



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

September 16, 1997

Ms. Dorcas A. Green  
Walsh, Anderson, Underwood,  
Schultz & Aldridge, P.C.  
P.O. Box 2156  
Austin, Texas 78768

OR97-2068

Dear Ms. Green:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your requests were assigned ID#s 108444 and 108660.<sup>1</sup>

The Comfort Independent School District (the "district"), which you represent, received three individual requests for a variety of information concerning a principal's employment, resignation and settlement agreements with the district, and related district board meetings. In response to the request, you submitted to this office for review a representative sample of the information you assert is responsive. You seek to withhold the information responsive to the first request pursuant to sections 552.102 and 552.103 of the Government Code. In response to the second and third requests for information, you assert sections 552.101 and 552.102 of the Government Code.<sup>2</sup> We have considered the exceptions and arguments you claim and reviewed the submitted information.

We first address section 552.101, in conjunction with the Family Educational Rights and Privacy Act of 1974 ("FERPA"). 20 U.S.C. § 1232g(a)(4)(A). Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by

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<sup>1</sup>We have combined the two related files, because the individual requestors seek information which you contend is related and subject to the same exceptions.

<sup>2</sup>Although you asserted that the submitted information at issue is excepted from required public disclosure pursuant to sections 552.101, 552.102, and 552.103 of the Government Code, you also marked portions of the submitted records as protected by section 552.111. However, you did not explain how section 552.111 applies to any of the submitted records. The Government Code places on the custodian of records the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). Therefore, in this ruling we only consider the exceptions for which you have offered support.

judicial decision.” This section excepts from disclosure information that is made confidential by statute. 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 excepted 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 excepted 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. FERPA provides the following:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of their parents to any individual, agency, or organization. . . .

20 U.S.C. § 1232g(b)(1). “Education records” are 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.

*Id.* § 1232g(a)(4)(A); *see also* Open Records Decision Nos. 462 (1987) at 14-15, 447 (1986). Information must be withheld from required public disclosure under FERPA only to the extent “reasonable and necessary to avoid personally identifying a particular student.” Open Records Decision Nos. 332 (1982), 206 (1978). We have reviewed the submitted records and it does not appear that the submitted records contain any information subject to FERPA. Based on your submissions, we therefore conclude that the submitted records may not be withheld under FERPA.

We next consider whether Section 21.355 of the Education Code excepts from required public disclosure any of the submitted records. Section 21.355 applies to a document that evaluates, as that term is commonly understood, the performance of a teacher or administrator.<sup>3</sup> *See* Open Records Decision No. 643 (1996). While the Education Code does not define “document evaluating the performance” for purposes of section 21.355, this office has stated that the common and ordinary meaning of these words should be applied. *See* Open Records Decision No. 643 (1996). To evaluate is “to determine or fix the value of,” “to determine the significance, worth, or condition of usually by careful appraisal and

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<sup>3</sup>Although you did not raise Section 21.355 of the Education Code as an applicable exception to disclosure, we will consider whether some of the requested information must be withheld pursuant to this statute. *See generally* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

study” or “to ascertain the value or amount of.” *See id.* (quoting dictionaries). You have submitted to this office several responsive documents which appear to be performance evaluations of a district principal. We do not believe that all of the submitted documents evaluate, as that term is commonly understood, the performance of the district administrator. We have tagged the documents which are subject to section 21.355 of the Education Code. These documents must be withheld from disclosure. The district may not withhold the remaining documents from public disclosure based on section 552.101 in conjunction with section 21.355 of the Education Code.

We next address whether the submitted records are subject to the common-law right of privacy, as protected under either section 552.101 or 552.102. Section 552.101 encompasses the common-law right to privacy. Section 552.102(a) protects “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” The test to determine whether information is private and excepted from disclosure under common-law privacy provisions, which are encompassed in section 552.101 and section 552.102 of the Government Code, is whether the information is (1) highly intimate or embarrassing to a reasonable person and (2) of no legitimate public concern. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 930 (1977); *Hubert v. Harte-Hanks Texas Newspapers Inc.*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.).

The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. We have marked and tagged the information which you must withhold pursuant to section 552.101 in conjunction with common-law privacy. However, most of the remaining information at issue relates to the job performance and work behavior of a public employee. There is a legitimate public interest in the work behavior of a public employee and how he or she performs job functions. Open Records Decision Nos. 470 (1987) at 4 (public has legitimate interest in job performance of public employees), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 (1984) at 2 (scope of public employee privacy is narrow). Thus, to the extent the submitted information relates to a public employee’s job performance, we conclude that the public has a legitimate right to this information. Therefore, except for the information which we have marked with red brackets, we did not find any other information which is protected from disclosure by the common-law right to privacy pursuant to sections 552.101 or 552.102.

Before we consider the application of section 552.103 to the submitted records, we note that for compelling reasons of public policy, some information cannot be withheld from disclosure regardless of its relationship to litigation. Open Records Decision No. 551 (1990). The “litigation exception” cannot be applied to except from disclosure the official records

of the public proceedings of a governmental body. Open Records Decision No. 221 (1979).<sup>4</sup> Alternatively, section 551.104 of the Government Code, a provision of the Open Meetings Act, makes the tape of a properly closed meeting confidential. See Gov't Code §§ 551.104(c) ("The certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3)"); see also § 551.146 (public disclosure of certified agenda of meeting that was lawfully closed to public is prohibited); Open Records Decision No. 495 (1988) (Open Meetings Act specifically makes confidential certified agendas or tapes of executive sessions).<sup>5</sup>

Section 552.103(a), known as the litigation exception, exempts from required public disclosure information

- (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and,
- (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection

When asserting section 552.103(a), a governmental body must establish that the requested information relates to pending or reasonably anticipated litigation. Thus, under section 552.103(a) a governmental body's burden is two-pronged. The governmental body must establish that (1) litigation is either pending or reasonably anticipated, and that (2) the requested information relates to that litigation. See *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. In this instance, we conclude that you have failed to meet the requisite showing that litigation is reasonably anticipated or pending. Therefore, you may not rely on section 552.103 to withhold the submitted information from the requestors. As you raise no other exception to the release of the requested information, we conclude that the district may not withhold the requested records based on the claimed exceptions.

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<sup>4</sup>Information that a statute other than chapter 552 expressly makes public is not subject to the exceptions to required public disclosure. Open Records Decision No. 623 (1994) at 3. The minutes, tape recordings, and agenda of an open meeting are public records. Gov't Code §§ 551.022 (minutes and tape recordings), .041 (notice), .043 (time and accessibility of notice), .045 (emergency addition to agenda).

<sup>5</sup>However, records that were discussed in a closed meeting and records created in a closed meeting, other than a certified agenda or tape recording, are not made confidential by chapter 551 of the Government Code. Open Records Decision No. 605 (1992).

We are resolving this matter with an informal letter ruling rather than with a published open records decision.<sup>6</sup> 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,



Sam Haddad

Assistant Attorney General  
Open Records Division

SH/rho

Ref: ID#s 108444 and 108660

Enclosures: Marked documents

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<sup>6</sup>In reaching our conclusion, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

