



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 9, 2006

Mr. Ricardo Rodriguez  
Schwartz & Eichelbaum, P.C.  
4201 West Parmer Lane, Suite A-100  
Austin, Texas 78727

OR2006-09007

Dear Mr. Rodriguez:

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# 256104.

The Mission Consolidated Independent School District (the "district"), which you represent, received a request for information relating to a former employee. You state that the district has released some of the requested information. You claim that other responsive information is excepted from disclosure under sections 552.101, 552.107, 552.114, and 552.135 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

Initially, we address the district's obligations under section 552.301 of the Government Code. Section 552.301 prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See Gov't Code* § 552.301(b). If a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

You acknowledge that the district failed to comply with section 552.301(b) in requesting this decision. Therefore, the submitted information is presumed to be public under section 552.302. This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). You contend that the district's assertion of the attorney-client privilege under sections 552.101 and 552.107 of the Government Code provides a compelling reason for non-disclosure. We note, however, that section 552.101 does not encompass the attorney-client privilege. *See* Open Records Decision No. 676 at 1-3 (2002) (TEX. R. EVID. 503 not constitutional, statutory, or decisional law for purposes of Gov't Code § 552.101). Furthermore, section 552.107 is a discretionary exception to disclosure that a governmental body may waive. *See id.* at 12 (claim of attorney-client privilege under Gov't Code § 552.107 or TEX. R. EVID. 503 provides compelling reason for non-disclosure if it is shown that release of information would harm third party; harm to interests of governmental body that received request for information not compelling reason under Gov't Code § 552.302.); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the district may not withhold any of the submitted information on the basis of the attorney-client privilege under section 552.101 or section 552.107. However, we will address your other claims under sections 552.101, 552.114, and 552.135 of the Government Code, as the applicability of these exceptions can provide compelling reasons for non-disclosure under section 552.302.

Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses the Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of title 20 of the United States Code. 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 the Act. *See* Gov't Code § 552.026 (Act does not require release of information contained in education records of educational agency or institution, except in conformity with [FERPA]). "Education records" under FERPA are 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 552.114 of the Government Code excepts from disclosure "information in a student record at an educational institution funded wholly or partly by state revenue." Gov't Code § 552.114(a). This office generally has treated "student record" information under section 552.114(a) as the equivalent of "education record" information under FERPA. *See* Open Records Decision No. 634 at 5 (1995).

Generally, FERPA requires that information be withheld from the public only to the extent “reasonable and necessary to avoid personally identifying a particular student.” *See* Open Records Decision Nos. 332 at 3 (1982), 206 at 2 (1978). We have marked information in Exhibits B and C that identifies students of the district and is therefore confidential under FERPA. The district must not release that information unless it has authorization to do so under the federal law.<sup>1</sup>

Section 552.101 of the Government Code also encompasses section 21.355 of the Education Code, which 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 Open Records Decision No. 643, we determined that for purposes of section 21.355, the word “teacher” means 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 determined 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 assert that the document submitted as Exhibit E is a confidential evaluation of a teacher for purposes of section 21.355. Based on your representation and our review of the information in question, we agree that Exhibit E is confidential under section 21.355 of the Education Code and thus must be withheld from disclosure under section 552.101 of the Government Code. *See Abbott v. North East Indep. Sch. Dist.*, No. 03-04-00744-CV (Tex. App.—Austin 2006, no pet. h.) (concluding that written reprimand constitutes evaluation for purposes of Educ. Code § 21.355).

Next, we address your claim under section 552.135 of the Government Code. This exception provides in part:

(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

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<sup>1</sup>We note that the district appears to have redacted other student-identifying information from the submitted documents. In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold 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) a state-funded educational agency or institution may withhold 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. *See id.* at 6-8.

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.

Gov't Code § 552.135(a)-(c). 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 this exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See id.* §§ 552.301(e)(1)(A), .135(a). You state that the information submitted as Exhibits B and C reveals the identities of employees of the district who reported possible violations of a specific criminal law. Based on your representations and our review of the information in question, we conclude that the district must withhold the information that we have marked in Exhibits B and C under section 552.135 of the Government Code.

In summary: (1) the district must not release the marked information that is confidential under FERPA unless it has authorization to do so under the federal law; (2) the district must withhold Exhibit E under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code; and (3) the district must withhold the information that we have marked in Exhibits B and C under section 552.135 of the Government Code. The rest of the submitted information must be released.

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).

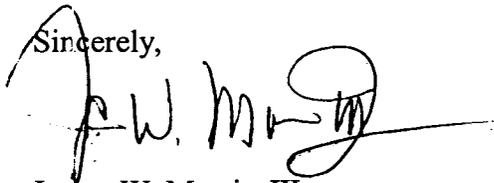
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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", with a long horizontal flourish extending to the right.

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

JWM/sdk

Ref: ID# 256104

Enc: Submitted documents

c: Mr. Humberto Villarreal, Jr.  
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(w/o enclosures)