



June 6, 2001

Mr. Dick Hall
Schwartz & Eichelbaum, P.C.
517 Soledad Street
San Antonio, Texas 78205

OR2001-2360

Dear Mr. Hall:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 148060.

The United Independent School District (the “district”), which you represent, received a request for information relating to a named individual, including her employment application and records regarding any final disciplinary action or letter of resignation. You have submitted documents that the district deems to be responsive to the request.¹ You claim that the submitted documents contain information that is excepted from disclosure under sections 552.026, 552.101, and 552.114 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.

We first address your assertion that this request for information is “void in its entirety” because the requestor is not a Texas resident and, in your opinion, has “no legitimate interest in the public records of this state.” We disagree. Under the Public Information Act, any member of the public has a right of access to information that a governmental body collects, assembles, or maintains in connection with the transaction of official business. *See* Gov’t Code §§ 552.002(a), .021. In this instance, the requestor seeks information about one of the district’s former employees. Therefore, the Act is plainly applicable to this request for information. Furthermore, the Act expressly provides that the district “shall treat all requests for information uniformly without regard to the position or occupation of the requestor, the person on whose behalf the request is made, or the status of the individual as a member of the media.” *Id.* § 552.223; *see also id.* §§ 552.007(b), .221(a), 222(a). Accordingly, the Act clearly entitles this individual to make this request for information.

¹We note a discrepancy between the last names of the individual about whom the requestor seeks information and of the former employee of the district to whom the submitted records pertain. We presume that the district satisfied itself that the submitted records are responsive to the request.

We next note that the submitted records of teacher appraisals fall within the scope of section 552.022 of the Government Code. Section 552.022 provides in relevant part that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]

Gov't Code § 552.022(a)(1). Thus, the district must release the teacher appraisals under section 552.022(a)(1), unless those records are expressly confidential under other law.

You claim that the teacher appraisals are confidential under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that is confidential under another statute. Section 21.355 of the Education Code provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. *See* Open Records Decision No. 643 at 3 (1996). In that same decision, we also determined that the word "teacher," for the purposes of section 21.355, is a person who is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See* ORD 643 at 4. Upon review of the submitted teacher appraisals, we conclude that they qualify as confidential evaluations of a teacher under section 21.355 of the Education Code. Therefore, the district must withhold the teacher appraisals, which we have marked, under section 552.101 of the Government Code.

You also claim that the submitted documents may contain information that is confidential under sections 552.026 and 552.114 of the Government Code. Section 552.026 provides that chapter 552 of the Government Code

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.

Gov't Code § 552.026. Section 552.026 incorporates the federal Family Educational Rights and Privacy Act ("FERPA") into chapter 552 of the Government Code. *See* Open Records Decision No. 634 at 6-8 (1995). 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); see also 34 C.F.R. § 99.3 (defining personally identifiable information). "Education records" under FERPA are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. See 20 U.S.C. § 1232g(a)(4)(A). 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 at 3 (1982), 206 at 2 (1978). Section 552.114(a) of the Government Code requires the district to withhold "information in a student record at an educational institution funded wholly or partly by state revenue." This office generally has treated "student record" information under section 552.114(a) as the equivalent of "education record" information that is protected by FERPA. See Open Records Decision No. 634 at 5 (1995).

You have highlighted information that you believe may reveal a student's identity. We have reviewed that information and conclude that it does not constitute student-identifying information that must be withheld from disclosure under sections 552.026 and 552.114 and FERPA.

Section 552.101 also encompasses the common law right to privacy. Information must be withheld from the public under section 552.101 in conjunction with common law privacy when the information (1) is highly intimate and embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) is of no legitimate public interest. See *Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). You claim that the former teacher's social security number, ethnic origin, and other personal information are unrelated to her employment by the district and are of no legitimate public interest. We conclude, however, that the information in question is not protected by common law privacy. See also Gov't Code § 552.022(a)(2) (providing for required public disclosure of "the name, sex, ethnicity, salary, title, and dates of employment of each employee . . . of a governmental body," unless the information is "expressly confidential under other law"); Open Records Decision Nos. 659 at 5 (1999) (listing types of information that attorney general has held to be protected by a right to privacy), 622 at 1-2 (1994) (stating that social security numbers are not private under section 552.101 or section 552.102), 423 at 2 (1984) (explaining that because of the greater legitimate public interest in the disclosure of information regarding public employees, employee privacy under section 552.102 is confined to information that reveals "intimate details of a highly personal nature").

You also raise section 552.101 in conjunction with *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App. - El Paso 1992, writ denied). In *Ellen*, the court applied the common law right to privacy addressed in *Industrial Foundation* to an investigation of allegations of sexual harassment. The court held that the public has no legitimate interest in the identities and detailed personal statements of a victim of alleged sexual harassment or of a witness to such

an incident. *Id.* at 525. However, the identity of the employee who is accused of sexual harassment may not be withheld, because information relating to an employee's misconduct is not protected by common law privacy. *Id.*; see also Open Records Decision Nos. 438 at 5 (1986), 405 at 2 (1983), 230 at 3 (1979), 219 at 2 (1978).

In this instance, you assert that two of the submitted documents contain highly embarrassing information that should be protected under section 552.101 and *Ellen*. The documents in question reflect that the former teacher was accused of having sexual contact with a student. The documents reveal only the allegation itself, the former teacher's identity, and the fact that she was suspended with pay and subsequently terminated. We therefore conclude that these documents are not excepted from disclosure under section 552.101 in conjunction with *Morales v. Ellen*.

Some personal information about the former teacher may be excepted from disclosure under section 552.117 of the Government Code. Section 552.117(1) protects information relating to the home address, home telephone number, and social security number of a current or former public employee, as well as information that reveals whether the current or former employee has family members, *if the employee requested that this information be kept confidential under section 552.024*. See Open Records Decision Nos. 622 (1994), 455 (1987). You do not inform this office whether the former teacher made an election under section 552.024. Therefore, we have marked information in Exhibits "C," "D," and "E" that the district may withhold *only if* the former teacher properly elected to keep this personal information confidential. If a proper section 552.024 election was not made, then the district may not withhold the marked personal information under section 552.117.

If the former teacher did not elect to withhold her social security number under section 552.024, the social security number may still be confidential under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). A social security number is confidential under the federal law if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. See Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that the social security number in question is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. 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 former teacher's social security number was obtained or is maintained pursuant to such a statute and is therefore confidential under the federal law. We caution you, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. See Gov't Code §§ 552.007, .352. Therefore, prior to releasing the former teacher's social security number, the district should ensure that it was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

In summary, the district must withhold the submitted teacher appraisals from the requestor under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The former teacher's home address, home telephone number, social security number, and other personal information may be excepted from disclosure under section 552.117. Her social security number also may be confidential under section 552.101 in conjunction with federal law. All of the requested information that is not protected under one of these exceptions must be released.

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).

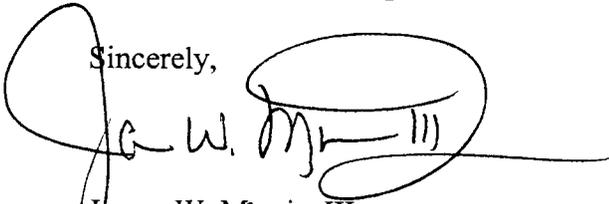
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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, appearing to read "J. W. Morris, III". The signature is written in a cursive style and is enclosed within a large, hand-drawn oval.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 148060

Enc: Marked documents

c: Ms. Christy Watson
The Oklahoman
P.O. Box 25125
Oklahoma City, Oklahoma 73125-0125
(w/o enclosures)