



Office of the Attorney General  
State of Texas

October 26, 1992

DAN MORALES  
ATTORNEY GENERAL

Mr. Randel B. Gibbs  
Attorney for Garland Independent School District  
Law Offices of Earl Luna, P.C.  
4411 Central Building  
4411 N. Central Expressway  
Dallas, Texas 75205

OR92-624

Dear Mr. Gibbs:

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# 16170.

The Garland Independent School District (the "school district"), which you represent, has received from a parent a request for certain information relating to the school district's decision to uphold disciplinary action taken against his daughter. Of the information requested, we understand the school district seeks to withhold only the personal notes of teachers regarding disciplinary matters concerning the daughter and the teacher performance evaluations of two particular teachers for the 1991-92 year.

This letter ruling will address only the availability of the teacher performance evaluations under the Texas Open Records Act. With regard to the teachers' personal notes, we have requested assistance from the federal agency charged with implementing the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, and we have assigned ID# 17572 to the part of your request related to the notes.

You have submitted to us for review representative samples of the requested teacher evaluations. You claim that sections 3(a)(3) and section 3(a)(11) except those evaluations from required public disclosure.

We turn first to the section 3(a)(3) exception. Section 3(a)(3) excepts

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

Section 3(a)(3) applies only when litigation in a specific matter is pending or reasonably anticipated and only to information clearly relevant to that litigation. Open Records Decision No. 551 (1990). "Whether litigation is reasonably anticipated must be determined on a case-by-case basis." Open Records Decision No. 452 (1986) at 4. The mere fact that a request for information is made by an attorney is not sufficient to invoke section 3(a)(3). Open Records Decision No. 361 (1983).

You advise us that the requestor, who is an attorney, requested the information in order to appeal a decision of the school district to the district's board of trustees. You further advise us that the requestor "has stated his intent to make this dispute his hobby and to engage in a 'scorched earth' policy." However, this statement standing alone does not establish that future litigation against the school district is reasonably anticipated. *See generally* Open Records Decision No. 331 (1982) (even express threat to sue by itself does not establish that section 3(a)(3) applies). Accordingly, the documents at issue here may not be withheld from required public disclosure under section 3(a)(3).

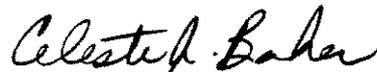
We next turn to the section 3(a)(11) exception and its application to the requested teacher evaluations. Section 3(a)(11) protects from required public disclosure advice, opinion and recommendation used in the decisional process within an agency or between agencies. This protection is intended to encourage open and frank discussion in the deliberative process. *See, e.g., Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.); Attorney General Opinion H-436 (1974); Open Records Decision Nos. 538 (1990) at 2; 470 (1987) at 6. In particular, advice, opinion, and recommendations recorded in a performance evaluation of an employee are protected from public disclosure if they are used in the deliberative process. Open Records Decision No. 468 (1987) at 1; *see also* Open Records Decision Nos. 464 (1987); 345 (1982). Purely factual information, however, does not constitute advice, opinion, or recommendation and

may not be withheld under section 3(a)(11). Open Records Decision No. 450 (1986).

The "Observation/Evaluation Records" submitted to us for review include some factual information; however, this information is inextricably intertwined with advice, opinion, or recommendation used in the deliberative process. We conclude, therefore, that these forms may be withheld from required public disclosure in their entirety under section 3(a)(11).

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 OR92-624.

Yours very truly,



Celeste A. Baker  
Assistant Attorney General  
Opinion Committee

CAB/GCK/lmm

Ref.: ID# 16170

cc: Mr. Glenn D. Seeley  
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(w/o enclosures)