



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

April 10, 2003

Ms. Lisa B. Silvia
Paralegal
Fort Worth Independent School District
100 North University Drive, Suite NW 130
Fort Worth, Texas 76107

OR2003-2406

Dear Ms. Silvia:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 179246.

The Fort Worth Independent School District (the "district") received a request for six categories of information, paraphrased as follows:

- 1) The 1998-2002 work records of three named district employees.
- 2) The personnel and departmental files of seven named district employees.
- 3) All opinion requests since January 2, 1998 submitted to the Office of the Attorney General by the district.
- 4) District records naming all Fort Worth police officers providing security at district board meetings in 2002.
- 5) District rules regarding the proper attire to be worn by police officers providing security.
- 6) Any and all contracts granted to a named district employee.

You state that some responsive information has been destroyed under the record retention and destruction policy in effect at the time. The Public Information Act (the "Act") does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). You further state that the district has previously provided the requestor with information responsive to a portion of item 6 of the request, and that the requestor has been notified of this fact pursuant to section 552.232 of the Government Code. *See* Gov't Code § 552.232 (governmental body shall certify to requestor that copies of all or part of requested information, as applicable, were previously furnished to requestor). Thus, we need not address that portion of the request in this ruling. *See* Gov't Code § 552.301. Finally, you assert that some responsive information will be made available to the requestor. You claim that the remaining requested information, a portion of which consists of representative sample information,¹ is excepted from disclosure under sections 552.101, 552.102, 552.117, 552.119, and 552.130 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

We first note that you have not submitted information responsive to item 4 or to a portion of item 6 of the request. Further, you have not indicated that such information does not exist. Therefore, to the extent information responsive to these aspects of the request exists, we assume that you have released it to the requestor. If you have not released any such information, you must release it to the requestor at this time. *See* Gov't Code §§ 552.301(a), .302; Open Records Decision No. 664 (2000).

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

²Section 552.119 generally excepts from public disclosure a photograph of a peace officer that, if released, would endanger the life or physical safety of the officer. The submitted documents contain no photographs of peace officers. Thus, no portion of the submitted information may be withheld from disclosure under section 552.119.

We next note that a portion of the submitted materials includes information made public by section 552.022 of the Government Code. This section provides several categories of information that are not excepted from required disclosure unless they “are expressly confidential under other law.” In pertinent part this section reads

(a) Without limiting the amount or kind of information that is public information under this chapter, 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, except as provided by Section 552.108;

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate;

...

(15) information regarded as open to the public under an agency’s policies[.]

The submitted materials include completed evaluations that are subject to required release under section 552.022(a)(1), and information used to estimate the need for or expenditure of public funds that is made public pursuant to section 552.022(a)(5). The job postings are subject to required release under section 552.022(a)(15). The submitted information which is within the ambit of section 552.022 is therefore subject to required public disclosure, except to the extent that any of this information is expressly confidential under other law, or, in the case of the completed evaluations, excepted under section 552.108 of the Government Code.³ As you claim that some of the submitted information is confidential by law, we will

³You do not claim that section 552.108 is applicable to the information.

address your arguments for both the information subject to section 552.022 and the remaining submitted information.

You claim that a portion of the requested information is confidential under article 2.12 of the Code of Criminal Procedure and section 1702.002 of the Occupations Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information made confidential by statutes outside the Act. However, these statutory provisions do not expressly make information confidential. In order for section 552.101 to apply, a statute must contain language expressly making certain information confidential. *See Open Records Decision Nos. 658 at 4 (1998), 478 at 2 (1987)* (language of confidentiality statute controls scope of protection), 465 at 4-5 (1987) (statute explicitly required confidentiality); *see also* Occ. Code § 1702.002 (definitions), Code Crim. Proc. art. 2.12 (defining peace officers). Confidentiality cannot be implied from the structure of a statute or rule. *See Open Records Decision No. 465 at 4-5 (1987)*. Accordingly, no portion of the submitted information may be withheld under section 552.101 in conjunction with section 1702.002 or article 2.12.

The district also raises section 552.102 of the Government Code. Section 552.102(b) excepts from disclosure "a transcript from an institution of higher education maintained in the personnel file of a professional public school employee." Section 552.102(b) further provides, however, that "the degree obtained or the curriculum on a transcript in the personnel file of the employee" are not excepted from disclosure. Thus, except for the information that reveals the degree obtained and the courses taken, the district must withhold the marked college transcripts under section 552.102(b).

Section 552.102(a), on the other hand, 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).⁴ Accordingly, we will consider your section 552.101 common law and section 552.102 claims together.

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. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Because of the greater legitimate public interest in information that relates to public officials and employees, privacy under section 552.102(a) 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(a) is "very narrow." See Open Records Decision No. 400 at 5 (1983); 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 protected information only if its release would lead to clearly unwarranted invasion of privacy).

Prior decisions of this office have found that financial information relating only 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. See Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). For example, a public employee's allocation of his salary to a voluntary investment program or to optional insurance coverage which is offered by his employer is a personal investment decision and information about it is excepted from disclosure under the common-law right of privacy. See Open Records Decision No. 545 (1990). Likewise, an employee's designation of a retirement beneficiary is excepted from disclosure under the common-law right to privacy. See Open Records Decision No. 600

⁴Section 552.101 also encompasses the doctrine of common-law privacy

(1992). However, information revealing that an employee participates in a group insurance plan funded partly or wholly by the governmental body is not excepted from disclosure. See Open Records Decision No. 600 at 10 (1992).

We have reviewed the submitted documents and agree that a portion of the information constitutes personal financial information that is confidential under the common-law right of privacy and is, thus, excepted from disclosure under section 552.102 of the Government Code. We have marked this information. You also argue that the leave information in Tab 9 is confidential under common-law privacy. Based upon our review of this information, however, we find that it is not the type of information considered intimate and embarrassing in *Industrial Foundation*. Thus, the information in Tab 9 may not be withheld under section 552.101 or 552.102 in conjunction with traditional notions of common-law privacy. See Open Records Decisions Nos. 478 (1987), 455 (1987) (absent special circumstances, names, addresses, and telephone numbers are not "intimate" information).

You also assert that certain information is protected under the common-law doctrine of "special circumstances" as well as section 552.117 of the Government Code. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. 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, the district may only withhold information under section 552.117(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the district must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. The district may not withhold this information under section 552.117(1) for those employees who did not make a timely election to keep the information confidential. For your convenience, we have marked a representative sample of the types of information that must be withheld under section 552.117(1) if a timely election has been made. We note that while you also claim sections 552.117(2) and 552.1175 as exceptions to disclosure, section 552.117(2) is applicable only to the personal information of peace officers, while section 552.1175 makes confidential certain information of peace officers, county jailers, security officers, and employees of the Texas Department

of Criminal Justice. You do not inform this office, nor is it apparent on the face of the documents, that any of the employees whose files you have submitted to us for review are employed in the listed occupations. Therefore, we find that sections 552.117(2) and 552.1175 are inapplicable to the submitted information.

We next address your claim regarding "special circumstances." In prior decisions, this office has also determined that information that ordinarily would be subject to disclosure may be withheld under section 552.101 in conjunction with common-law privacy upon a showing of "special circumstances." *See, e.g.*, Open Records Decision 169 at 6-7 (1977) (describing special circumstances under which certain home addresses are private). This office considers "special circumstances" to refer to a very narrow set of situations, in which the release of information would likely cause a person to face "an imminent threat of physical danger." *Id.* at 6. Such special circumstances do not include "a generalized and speculative fear of harassment or retribution." *Id.*

In this case, you contend that the requestor has harassed and threatened district employees, and you believe that the requestor's harassing behavior will continue if the requested information is released. You have submitted a sample of alleged harassing communications sent by the requestor to district officials, agents, and employees for our review. You also state that the district has filed a lawsuit seeking protection from the requestor's actions. You inform us that the 153rd District Court of Tarrant County has issued a temporary restraining order against the requestor, and you have submitted a copy of the temporary restraining order for our review. Pursuant to the order, the requestor is restrained from contacting "[the district superintendent] or any Board member, employee, or official of the [district] by e-mail, letter, fax, or other form of communication." The order also prohibits the requestor from "[p]lacing unsolicited telephone calls, or e-mails to any person known by [the requestor] to be related to any person employed by [the district], in any capacity." Furthermore, the order prohibits the requestor from attending meetings of the district board of trustees, from entering district property without the written consent of the district, and from "[t]hreatening the physical safety of any student, parent, staff member, employee, or agent of [the district] at any place or time." The temporary restraining order states that "a serious risk exists that the staff, officials, agents, and teachers of the school may be subjected to defamation or physical attack" if the foregoing restrictions are not imposed while the district's lawsuit is pending. Based on the totality of the information you provided in this instance, we determine that you have established the presence of special circumstances sufficient to justify withholding some of the information appearing in the records at issue.

Accordingly, we determine that the district must withhold information which tends to identify officials, staff members, employees and agents of the district, as well as identifying information of relatives of officials, staff members, employees and agents of the district, from the responsive records pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. Such identifying information includes home address and telephone number, former home address and telephone number, social security number, work telephone number, personal and work e-mail addresses, and any information that reveals whether the person has family members.

Section 552.101 also encompasses information made confidential by federal and state statutes. The submitted documents also contain employee I-9 and W-4 forms. Section 1324a of title 8 of the United States Code provides that an Employment Eligibility Verification Form I-9 "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. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). A Form I-9 may be released only for purposes of compliance with the federal laws and regulations governing the employment verification system. The release of submitted I-9 forms in response to this request for information would be "for purposes other than for enforcement" of the referenced federal statutes. A W-4 form is confidential under section 6103 of title 26 of the United States Code. Therefore, the district must withhold the I-9 and W-4 forms under section 552.101 of the Government Code in conjunction with federal law.

Section 21.355 of the Education Code provides that "[a] document evaluating the performance of a teacher or administrator is confidential." In Open Records Decision No. 643 (1996), 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. 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. Open Records Decision No. 643 (1996). 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 our careful review of the submitted information, we find that the teacher and administrator performance evaluations that we have marked must be withheld from the public in their entirety pursuant to section 552.101 in conjunction with section 21.355 of the Education Code. The remaining evaluations, however, do not evaluate the performance of

a teacher or administrator, and thus may not be withheld from disclosure under section 552.101 in conjunction with section 21.355 of the Education Code.

Finally, we note that section 552.130 of the Government Code excepts from public disclosure information relating to a driver's license or motor vehicle title or registration issued by an agency of this state. Thus, we have marked the information in the submitted documents that the district must withhold pursuant to section 552.130.

In summary, we have marked the information that the district must withhold pursuant to section 552.130. Under section 552.117, the district must withhold the social security number, home phone number, and address of any current or former district official or employee and who, prior to the receipt of this request, elected to keep such information confidential. The marked performance evaluations, W-4 forms, and I-9 forms must be withheld pursuant to section 552.101 of the Government Code. The marked financial information must be withheld pursuant to section 552.102 of the Government Code. Except for the information that reveals the degree obtained and the courses taken, the district must withhold the college transcripts of professional public school employees under section 552.102(b). Additionally, the district must withhold information which tends to identify officials, staff members, employees and agents of the district, as well as identifying information of relatives of officials, staff members, employees and agents of the district, from the responsive records pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. The remaining submitted information must be released to the requestor.⁵

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

⁵As our ruling is dispositive, we do not address your remaining arguments.

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

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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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh -

Ref: ID# 179246

Enc. Submitted documents

c: Mr. Tom Purcell
P.O. Box 564
Keller, Texas 76244
(w/o enclosures)