



Office of the Attorney General

State of Texas

September 11, 1992

DAN MORALES  
ATTORNEY GENERAL

Mr. John S. Aldridge  
Walsh, Judge, Anderson, Underwood & Schulze, P.C.  
P.O. Box 2156  
Austin, Texas 78768

OR92-541

Dear Mr. Aldridge:

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# 17195.

The Karnack Independent School District (the "district") received an open records request for a copy of the allegations against the district's superintendent and a copy of "the independent audit report which was presented to the Karnack ISD Board of Trustees" concerning the allegations. You have submitted to this office as responsive to the request a document you characterize as a "due process letter" that the district sent to the superintendent advising him of his proposed dismissal and a copy of the results of an independent investigation (the "audit") made by a certified public accountant that the district hired as an independent contractor to report to the district's board of trustees. You contend that the requested information comes under the protection of sections 3(a)(1), 3(a)(2), 3(a)(3), and 3(a)(11) of the Open Records Act.

Section 3(a)(2) is designed to protect public employees' personal privacy. The scope of section 3(a)(2) protection, however, is very narrow. *See* Open Records Decision Nos. 336 (1982) (enclosed); 257 (1980) (enclosed). 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, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.). In our opinion, the information at issue pertains solely to the superintendent'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.<sup>1</sup>

To secure the protection of section 3(a)(3), a governmental body must demonstrate that the requested information "relates" to pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990). As noted in Open Records Decision No. 551, the purpose of the litigation exception is to require the parties to the litigation to obtain relevant information from the opposing party by utilizing the discovery process. In this instance, both parties participating in the process have already obtained all of the documents at issue. Absent special circumstances, once information has been obtained by all parties to the litigation, no section 3(a)(3) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). Accordingly, section 3(a)(3) is inapplicable to these records.

Section 3(a)(11) of the act excepts inter-agency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the deliberative process. Open Records Decision No. 538 (1990). The purpose of this section is "to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.).

You contend that the "due process letter" comes under the protection of section 3(a)(11) because the allegations against the superintendent have not yet been "proven" and only constitute the opinion of the school board. We disagree. For information to be protected by section 3(a)(11), it must be demonstrated that the release of the information would inhibit the free flow of discussion -- the essential "give-and-take" -- of the decision-making process. See Open Records Decision No. 439 (1986) and authorities cited therein (copy enclosed). It is clear that the "due process letter" was not submitted to the superintendent in order to facilitate the deliberative process, but rather to serve notice that the school board has decided to institute the termination process. The letter does not contain the

---

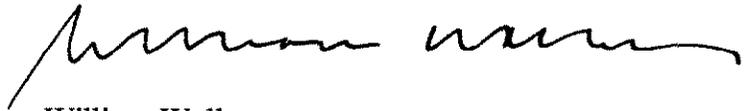
<sup>1</sup>We also note that the requested letters may not be withheld under the Open Records Act merely because the information might place employees in a "false light." As noted in Open Records Decision No. 579 (1990) (copy enclosed), the gravamen of a false light privacy complaint is not that the information revealed is confidential, but that it is false. Therefore, exceptions to the Open Records Act, focused on the confidentiality of information, do not embrace this particular tort doctrine.

type of discussion that section 3(a)(11) was intended to protect. The letter does not come under the protection of any of the exceptions you claim; accordingly, the district must release this document in its entirety.

On the other hand, we concluded that portions of the audit constitute "advice, opinion, or recommendation intended for use in the deliberative process" and thus come under the protection of section 3(a)(11). For your convenience we have marked those portions that the district may withhold. The remaining portions of the audit must, however, be released.

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 OR92-541.

Yours very truly,



William Walker  
Assistant Attorney General  
Opinion Committee

WW/RWP/lmm

Ref.: ID# 17195

Enclosures: Open Records Decision Nos. 579, 439, 336, 257  
Marked documents

cc: Mr. Floyd J. Travis, Ed.D.  
Education Specialist  
Governance Operations  
Texas Education Agency  
1701 North Congress Avenue  
Austin, Texas 78701-1494  
(w/o enclosures)