



May 15, 2001

Mr. Rick Faulkner
Brown McCarroll, L.L.P.
P.O. Box 3999
Longview, Texas 75606-3999

OR2000-1998

Dear Mr. Faulkner:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 147234.

Kilgore College (the "college"), which you represent, received a request for four types of information, including 1) all evaluations for the past five years of a certain named employee, either as an instructor or as a department chair; 2) the current resume of that same employee; 3) all documents, memoranda, e-mail, or other correspondence regarding any complaints filed against that same employee; and 4) all teaching evaluations of a second named employee. You claim that the first type of requested information is excepted from disclosure under section 552.101 of the Government Code in conjunction with sections 21.355 and 130.084 of the Education Code, and under section 552.102 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

With respect to the second and fourth types of information, you inform us that you do not seek a decision from this office because you consider that information to be public. Inasmuch as you have not sought a decision with respect to that information, we assume that you have released it to the requestor. *See* Gov't Code § 552.301(a). If not, you must do so. *See* Gov't Code § 552.302.

In addition, you inform us that you do not seek a decision with respect to the third type of information requested because the college does not possess any information responsive to the request. We note that a governmental body is not required to obtain information not in its possession. *See* Open Records Decision No. 558 (1990).

The information submitted in association with the request for “all evaluations [of a certain named employee] for the past five years, either as an instructor or as a department chair,” contains course outlines and a grade report for a course taken by the employee whose evaluations were requested. Since this information is not responsive to the request, we will not rule with respect to that particular information.

As for the responsive records submitted with the request, 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 provides that, “[a]ny document evaluating the performance of a teacher or administrator is confidential.” You assert that this provision is applicable to junior and community colleges by virtue of section 130.084 of the Education Code. Section 130.084 reads as follows:

The board of trustees of junior college districts shall be governed in the establishment, management and control of the junior college by the general law governing the establishment, management and control of independent school districts insofar as the general law is applicable.

By its terms, section 130.084 effects only the authority of junior college trustees to direct a junior college. *See San Antonio Union Junior College Dist. v. Daniel*, 206 S.W.2d 995 (Tex. 1947). Thus, this office has applied section 130.084 and its predecessor to confer various school district powers on junior college trustees. *See, e.g.*, Attorney General Opinions DM-178 (1992) (power to borrow money secured by delinquent maintenance tax revenues under Educ. Code § 20.45), M-878 (1971) (power to issue time warrants to repair, renovate, and equip school buildings under Educ. Code § 20.43), M-700 (1970) (power to exercise right of eminent domain under Educ. Code § 23.31). We do not believe a statute that makes certain information confidential, such as section 21.355 of the Education Code, bears on the trustees’ direction of a junior college or in any way confers power on those trustees. Thus, section 21.355 does not affect the college’s authority to direct the junior college.

Furthermore, we do not believe section 21.355 is a general law that is “applicable” to junior colleges through section 130.084. Section 21.355 is part of subchapter H of the Education Code which sets forth the appraisal processes that relate to the accountability of public schools providing compulsory public education. We believe subchapter H is applicable only to public school districts and not to junior college districts.

Moreover, this office has limited the meaning of “teacher” and “administrator” for purposes of section 21.355. *See Open Records Decision No. 643* (1996). The term “teacher” in section 21.355 means an individual who is required to hold and does hold a teaching certificate or school district teaching permit under subchapter B of chapter 21, and who is engaged in teaching at the time of the evaluation. *See id.* at 4. An “administrator” for purposes of section 21.355 is a person who is required to hold and does hold an

administrator's certificate under subchapter B of chapter 21, and is currently performing the functions of an administrator. *See id.* There is no indication that the employee whose evaluation records are requested is a "teacher" or an "administrator" as those terms are used in section 21.355.

Thus, we believe that section 21.355 is inapplicable to a junior college through section 130.084 of the Education Code. Accordingly, the college may not withhold the requested evaluations from the public pursuant to section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

You also contend that the first type of information is made confidential under 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*, 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. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In *Industrial Foundation*, the Texas Supreme 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. *Id.* at 685. As you have acknowledged, this office has concluded that a public employee's performance evaluation is of legitimate public concern, and is not private information. Open Records Decision 470 (1987). Accordingly, the college may not withhold the requested evaluations from the public pursuant to section 552.102(a) of the Government Code.

In summary, the college is under no obligation to release information not in its possession, provided that this means that there is no responsive information within the college's ownership or right of access. The college may not withhold the evaluations for the past five years of a certain named employee, either as an instructor or as a department chair, either under section 552.101 of the Government Code in conjunction with sections 21.355 and 130.084 of the Education Code, or under section 552.102(a) of the Government Code.

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).

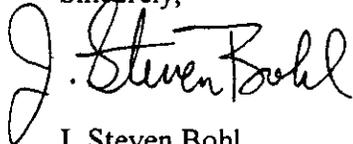
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,

A handwritten signature in black ink that reads "J. Steven Bohl". The signature is written in a cursive style with a large, looped initial "J".

J. Steven Bohl
Assistant Attorney General
Open Records Division

JSB/sdk

Ref: ID# 147234

Encl. Submitted documents

cc: Dr. Robert H. Jackson
Grievance Consultant
Texas Faculty Association
316 W. 12th Street
Austin, Texas 78701
(w/o enclosures)