



April 4, 2001

Mr. Juan Cruz  
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Attorneys and Counselors  
P.O. Box 200  
San Antonio, Texas 78291-0200

OR2001-1336

Dear Mr. Cruz:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 145653.

The Mathis Independent School District (the "school district"), which you represent, received a request for the personnel file of a named school district employee, records relating to the hiring and dismissal of the employee, and records relating to any investigation of the employee. The school district seeks to withhold certain information that it has submitted to this office.<sup>1</sup> You argue that some of the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.114 of the Government Code, while other portions of the submitted information are not considered public information. We have also received comments submitted on behalf of the requestor. *See* Gov't Code § 552.304. We have considered the submitted arguments and reviewed the submitted information.

You state that the documents in Exhibit B consist of teacher evaluations that are confidential under section 21.355 of the Education Code. Section 552.101 of the Government Code 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 provides, "A document evaluating the performance of a teacher or administrator is confidential." This office 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

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<sup>1</sup>We note that the information submitted to this office does not appear to encompass the entire request for information. To the extent you possess responsive information that you have not submitted to this office, we assume that you have released such information. *See* Gov't Code §§ 552.021, .301, .302.

(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.* 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.* Based on the reasoning set out in Open Records Decision No. 643, we conclude that the evaluations submitted to this office in Exhibit B are confidential under section 21.355 of the Education Code. Therefore, pursuant to section 552.101 of the Government Code, the school district must withhold these documents.

You next contend that the documents contained in Exhibit C consist of documents pertaining to an investigation conducted by the Federal Bureau of Investigations (the "FBI") and the Texas Department of Public Safety ("DPS") that are excepted from disclosure under section 552.108 of the Government Code. Section 552.108 provides, in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in a conviction or deferred adjudication; or

(3) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is obtained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in a conviction or deferred adjudication; or

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

You state that the named employee who was the subject of the investigation has been convicted. Furthermore, you have not provided this office with any representation from either the FBI or DPS indicating that the release of the investigative material in Exhibit C would interfere with a continuous prosecution of the case. Finally, you have not provided this office with any representation that the information in Exhibit C constitutes the work product of a state attorney. Therefore, we find that you have not demonstrated that the information in Exhibit C is excepted under any provision of section 552.108.

We note, however, that Exhibit C contains a voluntary statement by a student to DPS regarding an alleged incident of sexual harassment by the named teacher. The common law right of privacy is incorporated into the Public Information Act by section 552.101. For information to be protected by common law privacy it must meet the criteria set out in *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court stated that information is excepted from disclosure 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. 540 S.W.2d at 685.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

Because there is no adequate summary of the sexual harassment allegations and any subsequent investigation, the school district must release the student's statement contained in Exhibit C. However, based on *Ellen*, the school district must withhold the identities of the victim and the witnesses. We have marked the information in the student's statement that must be withheld under section 552.101 in conjunction with common law privacy.

Similarly, you contend a letter contained in Exhibit D detailing another allegation of sexual harassment against the named teacher is confidential. Like the statement in Exhibit C, there is no adequate summary of the sexual harassment allegation in Exhibit D. Therefore, the school district must release Exhibit D but withhold the names of the witnesses, which we have marked.

Next you contend that a student statement in Exhibit E is protected under the Family Educational Rights and Privacy Act ("FERPA") and section 552.114 of the Government Code. 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). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990).

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 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.

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). For purposes of FERPA, a student's handwritten letters constitute "education records" in that they contain information about identifiable students. *See* Open Records Decision No. 224 (1979) (student's handwritten comments that would make identity of student easily traceable through handwriting, style of expression, or particular incidents related in comments protected under FERPA). We agree that the handwritten statement contained in Exhibit E must be withheld pursuant to FERPA and section 552.114 of the Government Code.

Finally, you contend that Exhibit F contains the personal notes of a former school district superintendent that are not considered public information. Section 552.021 of the Government code provides for public access to “public information.” Section 552.002 defines “public information” as

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- . (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov’t Code § 552.002. This office has additionally observed that certain factors are relevant, although not exhaustive, in deciding whether a document is essentially a governmental or personal document: who prepared the document; the nature of its contents; its purpose or use; who possessed it; who had access to it; whether the governmental body required its preparation; and whether its existence was necessary to or in furtherance of official business. Open Records Decision No. 635 at 4-5 (1995); *see also* Open Records Decision Nos. 626 (1994) (handwritten notes taken during oral interview by Texas Department of Public Safety promotion board members public are public information), 450 (1986) (notes of appraisers taken in the course of teacher appraisals were public information), 120 (1976) (faculty members’ written evaluations of doctoral student’s qualifying exam are subject to act). *But see* Open Records Decision Nos. 635 (1995) (calendar purchased and maintained by a commission employee who had sole access to it was not subject to the act), 77 (1975) (personal notes made by individual faculty members for their own use as memory aids were not subject to the act). Upon review of the documents contained in Exhibit F, we note that the handwritten notes, which were created by the school district’s superintendent, detail actions to be taken in a school district personnel matter. We therefore believe that the notes are public information subject to the Act. *See* Gov’t Code § 552.002; ORD Nos. 635, 626.

You next contend that the notes in Exhibit F contain communications between an attorney and the school district that constitute privileged legal advice. Although you do not raise a specific exception to the disclosure of this information, we assume that you are raising section 552.107 of the Government Code, which protects information coming within the attorney-client privilege. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only “privileged information,” that is, information that reflects either confidential communications from the client to the attorney or the attorney’s legal advice or opinions; it does not apply to all client information held by a governmental body’s attorney. Open Records Decision No. 574 at 5 (1990). Although you argue that the notes in Exhibit F contain legal advice obtained by the school district from an attorney, you have not shown, nor is it apparent, which information, if any, reflects attorney advice. Therefore, we find you have not adequately demonstrated that any of the information in Exhibit F is excepted under section 552.107, and thus, the school district must release this information. *See* Open Records Decision No. 589 (1991).

In summary, you must withhold the teacher evaluations in Exhibit B under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. Furthermore, you must withhold the names of the complainant and witnesses in the student statement contained in Exhibit C under section 552.101 and common law privacy. Likewise, you must withhold the name of the witness in the letter contained in Exhibit D under section 552.101 and common law privacy. Finally, you must withhold the entire handwritten statement contained in Exhibit E under FERPA and section 552.114 of the Government Code. You must release the remainder of the information.

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).

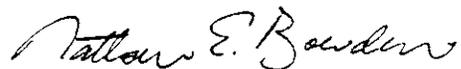
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dep't of Pub. 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,



Nathan E. Bowden  
Assistant Attorney General  
Open Records Division

NEB/er

Ref: ID# 145653

Encl: Submitted documents

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