



March 27, 2001

Mr. Jeffrey J. Horner
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711 Louisiana Street, Suite 2900
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OR2001-1208

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# 145355.

The Newton Independent School District (the "district"), which you represent, received a request for information related to a former district teacher/coach. You claim that some of the requested information is excepted from disclosure by sections 552.102, 552.103, 552.107, 552.114, and 552.117 of the Government Code. You have submitted information related to this former employee. We have considered the exceptions you claim and reviewed the submitted information. We have also reviewed the comments submitted on behalf of the requestor. See Gov't Code § 552.304 (providing for submission of public comments).

A governmental body that wishes to withhold information responsive to a written request must submit to this office within fifteen business days of receiving the 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). You have submitted responsive information and have specified certain exceptions to public disclosure that you contend apply to this information, but you have not provided any written comments stating the reasons why the stated exceptions apply to the submitted information. Therefore, you have failed to comply with section 552.301 of the Government Code. A governmental body's failure to comply with section 552.301 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. Gov't Code § 552.302; *see also 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).

A compelling reason is demonstrated where information is made confidential by other law, or where third party interests are at issue. Open Record Decision No. 150 (1977). You raise sections 552.103 and 552.107 of the Government Code. These permissive exceptions protect only the interest of the governmental body, as distinct from exceptions which protect information deemed confidential by law or which protect the rights of third parties; these exceptions do not provide a compelling reason for withholding requested information. *See* Open Records Decision Nos. 473 (1987), 630 (1994). Therefore, sections 552.103 and 552.107 shall not be considered. Sections 552.101, 552.102, 552.114, and 552.117 of the Government Code protect confidential information or the interests of third parties and shall therefore be addressed. A portion of the submitted information also consists of records that are governed by provisions outside the Public Information Act.

Some of the submitted information is governed by the Medical Practice Act (the "MPA") chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is 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.

Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). Such records must be released upon the patient's signed, 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. Occ. Code §§ 159.004, .005. Section 159.002(c) 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). Records that are subject to the MPA may be released only as provided under the MPA. Open Records Decision No. 598 (1991). For your convenience, we have marked sample documents to show which are records subject to the MPA.

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. Section 21.355 of the Education Code makes documents that evaluate the performance of a teacher or administrator 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). This office has 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.* Similarly, an

administrator is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is administering at the time of his or her evaluation. *Id.* We have marked the documents in the submitted materials that are made confidential by section 21.355 of the Education Code and must therefore be withheld under section 552.101 of the Government Code.

Social security numbers may also 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 in the records here are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure on the basis of that federal provision. We caution, however, that section 552.353 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 pursuant to any provision of law, enacted on or after October 1, 1990.

Section 552.101 of the Government Code also encompasses information protected by the common law right of privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information is protected by the common law right of privacy if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* The *Industrial Foundation* common law privacy test is also applied in making determinations under section 552.102(a). *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.). From our review of the submitted materials, we conclude that none of this information is protected by the common law right of privacy. Therefore, none of the submitted information may be withheld under section 552.101 in conjunction with the common law right of privacy, or under section 552.102(a) of the Government Code.

Section 552.102(b) of the Government Code excepts from public disclosure information other than the curriculum and the degree obtained, in transcripts from an institution of higher education in records maintained in the personnel file of a professional public school employee. The submitted materials include such transcripts. Only the degree obtained and the curriculum pursued may be released. The district must withhold the remainder of these transcripts.

The submitted materials also include the records of students of the former teacher/coach. These records are subject to section 552.114 of the Government Code and to the Family Educational Rights and Privacy Act of 1974 ("FERPA") 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). Section 552.026 of the Government Code states that information contained in education records of an educational agency or institution are not subject to public disclosure except in conformity with FERPA. 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 FERPA and section 552.114. *See, e.g.*, Open Records Decision No. 539 (1990).

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). For example, all handwritten documents created by students must be withheld in their entirety since the identity of particular students could easily be traced from such documents. *See* Open Records Decision No. 224 (1979). However, FERPA provides that, "directory information" may be released to the public if the institution or agency complies with section 1232g(a)(5)(B) of title 20 of the United States Code. "Directory information" includes the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student. 20 U.S.C. § 1232g(a)(5)(A). Section 1232g(a)(5)(B) provides as follows:

[a]ny educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

20 U.S.C. § 1232g(a)(5)(B). This office has previously held that a class roster is the type of information that may be directory information. *See* Open Records Decision No. 244 (1980). The submitted attendance collection reports and class rolls are similar to or the same as class rosters. Accordingly, if the district has designated this type of information as directory information, then the district is required to disclose the information after complying with federal notice requirements for release of directory information. *Id.*; 34 C.F.R. § 99.37. If the district has not designated this information as directory information, then the district must withhold these records under FERPA. Other submitted materials include students' names, students' parents' or guardians' names, students' identification numbers, students' social security numbers, student's telephone numbers, students' birth dates, and the home or mailing addresses of students, all of which must be withheld under FERPA and section 552.114 of the Government Code.

The submitted materials also include information about the teacher/coach that may be protected by section 552.117(1) of the Government Code. This section 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. 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, if this former employee did not elect to keep his home addresses, telephone numbers, social security number, or family member information confidential under section 552.024 before the request was received, this information may not be withheld from public disclosure under section 552.117(1) of the Government Code. If the teacher/coach made such an election before the request was received, this information must be withheld.

In summary, you must withhold the submitted evaluations and transcripts of the teacher/coach and all social security numbers obtained or maintained pursuant to any provision of law enacted on or after October 1, 1990. You must also withhold all information which would identify a current or former student, other than information which you have designated as directory information in conformity with the applicable provisions of FERPA. If, and only if, the teacher/coach elected non-disclosure of personal information under section 552.024 of the Government Code before the request for information was received, you must withhold this former employee's home addresses, home telephone numbers, social security numbers, and family member information. All other responsive information must be released to this requestor.

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

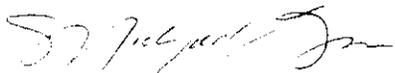
governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The 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,



Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/er

Ref: ID# 145355

Encl: Submitted documents

cc: Mr. Danny Robbins
Houston Chronicle
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(w/o enclosures)