



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 5, 1993

Mr. Donald J. Walheim
Schulman, Walheim, Beck & Heidelberg, Inc.
745 E. Mulberry, Suite 700
San Antonio, Texas 78212

OR93-061

Dear Mr. Walheim:

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# 18737.

The San Antonio Independent School District (the district) received an open records request for a copy of a survey that the requestor characterizes as "a sex survey of students' sexual practices." The requestor specifically sought a copy of either a blank, uncompleted survey or a completed survey with the name of the student and his or her responses deleted. You have submitted to this office for review a copy of a blank survey. You seek to withhold this record pursuant to sections 3(a)(1), 3(a)(2), 3(a)(3), and 3(a)(11) of the Open Records Act.

Your entire argument that sections 3(a)(1) and 3(a)(11) apply here is that the survey relates to "an ongoing investigation which has yet to be completed, and which would be adversely affected if the document was prematurely released." Section 3(a)(1) of the act protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." Section 3(a)(11) protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency." You have not explained, nor is it apparent to this office, how either of these exceptions apply to the information at issue. The Open Records Act places on the governmental body the burden of establishing why and how an exception applies to requested information; in the absence of such a showing, this office has no basis on which to pronounce the information protected. *See, e.g.,* Open Records Decision Nos. 363 (1983); 150 (1977). Because you have not met your burden with regard to these exceptions, we determine that sections 3(a)(1) and 3(a)(11) do not apply.

Section 3(a)(2) protects, *inter alia*, "information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 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 No. 336 (1982). *See also* Attorney General Opinion JM-36 (1983). The test for section 3(a)(2) protection

is that 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.). The information at issue pertains solely to the teacher'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.

Finally, you contend the survey may be withheld pursuant to section 3(a)(3), the litigation exception. You first argue that section 3(a)(3) applies because:

The administration of the School District has been informed by the teacher's representative that premature release of the document will result in litigation. In addition, since this is an investigation which ultimately may result in adverse action against a contract employee of the District, experience would demonstrate in this area that litigation will invariably result.

Section 3(a)(3) protects "information relating to litigation of a . . . civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party." To secure the protection of section 3(a)(3), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation. Open Records Decision Nos. 588 (1991); 452 (1986). 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. Open Records Decision Nos. 437 (1986); 331, 328 (1982). This office has previously held that an isolated threat of a lawsuit alone does not constitute grounds for withholding information pursuant to section 3(a)(3). *See* Open Records Decision No. 351 (1982) at 2.

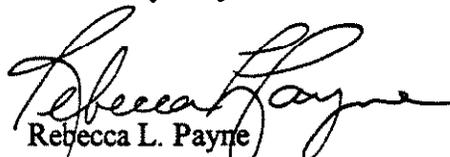
In this instance, however, this office need not determine whether you have made the requisite showing that litigation pertaining to the survey is reasonably anticipated. The teacher who conducted the survey has obviously had prior access to the requested document currently held by the district. The purpose of the section 3(a)(3) litigation exception is to prevent parties from avoiding discovery procedures by using the Open Records Act as a method of obtaining needed information; absent special circumstances, once information has been obtained by all parties to the potential litigation, no section 3(a)(3) interest exists with respect to that information. *Cf.* Open Records Decision Nos. 454 (1986); 349, 320 (1982).

You also contend that section 3(a)(3) protects the survey because "in the course of the investigation, administration is negotiating with the teacher and her representatives a possible settlement surrounding the controversy, and premature release of the document will adversely affect such negotiations." However, you have not presented this office with an open records decision or any other legal authority, nor are we aware of any such

authority, which supports your contention that section 3(a)(3) protection would apply to this type of document in the settlement context. Accordingly, section 3(a)(3) does not protect the survey from required public disclosure. Because none of the exceptions you raise apply in this instance, the survey is public information.

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 OR93-061.

Yours very truly,


Rebecca L. Payne
Assistant Attorney General
Opinion Committee

RLP/RWP/lmm

Ref.: ID# 18737

Enclosure: Submitted document

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