TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00094-CV

Del Mar College District, Appellant

v.

Ken Paxton, Attorney General of The State of Texas, Appellee

FROM THE 201ST DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-GN-18-001456, THE HONORABLE SCOTT H. JENKINS, JUDGE PRESIDING

MEMORANDUM OPINION

After appellant Del Mar College District received a request for disclosure under the Texas Public Information Act (the Act), it sought to withhold certain documents contained in the personnel files of two employees, including the employees' college transcripts. *See generally* Tex. Gov't Code §§ 552.001-.376. After receiving an opinion by appellee Ken Paxton, Attorney General of the State of Texas, as required by the Act, *see id*. § 552.301, the College sought judicial review, *see id*. § 552.324. The College appeals from the trial court's determination that the transcripts should be disclosed. We will affirm the court's final judgment.

PROCEDURAL BACKGROUND

In November 2017, an individual sent a request under the Act, asking for documents from the College's personnel files of two professors. Believing that some of the requested information fell within the Act's exceptions to disclosure, the College sought to

withhold the employees' tax forms, documents showing their salary allocations to investment programs, documents showing optional insurance coverages, documents providing information about the employees' participation in state retirement systems, and their educational transcripts. The College requested an opinion by the Attorney General as required by the Act, *see id*. § 552.301, and the Attorney General concluded that only some of the information could be withheld. The College sought judicial review, and the parties filed competing motions for summary judgment. The trial court signed a final judgment ordering that some of the requested documents should be withheld but that others should be disclosed. The College appeals, challenging the portion of the judgment that states:

> The remaining disputed information at issue is the college transcripts of the two employees. [The College] contends that the transcripts may be withheld through the exemption of Texas Government Code Section 552.102(b)—which limits the disclosure of the college transcripts of "professional public school employees." "Public school," in the context of Section 552.102(b) and in light of the Public Information Act's liberal construction toward disclosure, does not include junior college districts like [the College] but, instead, is limited to the public primary and secondary schools. Because Section 552.102(b) is inapplicable to the transcripts of [the College's] employees, it is ORDERED that the transcripts . . . may not be withheld and must be disclosed . . . .

STANDARD OF REVIEW AND APPLICABLE STATUTES

Under the Act, information collected, assembled, or maintained in connection with a governmental body's transaction of official business is "public information" that generally must be made available to the public. *Id.* §§ 552.001(a), .002(a)(1), .021. A governmental body may only withhold information if it falls within one of the Act's exceptions. *See id*. §§ 552.101-.160. The Act must be construed liberally in favor of disclosure, and exceptions to disclosure are narrowly construed. *Id.* § 552.001(b); *Texas State Bd. of Chiropractic Exam'rs v. Abbott*, 391

S.W.3d 343, 347 (Tex. App.—Austin 2013, no pet.); *see Paxton v. Escamilla*, 590 S.W.3d 617, 621 (Tex. App.—Austin 2019, pet. denied); *City of Carrollton v. Paxton*, 490 S.W.3d 187, 195 (Tex. App.—Austin 2016, pet. denied).

This case arises out of the trial court's decision on cross-motions for summary judgment and asks only whether a statutory exception to disclosure under the Act applies, which is a question of law we determine de novo. *Paxton v. City of Dallas*, 509 S.W.3d 247, 256 (Tex. 2017); *Escamilla*, 590 S.W.3d at 621; *City of Carrollton*, 490 S.W.3d at 195. We thus determine all issues presented and render the judgment the trial court should have rendered. *Colorado County v. Staff*, 510 S.W.3d 435, 444 (Tex. 2017); *Escamilla*, 590 S.W.3d at 621.

In construing a statute, we seek to give effect to the legislature's intent by first looking to the statutory text. *Staff*, 510 S.W.3d at 444; *Escamilla*, 590 S.W.3d at 621. "The plain meaning of the text is the best expression of legislative intent unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results." *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011). We consider the entire statute, rather than isolated provisions, and should not interpret one provision inconsistently with others, even if it might be susceptible to such a construction standing alone. *Chiropractic Exam'rs*, 391 S.W.3d at 347. We may not rewrite the statute under the guise of interpreting it, and we may not look beyond its language for assistance unless the text is susceptible to more than one reasonable interpretation. *Staff*, 510 S.W.3d at 444; *Escamilla*, 590 S.W.3d at 621.

In considering and applying the Act, the Attorney General's interpretation is entitled to due consideration, but "as with other administrative statutory constructions, such deference must yield to unambiguous statutory language." *Boeing Co. v. Paxton*, 466 S.W.3d 831, 838 (Tex. 2015); *see City of Carrollton*, 490 S.W.3d at 195; *see also Shepherd v. San*

Jacinto Junior Coll. Dist., 363 S.W.2d 742, 765 (Tex. 1962) ("an opinion of the Attorney General is entitled to great weight when the correct decision of a question is doubtful, particularly when it has gone unchallenged and has been acted upon by the Legislature or administrative agencies for a long period of time" (citation omitted)); *San Antonio Union Junior Coll. Dist. v. Daniel*, 206 S.W.2d 995, 998 (Tex. 1947) (noting that Attorney General was responsible for approving or disapproving refunding bonds and that attorneys general had consistently held that junior college districts lacked power to issue such bonds; stating that Attorney General's construction was "entitled to great weight, and this court should not give a different construction unless we are convinced that his is wrong"; and observing that it was significant that although statute had been amended several times, "the legislature has not seen fit to amend sections 5 and 1 so as to avoid the construction the attorney general has consistently given it"). The courts thus give due consideration to the Attorney General's interpretation of the Act, under which he is required "to determine the applicability of exceptions to disclosure." *Abbott v. Texas State Bd. of Pharmacy*, 391 S.W.3d 253, 258 (Tex. App.—Austin 2012, no pet.); *see City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010) (Attorney General's interpretation of Act is persuasive but not controlling).

DISCUSSION

The question posed by this appeal is a limited one—whether the College is a "public school" for purposes of Section 552.102(b) of the Government Code, which provides:

> Information is excepted from the requirements of Section 552.021 if it is a transcript from an institution of higher education maintained in the personnel file of a professional public school employee, except that this section does not exempt from disclosure the degree obtained or the curriculum on a transcript in the personnel file of the employee.

Tex. Gov't Code § 552.102(b); *see id*. § 552.021 ("Public information is available to the public at a minimum during the normal business hours of the governmental body."). As the parties observe, the legislature did not define "public school" in the Act, and we thus must determine the intended meaning by starting with the term's plain and common meaning unless that construction would lead to absurd results or a different meaning is apparent from the context. *See Union Carbide Corp. v. Synatzske*, 438 S.W.3d 39, 52 (Tex. 2014). "We take statutes as we find them, presuming the Legislature included words that it intended to include and omitted words it intended to omit," which means we may not "read words into a statute to make it what we consider to be more reasonable" and may only do so to prevent an absurd result. *Id.*

In the informal letter ruling prepared in response to the College's request, the Attorney General stated, "This office has interpreted 'professional public school employee' to refer to employees of public schools providing 'public education' under title 2 of the Education Code, not colleges and universities providing 'higher education' under title 3 of the Education Code." Tex. Att'y Gen. OR2018-03508. Thus, the Attorney General concluded that "[t]he employees at issue are not professional public school employees" and that the College could not withhold the transcripts under Section 552.102(b). The trial court agreed that the College is not a "public school" and that the employees' school transcripts therefore could not be withheld.

The College first insists that the trial court erred because it is both public, having been created by the legislature and funded by public tax funds, and a school. However, we believe the proper inquiry is into the meaning of the *phrase* "public school," which has its own generally accepted meaning, referring to the elementary and secondary educational system funded by the state—"a free tax-supported school controlled by a local governmental authority," *Public School*, Merriam-Webster.com Dictionary, www.merriam-webster.com/dictionary/public

%20school, last visited June 29, 2020, or "a school that is maintained at public expense for the education of the children of a community or district and that constitutes a part of a system of free public education commonly including primary and secondary schools," *Public School*, Dictionary.com, www.dictionary.com/browse/public-school, last visited June 29, 2020.[1]

Junior colleges, in contrast, are part of the higher education system and charge tuition to their students. *See* Tex. Educ. Code § 130.084(b). The Education Code is divided into six titles—Title 2, "Public Education," governs the State's free elementary and secondary schools, *see id.* §§ 4.001-49.357, while Title 3, "Higher Education," governs the State's university and college system, *see id.* §§ 51.001-156.008. Junior colleges are governed by Chapter 130 of Subtitle G, "Non-Baccalaureate System," within Title 3 and the "higher education" system, not the "public education" system. *See id.* §§ 130.001-.355. We thus disagree with the College's argument that it is a "public school" under the plain meaning of the statutory text. *See also Hamad v. Texas State Teachers Ass'n*, No. 03-01-00360-CV, 2001 WL 1627937, at *1 n.2 (Tex. App.—Austin Dec. 20, 2001, no pet.) (mem. op.) ("TSTA members, as

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[1] In the United States, . . . the term "public school" is used for elementary, middle, and high schools funded and/or run by a governmental entity. . . . Public school is normally split up into three stages: elementary school (kindergarten to 5th or 6th grade), middle ("intermediate" or junior high school) from 5th, 6th, or 7th grade to 8th or 9th grade, and high school (9th or 10th to 12th grade). . . . In the United States, institutions of higher education that are operated and subsidi[z]ed by the states are also referred to as "public." However, unlike public high schools, public universities charge tuition, but fees are usually much lower than those charged by private universities, particularly for students who meet in-state residency criteria. Community colleges, state colleges, and state universities are examples of public institutions of higher education.

State School, Wikipedia, https://en.wikipedia.org/wiki/State_school#United_States (last visited June 29, 2020).

public-school employees, have certain statutory rights concerning contracts, probationary periods, and termination procedures . . . [while] [e]mployees in higher education, those served by [the Texas Faculty Association], do not have such statutory rights.").

The College next argues that even if "public school" refers to primary and secondary schools, "the Texas Supreme Court [in *Shepherd v. San Jacinto Junior College District*] held that a junior college district was a 'school district' and a 'free public school' as those terms were used in the Texas Constitution."[2]

It is true that in *Shepherd*, the court acknowledged the lack of clarity as to the status of junior colleges in Texas:

> Some difficulty of classification has arisen with reference to junior colleges and the regional districts supporting them. Undoubtedly the framers of the Texas educational system envisioned a system of schools extending from those of an elementary grade to those of a university level, that is, elementary schools, secondary schools or high schools and colleges and universities. The junior colleges, developed for the most part since 1929, are sandwiched in, so to speak, between the high schools on one hand and the colleges or universities on the other hand. In certain respects, the junior college is what its name implies, that is, a school which is above the high school level yet one whose highest grade is below the educational level required for a degree from a university. Yet, as pointed out by one of the briefs on file here, it would not be inappropriate to refer to the districts which support such schools as "junior college districts," "advanced independent school districts" or "graduate high school districts." The point of this is that junior colleges and their districts may in some instances be regarded as colleges and in other instances as schools in the nature of advanced high schools. The Junior College Act itself makes numerous references to independent school districts when delineating the powers and operations of a junior college district.

[2] In *Shephard v. San Jacinto Junior College District*, a landowner argued that a law allowing junior colleges to collect taxes violated Article VII, Section 3 of the Texas Constitution, which at the time permitted the legislature to "authorize an additional ad valorem tax to be levied and collected within all school districts . . . for the further maintenance of public free schools." 363 S.W.2d 742, 742 n.1, 746 (Tex. 1962); *see* Tex. Const. art. VII, § 3(e).

Id. at 744. In that case, the Attorney General argued in favor of the provision's constitutionality, asserting that the constitution used language broad enough to encompass junior college districts. *Id.* at 746, 750. The court observed that for more than thirty years, the Attorney General's position had been unchallenged, during which time "the junior college [had] become an integral part of the Texas educational system," multiplying across Texas and relying upon taxes levied under the challenged provision. *Id*. at 752. Noting both the long-standing situation and the landowner's burden of establishing unconstitutionality, the court upheld the provision because "there is a tenable theory supporting the questioned legislative power." *Id*. at 753. In doing so, the court said that "public acquiescence could not result in a precedent in the judicial sense" but that long acceptance carries "a persuasiveness of compelling force." *Id*. at 750, 752-53. The court did not, however, go so far as to hold that "a junior college was a 'school district' and a 'free public school,'" as asserted by the College in this case. Thus, unfortunately, *Shepherd* does not answer the question before us.

The College also argues that it should be considered a "public school" because the legislature has declared junior college districts to be "school districts" and has provided that the law generally applicable to an independent school district applies to junior college districts. *See* Tex. Educ. Code §§ 130.122(f), .084(a). However, the College's broad reading of Sections 130.122 and 130.084 runs contrary to the structure of the Education Code as a whole and would render portions of Chapter 130 surplusage.

Section 130.122(f) of the Education Code provides that "[e]ach junior college district, and each regional college district . . . created pursuant to the laws of this state, is hereby declared to be, and constituted as, a school district within the meaning of Article VII, Section 3, of the Texas Constitution." *Id.* § 130.122(f). Article VII, Section 3 governs "Taxes for benefit

of schools; school districts" and allows the legislature to "pass laws for the assessment and collection of taxes in all school districts and for the management and control of the public school or schools of such districts." Tex. Const. art. VII, § 3(e). Section 130.122(f), therefore, defines a junior college as a "school district" only in the specific, limited context of a junior college's power to levy taxes.

As for Section 130.084, Subsection (a) is titled "Powers and Duties" and provides that "[t]he governing board of a junior college district shall be governed in the establishment, management, and control of a public junior college in the district by the general law governing the establishment, management, and control of independent school districts insofar as the general law is applicable." Tex. Educ. Code § 130.084(a). The supreme court looked to the predecessor to Section 130.084 when asked whether the trustees of a junior college district had authority to issue refunding bonds and concluded the trustees did not, explaining:

> Its language is that the trustees of junior college districts shall be governed in the establishment, management and control of the junior college by the general laws governing the establishment, management and control of independent school districts in so far as those laws are applicable. There is, of course, a clear distinction to be drawn between the district and the college, which the district is designed to create, so we think the language is clearly limited to the authority of the trustees to direct the college and that it has no reference to their authority with respect to the district, which alone can issue bonds.

Daniel, 206 S.W.2d at 997-98.

In 1992, the Office of the Attorney General explained that "the predecessor of section 130.084 is difficult to apply to other questions under that provision, because the board of trustees' authority with respect to the district often cannot be distinguished from its authority with respect to the colleges of the district." Tex. Att'y Gen. Op. DM-178 (1992). The Attorney

General explained that courts had equated junior college districts to "school districts" under that statute for purposes of spending local maintenance funds, exercising eminent domain, and repairing school buildings, all actions taken pursuant to authority granted to school districts under the Education Code. *See id*. Similarly, Section 130.084 has been held to mean that a junior college is subject to the "sue and be sued" language in Section 11.151 of the Education Code. *See Alamo Cmty. Coll. Dist. v. Obayashi Corp.*, 980 S.W.2d 745, 747-48 (Tex. App.—San Antonio 1998, pet. denied), *abrogated on other grounds by General Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591 (Tex. 2001).

Pursuant to case law and other analyses under Section 130.084 and its predecessor, a junior college's governing body certainly is subject to general Education Code provisions that guide the governing body of a public-school district. Section 130.084 does not, however, require that every statute that is applicable to a public-school district must be applied to a junior college. *See* Tex. Educ. Code § 130.084(a).

Section 552.102(b) is part of the Public Information Act, not the Education Code, and is not part of the "general law governing the establishment, management, and control of independent school districts." *See id.* § 130.084(a); Tex. Gov't Code § 552.102(b). Nor is it related to a junior college's taxing authority under Article VII, Section 3. *See* Tex. Educ. Code § 130.122(f). Sections 130.084 and 130.0122(f) do not therefore require the application of Section 552.102(b) to the College as if it is a "public school" rather than an institution of higher learning, as indicated by its inclusion in Title 3.

The Attorney General has for decades barred the application of Section 552.102(b) to employees of junior colleges: "We have interpreted 'professional public school employee,' to refer to employees of public schools providing 'public education' under

title 2 of the Education Code, not colleges and universities providing 'higher education' under title 3 of the Education Code." Tex. Att'y Gen. OR2000-2621. The Attorney General has also explained repeatedly that the exemption in Section 552.102(b) is limited to "professional educators" employed by the public schools, rather than other types of employees, such as a school district's construction manager, *see* Tex. Att'y Gen. OR2017-12010, police chief, *see* Tex. Att'y Gen. OR2014-12533, or in-house counsel, *see* Tex. Att'y Gen. OR2014-02647. In reaching that conclusion, the Attorney General has referred to the legislative history of Section 552.102(b), noting that the bill's author had explained that it was intended to stop inquiries by people trying to undermine a school district's hiring decisions and determination of a teacher's qualifications. *See, e.g.*, Tex. Att'y Gen. OR2020-09993 (citing to floor debate, in which author stated that "there are several other means by which we say teachers are qualified to teach in this state"). Those long-standing Attorney General rulings have not been challenged in the courts, and we are to give due consideration to the interpretation placed on the Act by the Attorney General, who is tasked with determining the applicability of exceptions to disclosure. *See Texas State Bd. of Pharmacy*, 391 S.W.3d at 258; *see also Shepherd*, 363 S.W.2d at 765 (Attorney General's interpretation entitled to great weight, particularly when unchallenged and acted upon by legislature or administrative agencies for long period of time); *Daniel*, 206 S.W.2d at 998 (Attorney General's construction is entitled to great weight, particularly when legislature has not amended language in response to construction, and courts should defer to construction "unless we are convinced that his is wrong"); *Welmaker v. Cuellar*, 37 S.W.3d 550, 552 (Tex. App.—Austin 2001, pet. denied) ("Although opinions of the attorney general are merely advisory and not binding on the courts, they are entitled to careful consideration.").

Section 552.102(b) is quite specific, only exempting from disclosure transcripts of "professional public school employees," *see* Tex. Gov't Code § 552.102(b), and we must hew to the rule that the legislature must have intended for a narrow exception to the general rule in favor of disclosure, *see Chiropractic Exam'rs*, 391 S.W.3d at 347 (Act is "liberally construed in favor of" disclosure, and exceptions "are narrowly construed"). If the legislature had intended a broader exception, it could easily have written the statute to apply to the files of employees of "educational institutions" or used other more inclusive or expansive language. Because it did not, we must assume that the legislature intended for the exemption to be narrowly construed. *See Chiropractic Exam'rs*, 391 S.W.3d at 347.

Having considered the plain meaning of the phrase "public school," the case law discussing Section 552.102(b) and Section 130.084(a), and the Attorney General's relevant opinions and rulings, we conclude that the trial court properly resolved the dueling motions for summary judgment by determining that the exception set out in Section 552.102(b) does not apply to the College. We overrule the College's issue on appeal.

CONCLUSION

Having overruled the College's arguments, we affirm the trial court's final judgment.

Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Triana and Smith

Affirmed

Filed: July 1, 2020