



March 27, 2001

Mr. Jeffrey J. Horner  
Bracewell & Patterson, L.L.P.  
711 Louisiana Street, Suite 2900  
Houston, Texas 77002-2781

OR2001-1192

Dear Mr. Horner:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 145354.

The Newton Independent School District (the "district"), which you represent, received a written request for certain records pertaining to Charles Ricky Johnson, a former district employee (the "employee"). Specifically, the requestor seeks the employee's personnel file, records pertaining the employee's "departure" from the district, records pertaining to any district investigation of the employee, and any correspondence between the district and any state agency regarding the employee. You contend that the requested information is excepted from disclosure under sections 552.102, 552.103, 552.107, 552.114, and 552.117 of the Government Code.

Pursuant to section 552.301(e)(1), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A)-(D). Although you have raised several exceptions to disclosure, you have not provided any written comments stating the reasons why the stated exceptions apply to the submitted information as required by section 552.301(e)(1)(A).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301(e) results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). You state that sections 552.103 and 552.107 apply to the submitted information. Sections 552.103 and 552.107 are discretionary exceptions and do not provide a compelling reason to overcome the presumption of openness. *See* Open Records Decision No. 473 at 2 (1987) (discretionary exceptions under the Act can be waived). However, your remaining asserted exceptions provide a compelling reason to overcome the presumption of openness. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). Therefore, we will address the applicability of sections 552.102, 552.114, and 552.117 of the Government Code as well as other statutes that make portions of the submitted information confidential.

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: 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.).

Prior decisions of this office have found that financial information relating 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. 545 (1990), 373 (1983). We have marked one document that reflects a personal financial decision of the employee that must be withheld pursuant to section 552.102(a).

The submitted information also contains college transcripts of the employee. Section 552.102(b) of the Government Code provides:

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.

The submitted transcripts are maintained in the personnel file of a professional public school employee. As such, the district must withhold all information on the submitted transcripts except for the degree obtained and the curriculum.

You also contend that the information is excepted under section 552.114 of the Government Code. Section 552.114 of the Government Code excepts from disclosure student records at an educational institution funded completely or in part by state revenue. This office generally applies the same analysis under section 552.114 and the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g. Open Records Decision No. 539 (1990). In this regard, section 552.026 of the Government Code provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A).

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. Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). We have marked the information that the district must withhold under FERPA and section 552.114 of the Government Code.

Section 552.117(1) excepts from disclosure information that relates to the home addresses, home telephone numbers, social security numbers, and family member information of current or former employees of a governmental body who request that this information remain confidential under section 552.024 of the Government Code. You do not indicate whether the employee made the election under section 552.024 to prohibit the release of his

section 552.117(1) information. Please note that whether a particular piece of information is protected by section 552.117(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, to withhold section 552.117(1) information, a proper election must be made prior to the receipt of the request for information. If the employee did not elect prior to the request to keep his home address, telephone number, social security number, or family member information confidential under section 552.024, this information may not be withheld from public disclosure based on section 552.117(1) of the Government Code. If the employee did make such an election, this information must be withheld.

Although the attorney general will not ordinarily raise an exception that might apply but that the governmental body has failed to claim, *see* Open Records Decision No. 325 at 1 (1982), we will raise section 552.101 of the Government Code, which protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," 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.

The submitted information also contains performance evaluations of the employee. Section 21.355 of the Education Code provides, "A document evaluating the performance of a teacher or administrator is confidential." This office interprets this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. *See* Open Records Decision No. 643 (1996). In that decision, 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, we conclude that some of the documents submitted to this office are confidential under section 21.355 of the Education Code. We have marked these documents accordingly.

We also note that the submitted information contains a medical record. The release of this record is governed by provisions outside the Public Information Act. Section 159.002(b) of the Occupations Code protects from disclosure "[a] record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician." Medical records may only be released as provided by chapter 159 of the Occupations Code. Open Records Decision No. 598 (1991). The Occupations Code provides for both the confidentiality of medical records and certain statutory access requirements. *Id.* at 2. We have marked the medical record that the district may release only in accordance with chapter 159 of the Occupations Code.

We also note that social security numbers are excepted from required public disclosure under section 552.101 of the Government Code in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if the social security numbers were obtained or are maintained by a governmental body pursuant to any provision of law

enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). It is not apparent to us that the social security numbers contained in the records at issue were obtained or are maintained by the district pursuant to any provision of law enacted on or after October 1, 1990. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the district to obtain or maintain a social security number. Therefore, we have no basis for concluding that the social security numbers at issue were obtained or are maintained pursuant to such a statute and are, therefore, confidential under section 405(c)(2)(C)(viii)(I). We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing the social security numbers, the district should ensure that these numbers were not obtained or maintained by the district pursuant to any provision of law enacted on or after October 1, 1990.

In summary, the only information excepted from required public disclosure is 1) the financial information we have marked, 2) the employee's college transcript, except for the degree obtained and the curriculum listed therein, 3) the information protected under FERPA, which we have marked, 4) the employee's section 552.117(1) information, provided the employee elected to make this information confidential in accordance with section 552.024, 5) all of the employee's performance evaluations, 6) the employee's medical record, which we have marked, and 7) social security numbers, if obtained or maintained by the district pursuant to any provision of law enacted on or after October 1, 1990. The district must release all remaining requested information in its entirety.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be

provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Karen A. Eckerle  
Assistant Attorney General  
Open Records Division

KAE/RWP/seg

Ref: ID# 145354

Encl. Submitted documents

cc: Mr. Danny Robbins  
Houston Chronicle  
P.O. Box 4260  
Houston, Texas 77210  
(w/o enclosures)