



June 4, 2002

Mr. Joe E. Williamson
Superintendent of Schools
Vidor Independent School District
120 East Bolivar
Vidor, Texas 77662

OR2002-3035

Dear Mr. Williamson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 163831.

The Vidor Independent School District (the "school district") received a request for (1) minutes of a school board meeting; (2) a copy of your letter of resignation; (3) filing papers relating to school board elections; (4) an order for a special election; and (5) a copy of your appointment book for January 1 through May 31, 2002. You state that the school district has released the information that is responsive to item numbers 1 through 4 of this request. You claim, however, that your appointment book contains information that is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.114, and 552.135 of the Government Code and the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. We have considered the exceptions you raise and have reviewed the information you submitted.

We first note that some of the submitted information appears to have been created after the school district received this request for information. Chapter 552 of the Government Code does not require the school district to release information that did not exist when it received this request for information. *See* Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

We also note that you have raised questions under the cost provisions of chapter 552. These provisions are found at subchapter F of chapter 552. *See* Gov't Code § 552.261 *et seq.* The Texas Building and Procurement Commission (the "TBPC"), formerly the General Services Commission, is responsible for the administration and enforcement of these provisions. Section 552.262 directs the TBPC to adopt rules for use by each governmental body in determining charges for providing copies of public information under chapter 552. The rules

adopted by the TBPC are found at title 1 of the Texas Administrative Code. The school district must comply with subchapter F of chapter 552 and the rules adopted by the TBPC in charging for copies of public information. You should direct any questions that relate to these cost provisions to the TBPC.

Next, we address the school district's exceptions to the disclosure of the submitted information. 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). Section 552.026 of the Government Code incorporates FERPA into chapter 552 of the Government Code. *See* Open Records Decision No. 634 at 6-8 (1995). 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.

Gov't Code § 552.026. "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).

Section 552.114(a) of the Government Code excepts from disclosure "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).

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 of the Government Code 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 of the Government Code 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.

You claim that the requested appointment book contains information that is confidential under FERPA and section 552.114 of the Government Code. However, you have not directed our attention to any specific information that constitutes an education record under FERPA or a student record under section 552.114. Therefore, we have no means of ascertaining whether FERPA and section 552.114 are applicable to any of the submitted information. Nevertheless, if any of the information in the appointment book reveals the identity of a student or a student's parent, then the school district must not release that information unless it is authorized under FERPA to do so. *See* Open Records Decision No. 634 at 6-8 (1995).

The school district also raises section 552.101 of the Government 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 another statute makes confidential. You raise section 552.101 in conjunction with section 21.355 of the Education Code. Section 21.355 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 (1996). In that decision, we determined that the word "teacher," for 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* Open Records Decision No. 643 at 4. We also concluded that the word "administrator" in section 21.355 means a person who is required to and does in fact hold an administrator's certificate under subchapter B of chapter 21 of the Education Code and is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.*

You have not directed our attention to any information in the appointment book that constitutes an evaluation of a teacher or an administrator under section 21.355 of the Education Code. Therefore, you have not shown that any of the submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 21.355.

Section 552.102 of the Government Code 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). Section 552.102(a) is applicable to information that relates to an official or employee of a governmental body. The test of privacy under section 552.102(a) is the same as the test under section 552.101 in conjunction with *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy under *Industrial Foundation* protects information that is (1) highly intimate or embarrassing, such that its release would

be highly objectionable to a person of ordinary sensibilities, *and* (2) of no legitimate public interest. *See* 540 S.W.2d at 685. Because of the greater legitimate public interest in information that relates to public officials and employees, privacy under section 552.102 is confined to information that reveals "intimate details of a highly personal nature." *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.--Austin 1983, writ ref'd n.r.e.); Open Records Decision Nos. 473 at 3 (1987), 444 at 3-4 (1986), 423 at 2 (1984). Thus, privacy under section 552.102 is "very narrow." *See* Open Records Decision No. 400 at 5 (1983).

You assert that the appointment book contains "references which constitute a clearly unwarranted invasion of the employee's personal privacy." We conclude, however, that you have not shown that any of the submitted information is protected by privacy under section 552.102. *See also* Open Records Decision Nos. 470 at 4 (1987) (public employee's job performance does not generally constitute that individual's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees), 423 at 2 (1984) (statutory predecessor applicable when information would reveal intimate details of a highly personal nature), 400 at 5 (1983) (statutory predecessor protects information only if its release would lead to clearly unwarranted invasion of privacy).

The school district also raises section 552.103 of the Government Code. This exception provides in part:

(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.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that

litigation. *See 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.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

You have not identified any submitted information that relates to any litigation that was pending or reasonably anticipated when the school district received this request for information. Therefore, you have not shown that any of the information in the appointment book is excepted from disclosure under section 552.103.

Section 552.107 of the Government Code excepts from public disclosure

information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct[.]

Gov't Code § 552.107(1). Section 552.107(1) protects information that comes within the attorney-client privilege. In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and the client's communications made in confidence to the attorney. *See* Open Records Decision No. 574 (1990). Accordingly, these two classes of information are the only information that may be withheld pursuant to the attorney-client privilege under section 552.107(1).

You have not directed our attention to any information in the appointment book that constitutes either a client's confidential communication to an attorney or an attorney's legal advice. Therefore, none of the submitted information is excepted from disclosure under section 552.107(1).

The school district also raises section 552.135 of the Government Code. This exception provides as follows:

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

(d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or prosecutor upon proper request made in compliance with applicable law and procedure.

(e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be constitutional, statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.

Gov't Code § 552.135. Because the legislature specifically limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under section 552.135 must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See also* Gov't Code § 552.301(e)(1)(A).

You have not identified any information in the appointment book that relates to a reported violation of a civil, criminal, or regulatory law. Thus, you have not shown that any of the submitted information is excepted from disclosure under section 552.135.

We note that some of the information in the appointment book may be excepted from disclosure under section 552.117 of the Government Code. Section 552.117(1) excepts from public disclosure the home address, home telephone number, and social security number of a current or former employee of a governmental body, as well as information that reveals whether the current or former employee has family members, if that person timely elected under section 552.024 to keep this information confidential. *See* Open Records Decision Nos. 622 at 5-6 (1994), 455 at 2-3 (1987). This information may not be withheld, however, if the current or former employee made a request for confidentiality under section 552.024 after the request for information was made. Whether a particular piece of information is public must be determined at the time that the request for it is made. *See* Open Records Decision No. 530 at 5 (1989).

We have marked the kind of information that reveals whether an individual has family members. If the marked information pertains to a current or former employee of the school district who timely elected to keep this information confidential under section 552.024, then the school district must withhold the marked information under section 552.117.

In summary, the identity of a student of the school district or a student's parent is confidential under FERPA. The school district must not release such information unless it is authorized under FERPA to do so. The kind of information that we have marked may be excepted from disclosure under section 552.117 of the Government Code. With those possible exceptions, you must release the submitted information, to the extent that it existed when the school district received this request for 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).

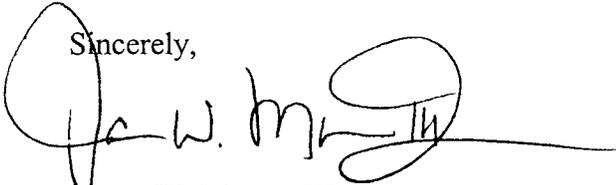
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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 with a large, prominent loop at the beginning and a long horizontal stroke extending to the right.

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

JWM/sdk

Ref: ID# 163831

Enc: Submitted documents

c: Mr. Jerry Jordan
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(w/o enclosures)