



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 7, 2005

Ms. Lydia L. Perry
Law Offices of Robert E. Luna
4411 North Central Expressway
Dallas, Texas 75205

OR2005-00275

Dear Ms. Perry:

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# 215464.

The Midlothian Independent School District (the "district"), which you represent, received five requests for information pertaining to a specified incident that transpired at Midlothian High School. In addition, some of the requestors seek personnel information for three identified district employees, correspondence between identified district employees, and specified district policy guidelines. You claim that the responsive information is excepted from disclosure under sections 552.101, 552.102, 552.114, 552.117, 552.130 and 552.135 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.¹

You claim that most of the information is excepted from disclosure pursuant to section 552.114 of the Government Code in conjunction with the Family Educational Rights and Privacy Act of 1974 ("FERPA"). Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990). 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

¹ We note that you have forwarded multiple document sets in response to these requests, which include duplicative information. This ruling addresses Exhibits B through H, as marked, as well as a letter relating to allegations of misconduct on the part of district employees, dated October 20, 2004.

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" means those records that contain information directly related to a student and 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 552.026 of the Government Code provides that "information contained in education records of an educational agency or institution" may only be released under the Public Information Act in accordance with FERPA.

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 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 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. However, in this instance, you have asked us to rule on the applicability of section 552.114 and FERPA.

Upon review, we agree that most of the documents at issue are records maintained by the district that contain information directly related to students. We therefore agree that these documents are education records that are subject to FERPA. 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 (1982), 206 (1978). Such information includes information that directly identifies a student as well as information that, if released, would allow the student's identity to be easily traced. *See* Open Records Decision No. 224 (1979) (finding student's handwritten comments protected under FERPA because they make identity of student easily traceable through handwriting, style of expression, or particular incidents related).

In this instance, you state that, due to extensive media coverage of the matter at issue, release of the education records with students' names redacted "will not be sufficient to protect the personally identifiable information therein." Because the identities of the students involved are generally known and have been inextricably linked with the incident at issue, we find that the information in Exhibits F and G cannot be redacted to the extent reasonable and necessary to avoid identifying these students. Therefore, Exhibits F and G must be withheld in their entireties pursuant to sections 552.026 and 552.114 of the Government Code.²

You claim that portions of the remaining information are confidential pursuant to section 552.101, which excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This

² Because we reach this conclusion, we need not address your remaining arguments against the disclosure of Exhibit F.

section encompasses information protected by other statutes. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *dismissed in part, aff'd in part, vacated in part, and remanded*, 993 F.2d 1111 (4th Cir. 1993). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of income, payments, tax withheld, deficiencies, overassessments or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return . . . or the determination of the existence, or possible existence, of liability . . . for any tax, . . . penalty, . . . , or offense[.]" *See* 26 U.S.C. § 6103(b)(2)(A). Upon review, we agree that the district must withhold the W-4 forms submitted as Exhibit E pursuant to section 552.101 in conjunction with section 6103 of title 26 of the United States Code.

You also claim that some of the remaining information is confidential pursuant to section 552.101 in conjunction with section 21.355 of the Education Code, which provides that "[a] document evaluating the performance of a teacher or administrator is confidential." *See generally* 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. Open Records Decision No. 643 (1996). 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. *Id.* 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 the reasoning set out in Open Records Decision No. 643, we conclude that the documents in Exhibit B are confidential under section 21.355 of the Education Code. Therefore, pursuant to section 552.101, the district must withhold these documents. However, we also find that the letter you seek to withhold on this basis relates to allegations of misconduct on the part of district employees and is not an evaluation as that term is commonly understood. Therefore, the letter may not be withheld as confidential under section 552.101 in conjunction with section 21.355.

You also assert that the identifying information of the individual who wrote the letter is excepted under section 552.135 of the Government Code, which provides:

- (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 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 that exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See* Gov't Code § 552.301(e)(1)(A). You state that the letter identifies the district employee who reported possible violations of the University Interscholastic League Constitution and Contest Rules (the "UIL Rules"). However, you have not demonstrated that the UIL rules constitute criminal, civil or regulatory law for the purposes of section 552.135 of the Government Code. Consequently, you have not met your burden of demonstrating the applicability of section 552.135, and the identifying information of the individual who wrote the letter may not be withheld on this basis. As you claim no other exceptions to the disclosure of the letter, you must release the letter in its entirety.

You further claim that the college transcripts submitted in Exhibit C are excepted under section 552.102(b), which excepts from public disclosure "a transcript from an institution of higher education maintained in the personnel file of a professional public school employee." Gov't Code § 552.102(b). This section 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 transcripts submitted in Exhibit C under section 552.102(b).

You claim that some of the remaining submitted information is excepted from disclosure under section 552.117 of the Government Code. Section 552.117 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 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The district may only withhold information under section 552.117 on behalf of current or former employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, to the extent that the employees in question made a timely election under section 552.024, the district must withhold the information you have marked in Exhibits D and H, as well as a small amount of information we have marked in Exhibit D, under section 552.117.

Even if an employee did not timely elect to keep this information confidential, the employee's social security number may also be excepted from disclosure under section 552.101 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.* We have no basis for concluding that the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the district pursuant to any provision of law, enacted on or after October 1, 1990.

You claim that some of the information in Exhibit H is excepted under section 552.130, which provides, in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Therefore, you must withhold the Texas driver's license information you have marked in Exhibit H pursuant to section 552.130.

Lastly, we note that the submitted information includes a private e-mail address. Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c).³ See Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public" but is instead the address of the individual as a government employee. The e-mail address at issue does not appear to be of a type specifically excluded by section 552.137(c). Therefore, in accordance with section 552.137, the district must withhold the marked e-mail address in Exhibit D unless the district receives consent to release it.

In summary, the district must withhold Exhibits F and G pursuant to FERPA. In conjunction with section 552.101, the district must withhold 1) the information in Exhibit E pursuant to section 6103(a) of title 26 of the United States Code and 2) the information in Exhibit B as confidential under section 21.355 of the Education Code. With the exception of information that reveals the degree obtained and the courses taken, the district must withhold the transcripts submitted in Exhibit C under section 552.102(b). To the extent that the employees in question made timely elections under section 552.024, the district must withhold the information it has marked in Exhibits D and H, as well as the information we have marked in Exhibit D, under section 552.117. Even if the employees did not make timely elections, their social security numbers may be excepted under section 552.101 in conjunction with federal law. The district must withhold the marked Texas driver's license information in Exhibit H pursuant to section 552.130. The district must withhold under section 552.137 the marked e-mail address in Exhibit D unless the owner consents to its release. The district must release all remaining 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 mandatory exceptions like section 552.137 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,


Marc A. Barenblat
Assistant Attorney General
Open Records Division

MAB/sdk

Ref: ID# 215464

Enc: Submitted documents

c: Mr. Joey Dauben
Ellis County Press
P.O. Box 370
Ferris, Texas 75125
(w/o enclosures)

Mr. Matthew A. Jacob
The Dallas Morning News
508 Young Street
Dallas, Texas 75202
(w/o enclosures)

Mr. Karl Tiger Hanner
Brim, Arnett, Soifer, Robinett, Hanner & Connors
2525 Wallingwood Drive, Building 14
Austin, Texas 78746
(w/o enclosures)

Mr. Floyd O. Ingram
Midlothian Mirror
P.O. Box 70
Midlothian, Texas 76065
(w/o enclosures)

Mr. Allen Manning
KTVT CBS News 11
10111 North Central Expressway
Dallas, Texas 75231
(w/o enclosures)