



May 21, 2001

Mr. Noble D. Walker, Jr.
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OR2001-2092

Dear Mr. Walker:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 147443.

The Wolfe City Independent School District (the "district"), which you represent, received a request for nine categories of information related to a former district employee and a district student. You claim that responsive information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103(a) provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong 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 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). Further, litigation must be pending or reasonably anticipated on the date the requestor applies to the public information officer for access. Gov't Code § 552.103(c).

In order to establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 at 2 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You state that no suit has been filed, but contend that "it is clear from the tenor of the communication from the Requestor that it is reasonable to anticipate such litigation." However, you have not submitted any communications containing a threat to sue from a potential opposing party. After reviewing your arguments, we conclude that you have not demonstrated that a potential opposing party has taken any concrete steps toward litigation. Therefore, you have not demonstrated that the district reasonably anticipates litigation. Accordingly, you may not withhold the submitted information under section 552.103 of the Government Code.

You also claim that portions of the submitted information are excepted under section 552.102 of the Government Code. 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 for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Government Code. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information protected by the common law right of privacy. *Id.* The doctrine of common law privacy protects information that contains 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. *Id.* However, the scope of public employee privacy is narrow. Open Records Decision No. 423 at 2 (1984). Because

the work behavior of a public employee and the conditions for his or her continued employment are matters of legitimate public interest, the common law right of privacy does not protect facts about a public employee's misconduct on the job or complaints made about the employee's performance. *See* Open Records Decision No. 438 (1986). Similarly, information about a public employee's qualifications, disciplinary action and background is not protected by common law privacy. *See* Open Records Decision No. 444 (1986).

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). A public employee's allocation of his salary to a voluntary investment program offered by his employer is a personal investment decision, and information about it is excepted from disclosure by a common law right of privacy. Open Records Decision No. 545 (deferred compensation plan). Information revealing that an employee participates in a group insurance plan funded partly or wholly by the governmental body is not excepted from disclosure by a common law right of privacy. Open Records Decision No. 600 at 10 (1992). For example, this office has held that an employee's participation in the Texas Municipal Retirement System or in a group insurance plan funded by the governmental body is not excepted from disclosure under common law privacy. *Id.*; Open Records Decision No. 480 (1987). Therefore, you must withhold any voluntary investments or insurance coverages that are not funded partly or wholly by the district under sections 552.101 and 552.102 in conjunction with common law privacy. The remaining submitted information is not protected under section 552.102 or section 552.101 in conjunction with common law privacy. *See, e.g.*, Open Records Decision Nos. 470 (1987), 455 (1987), 444 (1986).

Further, you contend that the submitted college transcripts are excepted under section 552.102(b) of the Government Code. 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. We have marked the information that is not excepted by section 552.102(b) and must be released. You must withhold the remaining information in the transcripts.

You also contend that criminal record history is excepted under section 552.101 of the Government Code. Where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). Accordingly, you must withhold any criminal record history compiled by the district under section 552.101 of the Government Code and the holding in *Reporters Committee*.

Section 552.101 also encompasses information protected by statute. Employment eligibility verification form I-9 is governed by title 8, section 1324a of the United States Code, which provides that this form "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Release of this document under chapter 552 of the Government Code would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that the submitted form I-9 is confidential under section 552.101 of the Government Code and must be withheld.

We also note that the submitted information contains student-identifying information that is excepted under the Family Educational Rights and Privacy Act of 1974 ("FERPA"). *See* 20 U.S.C. § 1232g(b)(1). 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. "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 letter personally identifies the student and must be withheld in its entirety. *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). The submitted items that were handwritten by a student, and the information that we have marked as identifying a particular student, must be withheld pursuant to FERPA and section 552.114 of the Government Code.

Next, you contend that the former employee's social security number is confidential under section 51.251 of the Texas Occupations Code. A note following section 51.251 of the Occupations Code provides the following:

The social security number of an applicant or holder of a license, certificate of registration, or other legal authorization issued by a licensing agency to practice in a specific occupation or profession that is provided to the licensing agency is confidential and not subject to disclosure under the open records law.

Occ. Code §51.251. Under this provision, social security numbers provided to a licensing agency by applicants or holders of licenses are confidential. Because the district is not a licensing agency, we conclude that the district may not withhold the former employee's social security number under section 51.251 of the Occupations Code.

However, the former employee's social security number and other personal information may be excepted under section 552.117(1) of the Government Code. Section 552.117(1) of the Government Code excepts from public disclosure information relating to the home address, home telephone number, social security number, and family member information of a current or former government employee, if the employee elected to withhold this information under section 552.024. 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, a proper election must be made *prior* to the request for information. If the employee elected prior to the request to keep this information confidential under section 552.024, you must withhold the marked information under section 552.117(1) of the Government Code. If no timely election was made, then you may not withhold the marked information under section 552.117 of the Government Code.

We note that social security numbers 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.* However, it is not apparent to us that the social security number was obtained or 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 number at issue was obtained or maintained pursuant to such a statute and is, therefore, confidential under section 405(c)(2)(C)(viii)(I). We caution the district, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Gov't Code § 552.352. Prior to releasing the social security number, the district should ensure that this number was not obtained or maintained by the district pursuant to any provision of law enacted on or after October 1, 1990.

The submitted information also contains a Texas driver's license number. Section 552.130(a) of the Government Code excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. Therefore, you must withhold the marked driver's license number under section 552.130(a) of the Government Code.

In conclusion, the district must withhold the marked personal financial information and any criminal history under section 552.101 in conjunction with common law privacy. You must also withhold the I-9 form under section 552.101 and the transcript, except for degree obtained and curriculum, under section 552.102(b). Further, you must withhold the information we have marked under FERPA. You must also withhold information excepted under section 552.117(1) if the former employee made a timely section 552.024 election. Further, the social security number is confidential and must be withheld, if obtained or maintained by the district pursuant to any provision of law enacted on or after October 1, 1990. You must also withhold the marked driver's license number. You must release the remaining requested 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).

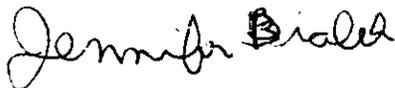
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



Jennifer Bialek
Assistant Attorney General
Open Records Division

JHB/sdk

Ref: ID# 147443

Encl: Marked documents

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