by section 21.355.

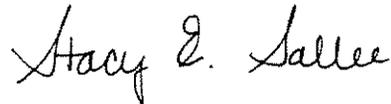
You ask if section 21.355 of the Education Code lapses after the death of the teacher. We have only addressed whether a statutory confidentiality provision lapses after the death of the subject of the information on a few occasions. Attorney General Opinion DM-61 (1991), JM-851 (1988), JM-229 (1984); Open Records Decision Nos. 536 (1989), 529 (1989), 524 (1989).

In Attorney General Opinion H-917 (1976), we first announced that this office would follow the uniform rule that the common-law right of privacy lapses upon death. *See* Open Records Decision No. 272 (1981). We have determined, however, that there is no similar presumption that prohibitions against disclosure in confidentiality statutes lapse upon the death of the subject of the information. Attorney General Opinion DM-61 (1991) at 3, JM-851 (1988) at 2; *see also* Attorney General Opinion JM-229 (1984); Open Records Decision No. 529 (1989). Whether a confidentiality provision lapses upon death is a question of statutory construction. Attorney General Opinion DM-61 (1991) at 3; Open Records Decision No. 524 (1989) at 3. We have previously stated that a confidentiality provision will lapse upon death when the statute is enacted merely to protect information that would not be covered by a common-law right of privacy or when the statute only protects a living person's privacy. Open Records Decision Nos. 536 (1989) (provision which protects police officer's photograph ceases to apply after death of officer), 524 (1989) at 3 (confidentiality of student records under Gov't Code § 552.114 lapses upon death). In other instances where we have found that a statutory provision would lapse upon death, we have determined that the statute was specifically applicable to living persons, and the circumstances involved the release of the information in question based on another statutory obligation. Attorney General Opinion DM-61 (1991) (death certificates); Open Records Decision No. 529 (1989) (autopsy reports). For example, in Open Records Decision Number 529 (1989), we stated that a confidentiality provision prohibiting the release of an AIDS test result would lapse upon death because the confidentiality provisions were expressed in language applicable to living persons, and a contrary interpretation would interfere with a medical examiner's statutory obligation to make full inquest reports. Conversely, we have held that when nothing in the statute indicates that the legislature intended the confidentiality provisions to apply only during lifetime, the statutory protection would not lapse upon the death of the subject of the information. Attorney General Opinions JM-851 (1988) at 2, JM-229 (1984) at 4.

After reviewing section 21.355 and other related provisions of the Education Code, we find nothing in the statute itself to indicate that the legislature intended the provision to apply only during the lifetime of the teacher or administrator. Furthermore, the confidentiality provision appears to protect more than the teacher's privacy interests. We conclude, therefore, that the district must withhold the submitted documents under section 21.355 of the Education Code. Attorney General Opinion JM-851 (1988). Section 21.355 of the Education Code remains in force after the death of the teacher or administrator involved.

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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/alg

Ref.: ID# 105399

Enclosures: Submitted documents

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