



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 27, 2003

Mr. S. Stephen Hilmy
Gary, Thomasson, Hall & Marks, P.C.
P.O. Box 2888
Corpus Christi, Texas 78403-2888

OR2003-6049

Dear Mr. Hilmy:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 189463.

The Del Mar Junior College District (the "college"), which you represent, received a request for "any and all evaluations done for Dr. Gustavo Valadez Ortiz during the past eighteen months." You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.111 of the Government Code. We have considered the exceptions you claim and reviewed a representative sample of the information at issue.¹

Section 552.101 of the Government Code 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, "A document evaluating the performance of a teacher or administrator is confidential." You assert that this provision is applicable to the college 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.

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.

By its terms, section 130.084 affects 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). However, 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 junior college trustees' authority to direct the 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. Accordingly, the college may not withhold the requested information under section 552.101 in conjunction with section 21.355 of the Education Code.

You also contend that the requested information is confidential under sections 551.074 and 551.104 of the Government Code, because it "was created . . . in closed session and was intended to remain confidential." Section 551.074 allows a governmental body "to deliberate the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee" during an executive session, unless the public officer or employee requests a public hearing. Section 551.104(c) provides that "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3)." Neither section 551.074 nor section 551.104(c) explicitly deems the information at issue confidential. Furthermore, information "is not excepted from required public disclosure simply by virtue of its having been considered in an executive session, and . . . all or part of it may be withheld only if a section 3(a) [now subchapter C of the Government Code] exception embraces it." Open Records Decision No. 485 at 10 (1987); *see also* Open Records Decision No. 605 at 2-3 (1992) (concluding that section 551.074 does not authorize a governmental body to withhold its records of the names of applicants for public employment who were discussed in an executive session). Therefore, we conclude that the requested information is not excepted from disclosure under section 552.101 in conjunction with section 551.074 or 551.104(c) of the Government Code.

Next, you contend that the requested information is excepted from disclosure under section 552.102 of the Government Code. Section 552.102 excepts "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 *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Common-law privacy protects information 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. The public has a legitimate interest in the job performance of the college president. Therefore, the requested information is not excepted from disclosure under section 552.102. See Open Records Decision Nos. 473 at 3 (1987) (even highly subjective evaluations of public employees may not ordinarily be withheld under Gov't Code § 552.102), 470 at 4 (1987) (public employee's job performance does not generally constitute his private affairs), 464 at 2 (1987) (public has interest in evaluations of administrators at public universities).

You also raise section 552.103 of the Government Code. Section 552.103 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.

....

(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.

A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information, 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, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). You note that litigation filed in the Nueces County 347th Judicial District Court "has since been nonsuited, but the applicable statute of limitations has not expired." It is not clear from your letter to this office whether this litigation was pending on the date the college received the request for information or whether the college reasonably anticipated additional

litigation on the date it received the request for information. Furthermore, you have not demonstrated that the requested information is related to either pending or reasonably anticipated litigation. Therefore, the college may not withhold the information from disclosure under section 552.103.

Finally, you claim that the requested information is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5. The submitted information does not relate to a policymaking function of the college. Rather it relates to the internal personnel matter of the college president's job performance. Therefore, the information is not excepted from disclosure under section 552.111. Because the information at issue is not protected by any of the exceptions you claim, the information must be released to the requestor.

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 Dep't of Pub. 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,



Karen Hattaway
Assistant Attorney General
Open Records Division

KEH/sdk

Ref: ID# 189463

Enc: Submitted documents

c: Ms. Icess Fernandez
Corpus Christi Caller-Times
820 North Lower Broadway
Corpus Christi, Texas 78401
(w/o enclosures)