



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 3, 2003

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

OR2003-6188

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# 187058.

The Fort Worth Independent School District (the "District") received two requests for the names and resumes of all candidates being considered for an assistant superintendent of maintenance position, as well as "access to the committee's documentation" regarding one of the requestors. The District has submitted the names and resumes of the applicants. We assume that the District has released the remaining responsive information to the extent that it exists. If not, it must do so at this time. *See* Gov't Code §§ 552.021, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under circumstances). You argue that the submitted information is excepted from disclosure under sections 552.102, 552.117 and 552.126 of the Government Code. You also claim some of the information is prohibited from release under the federal Family Educational Rights and Privacy Act of 1974. We have considered the exceptions you claim and reviewed the submitted sample of information.¹

Section 552.126 excepts from disclosure "[t]he name of an applicant for the position of public school superintendent." The express protection in section 552.126 regards information pertaining to a superintendent of a school district, not to other positions within

¹ We 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.

a school district. Because the position at issue is assistant superintendent of maintenance, the District may not withhold applicants' names under section 552.126 of the Government Code.

You argue that school transcripts are excepted from disclosure pursuant to the Family Educational Rights and Privacy Act of 1974 ("FERPA"). We note that 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). The term "student" includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution. *See id.* § 1232g(a)(6); *see also id.* § 1232g(a)(4)(B)(iii)(records of former students maintained exclusively for employment purposes are not "student records"). Based on our review of your arguments and the information at issue, none of the applicants attended the District as "students." Accordingly, we conclude that the transcripts are not excepted from disclosure pursuant to FERPA.

You further claim that some of the information is excepted from disclosure pursuant to section 552.117 of the Government Code. Section 552.117(a)(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 of the Government Code. *See* Gov't Code § 552.117(a)(1).² However, information subject to section 552.117(a)(1) may not be withheld from disclosure if the current or former employee made the request for confidentiality under section 552.024 after the request for information at issue was received by the governmental body. Whether a particular piece of information is public 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 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 for those employees who did not make a timely election to keep the information confidential. Furthermore, the District may not withhold this information for those applicants who are not current or former employees. Accordingly, the District must withhold from disclosure

² In Senate Bill 1388, which became effective on June 20, 2003, the Seventy-eighth Legislature recently amended section 552.117 of the Government Code by adding "(a)" to the relevant language of this provision. *See* Act of May 30, 2003, 78th Leg., R.S., S.B. 1388, § 1 (to be codified as an amendment to Gov't Code sec. 552.117).

information made confidential pursuant to section 552.117(a)(1), if the employee made a timely request under section 552.024. If the employee did not, the District must release this information to the requestor.

Additionally, you claim that the requested information is excepted from disclosure pursuant to 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). This office has previously determined that section 552.102 only protects information in a personnel file of an employee of a governmental body, not information relating to an applicant for employment with the governmental body. Open Records Decision No. 455 at 8 (1987). 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).

In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure 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 type of information considered intimate and embarrassing by the 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. Based upon our review of the information at issue, we find that it is not the type of information considered intimate and embarrassing under the standard articulated in *Industrial Foundation*. Moreover, we do find that the information is of a legitimate concern to the public. Accordingly, we conclude that the District may not withhold any portion of the submitted information from disclosure pursuant to section 552.102 of the Government Code.

The submitted information contains e-mail addresses obtained as part of the application process. Section 552.137 makes certain e-mail addresses confidential. Section 552.137 provides:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code §552.137. You do not inform us that any of the applicants have affirmatively consented to the release of their e-mail addresses. The District must, therefore, withhold the e-mail addresses under section 552.137.

We note, however, that an applicant's social security number may be confidential under federal law. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101.³ Section 552.101 encompasses information protected by other statutes. Social security numbers may therefore be excepted from disclosure under section 552.101 of the Government Code 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.* The District has cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes it to obtain or maintain these social security numbers. Therefore, we have no basis for concluding that these numbers are confidential pursuant to section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. We caution the District, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing the social security numbers at issue, the District should ensure that these social security numbers were not obtained or are not maintained by the District pursuant to any provision of law enacted on or after October 1, 1990.

In summary, the District must withhold the confidential information pursuant to section 552.117(a)(1) if the employee timely requested that this information be kept confidential under section 552.024. If no timely request was made, the District must release this information to the requestor. The District must withhold the e-mail addresses under section 552.137. Social security numbers may be confidential under federal law. The District must release all other submitted 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.

³ The Office of the Attorney General will raise a mandatory exception like section 552.101 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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).

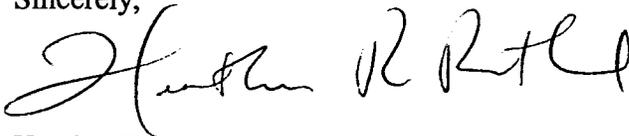
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



Heather R. Rutland
Assistant Attorney General
Open Records Division

HRR/sdk

Ref: ID# 187058

Enc: Submitted documents

c: Mr. Gustavo Acosta
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