



April 12, 1999

Ms. Paige D. Scherr  
Hayes, Coffey & Berry  
P.O. Box 50149  
Denton, Texas 76206

OR99-0990

Dear Ms. Scherr:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 123752.

The Denton Independent School District (the "district"), which you represent, received a request for information from a certain teacher's personnel file. You have released some of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.026, 552.101, 552.102, and 552.103 of the Government Code. You have submitted representative samples of the requested information.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

First, you inform us that you have withheld the parental complaints against the named teacher because they constitute education records that are confidential pursuant to the Family Educational Rights and Privacy Act of 1974 ("FERPA"). In Open Records Decision No. 634, this office concluded that an education institution may withhold from public disclosure information that is protected by FERPA in conjunction with section 552.101 of the Government Code<sup>2</sup> as information considered to be confidential by law without the necessity of requesting an attorney general decision as to that exception. Open Records Decision No. 634 at 7 (1995).

Second, you assert that the performance appraisals in Exhibit C1 are confidential under section 21.355 of the Education Code. Section 21.355 provides that, "[a]ny document

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<sup>1</sup>In reaching our conclusion here, 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.

<sup>2</sup>Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

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 teacher appraisals in Exhibit C1, which evaluate a teacher, are confidential under section 21.355 of the Education Code. Therefore, pursuant to section 552.101 of the Government Code, the district must withhold Exhibit C1.

Third, you contend that the physical examination record in Exhibit C2 is protected by section 552.102(a) as private information. We conclude that the physical examination record is a medical record made confidential by section 5.08 of article 4495b of Vernon’s Texas Civil Statutes. Access to medical records is governed by the Medical Practice Act (the “MPA”), article 4495b of Vernon’s Texas Civil Statutes. Section 5.08 of the MPA provides:

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient’s behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Section 5.08(j)(1) provides for release of medical records upon the patient’s written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Section 5.08(j)(3) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). The medical record in Exhibit C2 is confidential and may be released only as provided under the MPA. Open Records Decision No. 598 (1991).

Fourth, you assert that section 552.102(b) excepts the teacher’s college transcript in Exhibit C3 from public disclosure. Section 552.102(b) provides that information is excepted from public disclosure “if it is a transcript from an institution of higher education maintained in the personnel file of a professional public school employee, except that this section does not exempt from disclosure the degree obtained or the curriculum on a transcript in the personnel file of the employee.” Thus, you must withhold from disclosure all information in the transcript submitted as Exhibit C3, except for the degree obtained and the curriculum.

Fifth, you contend that the salary disclosure statements in Exhibit C4 are protected under section 552.102(a) as private information. 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*, 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 Open Records Act. For information to be protected from public disclosure under the common-law right of privacy, the information must meet the criteria set out in *Industrial Found. v. Texas Industrial Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The court stated that information is deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing statutory predecessor to Gov’t Code § 552.101). 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 reviewed the salary disclosure statements and conclude that the information is not protected by common-law privacy. There is a legitimate public interest in the expenditure of public funds. *See* Gov’t Code 552.022(3); Open Records Decision Nos. 541 at 1-2 (1990), 520 at 5 (1989), 518 at 7 (1989), 233 at 2 (1980). Moreover, this office has stated that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision No. 600 (1992). However, the salary disclosure statements in Exhibit C4 contains information that may be excepted from public disclosure by section 552.117(1). Section 552.117 excepts from required public disclosure the home addresses, telephone numbers, social security numbers, or information revealing whether a public employee has family members if the employee requests that this information be kept confidential under section 552.024. Therefore, section 552.117 requires you to withhold this information if the named teacher requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold this information if the teacher made the request for confidentiality under section 552.024 after this request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 at 5 (1989).

Finally, you argue that section 552.103 excepts the reprimand in Exhibit D from public disclosure. Section 552.103(a), the “litigation exception,” excepts from disclosure information relating to litigation to which the state is or may be a party. The district has the burden of providing relevant facts and documents to show that the section 552.103(a)

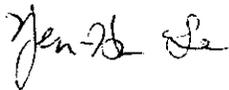
exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *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 at 4 (1990). The district must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform this office that the teacher has filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), in which the teacher complains of "inappropriate actions of the school board and discrimination by school administrators." This office has previously held that a pending complaint before the EEOC indicates a substantial likelihood of potential litigation. Open Records Decision Nos. 386 (1983), 336 (1982), 281 (1981). Therefore, the district has met the first prong of the section 552.103(a) test. We also conclude that the requested information relates to the anticipated litigation. However, when the opposing party in the litigation has seen or had access to any of the information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). Because the opposing party in the anticipated litigation has seen the reprimand in Exhibit D, you may not withhold Exhibit D under section 552.103.

You further argue that the reprimand is private information that is excepted from public disclosure. We conclude that the reprimand does not contain any information protected by common-law privacy. *See* Open Records Decision No. 444 (1986) (reasons for public employee's demotion, dismissal, or resignation of legitimate public interest). However, you must withhold the teacher's address from the reprimand in accordance with sections 552.024 and 552.117 as discussed above. You must release the remainder of Exhibit D.

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.

Sincerely,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/nc

Ref.: ID# 123752

Enclosures: Submitted documents

cc: Mr. David Snyder  
Denton Bureau  
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(w/o enclosures)