



Office of the Attorney General  
State of Texas

June 11, 1992

DAN MORALES  
ATTORNEY GENERAL

Mr. Richard M. Abernathy  
Abernathy, Roeder, Robertson & Joplin  
P. O. Box 576  
McKinney, Texas 75069-0576

OR92-331

Dear Mr. Abernathy:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 15920.

The Melissa Independent School District (the district) received an open records request for "a copy of the investigation report on the matter with the school principal." The "investigation report" in question was compiled by an investigator, an attorney, who interviewed various district staff members and parents of students who attend school in the district. The report itself consists of summaries of the teachers' and parents' statements regarding the district's principal, the principal's responses to the others' statements, and the investigator/attorney's concluding opinions and recommendations. You contend that the district may withhold the report from the public pursuant to sections 3(a)(1), 3(a)(2), 3(a)(3), and 3(a)(11) of the Open Records Act and Rule 166b(3) of the Texas Rules of Civil Procedure.

We note at the outset that section 3(a) of the Open Records Act provides in part:

All information collected, assembled, or maintained by or for governmental bodies . . . is public information and available to the public during normal business hours of any governmental body, *with the following exceptions only*. . . (Emphasis added.)

Although section 3(a)(1) of the act protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision," discovery privileges are not encompassed by section 3(a)(1). See Open Records Decision No. 575 (1990).

Accordingly, unless the investigative report comes under the protection of one of the exceptions specifically listed in section 3(a), the report must be released.

The test for section 3(a)(2) protection is the same as that for information protected by common-law privacy under section 3(a)(1): to be protected from required disclosure the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.).

A prior determination of this office, Attorney General Opinion JM-36 (1983) (copy enclosed), resolves this aspect of your request. Although section 3(a)(2) is designed to protect public employees' personal privacy, the scope of section 3(a)(2) protection is very narrow. *See* Open Records Decision No. 336 (1982). The information at issue pertains solely to the principal's actions as a public servant, and as such cannot be deemed to be outside the realm of public interest. Section 3(a)(2) was not intended to protect the type of information at issue here. We also note that because the investigative report contains no names of the individuals interviewed the report does not implicate the privacy interests of any identifiable third party. Accordingly, neither section 3(a)(1) nor 3(a)(2) protects any portion of the investigative report.

To secure the protection of section 3(a)(3), a governmental body must first demonstrate that a judicial or quasi-judicial proceeding is pending or reasonably anticipated. Open Records Decision Nos. 452 (1986); 360 (1983). The mere chance of litigation will not trigger the 3(a)(3) exception. Open Records Decision Nos. 331, 328 (1982). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Further, the governmental body's attorney must show that the requested material relates to the litigation. Open Records Decision No. 551 (1990).

You state that the district anticipates becoming a party to civil litigation pertaining to the investigation because the principal has hired an attorney and she has "demonstrated [a] willingness . . . to exhaust each legal remedy which she has been afforded." These assertions alone do not, however, constitute concrete evidence that the principal intends to file a lawsuit against the district. You have not demonstrated that the district's belief that it will become a party to litigation

over this matter is based on more than conjecture. Accordingly, the district may not withhold this information pursuant to section 3(a)(3). See Open Records Decision No. 328 (1982).

Although you raise the attorney-client privilege in the context of section 3(a)(1), this privilege is more properly deemed to be an aspect of section 3(a)(7) of the act, which protects, *inter alia*, "matters in which the duty of . . . an attorney of a political subdivision, to his client, pursuant to the Rules and Canons of Ethics of the State Bar of Texas are prohibited from disclosure." See Open Records Decision No. 574 (1990). In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and confidential attorney-client communications. *Id.*

The investigation report in question is similar to the one discussed in Open Records Decision No. 462 (1987), where this office determined that where a law firm conducted a factual investigation, the attorney-client privilege protected only legal advice and opinions, and not the information it discovered during the course of the investigation.

We conclude that the law firm clearly functioned in two different capacities when it performed its [investigation]. We further conclude that the firm's status as legal adviser was relevant in only one of these capacities, and that the attorney-client privilege applies only in this context. In giving legal advice and opinions based on its investigation, the firm undoubtedly played the role of legal adviser, and the privilege would embrace this advice and these opinions. On the other hand, in conducting the actual investigation, the firm was acting strictly as an investigator. To conclude that the privilege applies to any information collected by an attorney, regardless of whether he was actually acting as an attorney when he collected it, would be inconsistent with the concept of the privilege . . . .

*Id.* at 11 (emphasis in original). In accordance with Open Records Decision No. 462, the district may withhold pursuant to the attorney-client privilege paragraphs numbered 1 through 6 in the section entitled "Opinions, Conclusions and

Recommendations." The district must, however, release all remaining portions of the investigative report.<sup>1</sup>

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR92-331.

Yours very truly,



Kay H. Guajardo  
Assistant Attorney General  
Opinion Committee

KHG/RWP/lmm

Ref.: ID# 15920

Enclosures: Marked documents

cc: Mr. Robert F. Lawson  
P. O. Box 187  
Melissa, Texas 75454  
(w/o enclosures)

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<sup>1</sup>Because the protection of section 3(a)(11) is co-extensive with that of section 3(a)(7), we need not further address the applicability of that section. See Open Records Decision No. 574 (1990).