



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

September 22, 1998

Mr. Michael Currie  
Henslee, Fowler & Hepworth  
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816 Congress Avenue  
Austin, Texas 78701-2443

OR98-2268

Dear Mr. Currie:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 118225.

The Joaquin Independent School District (the "district"), which you represent, received a request for the credentials and experience of the faculty, staff, and administration. You have provided this office with various information you claim is responsive to this request. You assert that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.111, 552.114, and 552.117 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of documents.<sup>2</sup>

Initially, you assert that most of the submitted documents are excepted from disclosure by section 552.102. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*,

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<sup>1</sup>You did not raise your section 552.103 claim within the statutory ten business day period. Gov't Code 552.301. Consequently, you have waived this exception.

<sup>2</sup>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.

652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the act. 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 constitutional or common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992).

The constitutional right to privacy protects two interests. Open Records Decision No. 600 at 4 (1992) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). The first is the interest in independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court. Open Records Decision No. 600 at 4 (1992). The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.*

The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. *See* Open Records Decision No. 455 at 5-7 (1987) (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." *See* Open Records Decision No. at 5 455 (1987)(citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). After reviewing the submitted materials, we do not believe that the submitted information is protected in its entirety by a common-law or constitutional right to privacy. *See, e.g.*, Open Records Decision Nos. 444 (1986) (employee information about qualifications, disciplinary action and background not protected by privacy), 405 (1983) (employee performance audit not protected by privacy), 284 (1981) (letters of recommendation not protected by privacy). We note, however, that you have submitted documents revealing the results of drug or alcohol testing. This office has long recognized a privacy interest in the drug test results of public employees. *See* Open Records Decision Nos. 594 (1991) (suggesting identification of individual as having tested positive for use of illegal drug may raise privacy issues), 455 at 5 (1987) (citing *Shoemaker v. Handel*, 619 F. Supp. 1089 (D.N.J. 1985), *aff'd*, 795 F.2d. 1136 (3rd Cir. 1986)). Consequently, you must withhold these test results under common-law privacy.

You have also submitted numerous documents relating to employee insurance and retirement benefits. Previous decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). Thus, a public employee's allocation of his salary to a voluntary investment program offered by their employer is a personal investment decision, and information about it is excepted from disclosure by a common-law right of privacy. Open Records Decision Nos. 600 (1992) (TexFlex benefits), 545 (1990) (deferred compensation plan). However, where a transaction is funded in part by the state, it involves the employee in a transaction with the state and is not protected by privacy. Open Records Decision No. 600 (1992). After examining the submitted information, we are unable to determine whether the insurance and retirement information involves a financial transaction between an individual and the district. Therefore, to the extent that this information involves a financial transaction between an individual and the district, it must be released.<sup>3</sup> If the information does not involve a financial transaction between the district and the individual, it may be withheld under section 552.102 based on the common-law right of privacy.

Section 552.101 also encompasses information protected by other statutes. First, the Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes, protects from disclosure "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." V.T.C.S. art. 4495b, § 5.08(b). The MPA provides for both confidentiality of medical records and certain statutory access requirements. *Id.* at 2. We have marked the medical records that may only be released as provided by the MPA.

It also appears that some of the submitted information is protected from disclosure pursuant to the provisions of Title I of the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101 *et seq.* Information is confidential by law when it is made confidential by federal statute or administrative regulations enacted pursuant to statutory authority. Open Records Decision No. 476 at 5 (1987). The ADA provides that information about medical conditions and medical histories of applicants or employees must be 1) collected and maintained on separate forms, 2) kept in separate medical files, and 3) treated as confidential medical records. In addition, information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his job, is to be treated as a confidential medical record. 29 C.F.R. § 1630.14(c). We have marked the information that is confidential under the ADA and may only be released in accordance with that statute.

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<sup>3</sup>However, information revealing the designation of beneficiaries of insurance and retirement funds is confidential under the right of privacy and must be withheld. Open Records Decision No. 600 at 10 (1992).

You have also submitted documents which you claim are confidential teacher evaluations. Section 21.355 of the Education Code provides, "Any document evaluating the performance of a teacher or administrator is confidential." This office has 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.* We also concluded that an administrator is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is acting as an administrator 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 submitted evaluations are confidential under section 21.355 of the Education Code.

Additionally, some of the information contained within the submitted transcripts is protected from disclosure. Section 552.102(b) of the Government Code exempts from disclosure a transcript from an institution of higher education maintained in the personnel file of a professional public school employee, with the exception of the degree obtained and the curriculum. The district must, therefore, edit from the transcripts all information other than the employee's name, the degree obtained, and the courses taken. Open Records Decision No. 526 at 2-3 (1989).

We also note that employee W-4 forms are excepted from disclosure by 26 U.S.C. § 6103(a). Open Records Decision No. 600 (1992). An Employment Eligibility Verification, Form I-9, is confidential pursuant to 8 U.S.C. § 1324a(b)(5). Therefore, the district must withhold federal tax return information.

You also contend that certain employee information must be withheld under section 552.117. Section 552.024 of the Government Code provides a procedure by which an employee or official of a governmental body may choose whether to allow public access to the information covered by section 552.117. Section 552.117 exempts from public disclosure the home address, home telephone number, social security number, and information about family members of a current or former official or employee of a governmental body who has complied with section 552.024 of the Government Code. In this instance, the employees only elected to have their home addresses and phone numbers withheld from public disclosure. Consequently, the district may not withhold employee social security numbers or information relating to whether these employees have family members under section 552.117. Open Records Decision No. 455 (1987). Please note for future reference that employee names are not protected under section 552.117. *See* Gov't Code § 552.022.

We note, however, that social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social

security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Open Records Act. We caution, however, that section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the district pursuant to any provision of law enacted on or after October 1, 1990.

You also assert that some of the submitted documents are educational records that must be withheld pursuant to sections 552.026 and 552.114 of the Government Code, and pursuant to the Family Education Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. In Open Records Decision No. 634 (1995), this office concluded: (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. 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 marked the information the district must withhold under FERPA.

Additionally, you claim that some of the submitted information is excepted from disclosure under section 552.111. Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, generally do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. After reviewing the submitted information, we find that the documents relate solely to personnel matters and may not be withheld under this exception.

Finally, we note that you have submitted information that is protected under section 552.130. Section 552.130 provides in relevant part as follows:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

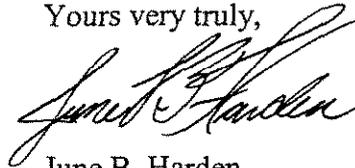
(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

Gov't Code § 552.130. Therefore, the district must withhold copies of Texas drivers' licenses and driver's license information pursuant to section 552.130. We have marked a sample of the types of information that must be withheld under this exception.

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,



June B. Harden  
Assistant Attorney General  
Open Records Division

JBH/ch

Ref.: ID# 118225

Enclosures: Marked documents

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(w/o enclosures)