



Office of the Attorney General
State of Texas

July 14, 1993

DAN MORALES
ATTORNEY GENERAL

A. Frank Cook, Ed.D.
Assistant Superintendent
Fort Stockton Independent School District
101 West Division
Fort Stockton, Texas 79735

OR93-455

Dear Mr. Cook:

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# 19794.

The Fort Stockton Independent School District (the "school district") has received a request for teacher evaluations. Specifically, the requestor seeks:

1. A copy of any and all notes/script taken by [a certain evaluator] during her observation of all teachers she observes this year ('92 - '93).
2. A copy of any and all appraisals for any and all teachers observed by [a certain evaluator] this year.
3. A copy of the schedule of all appraisers for all Fort Stockton teachers, noting the names of the appraisers and the teachers each evaluated.

You contend the requested information is excepted from required public disclosure under sections 3(a)(1), 3(a)(2), and 3(a)(11) of the Open Records Act.¹

¹We note that information is not within the purview of the Open Records Act if, when a governmental body receives a request for it, the document does not exist. Open Records Decision No. 452 (1986). Nor is a governmental body required to view a request as a standing request for information "on a periodic basis." Open Records Decision No. 465 (1987). Accordingly, the school district may construe the language in items 1 and 2 requesting a copy of notes and appraisals for "this year" as encompassing only those notes and appraisals in existence at the time of the request.

You state that the "information requested may be confidential as a matter of law under an employee's privacy rights secured by the state and federal constitutions." Section 3(a)(1) excepts "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." In order for information to be brought within the common-law right of privacy under section 3(a)(1), the information must meet the criteria set out in *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977), which held as follows:

information . . . is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4.

Teacher evaluations are based on an individual's performance of his or her job duties. A public employee's job performance does not generally constitute his *private* affair. Open Records Decision No. 470 (1987). There is nothing in the evaluations that is "highly intimate or embarrassing," and there is legitimate public interest in the performance of public school employees. *See generally* Open Records Decision No. 464 (1987) (public has an interest in evaluations of administrators at public universities). Accordingly, you may not withhold the requested information under the common-law privacy as incorporated by section 3(a)(1).

Section 3(a)(1) incorporates constitutional privacy as well. Constitutional privacy consists of two interrelated types of privacy: 1) the right to make certain kinds of decisions independently and 2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 (1987) at 4. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

The performance of a public school teacher does not fall within one of the "zones of privacy." As we stated above, a public employee's job performance does not generally

constitute his *private* affair. Open Records Decision No. 470 (1987). Furthermore, the evaluations do not contain any information concerning the "most intimate aspects of human affairs." Accordingly, you may not withhold the information under constitutional privacy as incorporated into section 3(a)(1).

Section 3(a)(2) excepts

information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, and transcripts of professional public school employees; provided, however, that nothing in this section shall be construed to exempt from disclosure the degree obtained and the curriculum on such transcripts of professional public school employees, and further provided that all information in personnel files of an individual employee within a governmental body is to be made available to that individual employee or his designated representative as is public information under this Act.

Section 3(a)(2) protects personnel file information only if its release would cause an invasion of privacy under the test articulated for common-law privacy under section 3(a)(1). *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.) (test to be applied under section 3(a)(2) is the same as that delineated in *Industrial Foundation of the South* for section 3(a)(1)). Because we have already determined you may not withhold the information under section 3(a)(1), you may not withhold the information under section 3(a)(2). See generally Open Records Decision No. 473 (1987) (even highly subjective evaluations of public employees may not ordinarily be withheld under section 3(a)(2)).

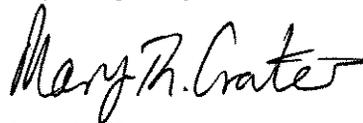
Section 3(a)(11) excepts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency." In a recent opinion that reexamined the section 3(a)(11) exception, this office concluded that section 3(a)(11) excepts from public disclosure

only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body at issue. [It] does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda.

Open Records Decision No. 615 (1993) at 5 (copy enclosed). Furthermore, in order for information to come within the section 3(a)(11) exception, the information must be related to the policymaking functions of the governmental body. *Id.* "An agency's policymaking functions do not encompass routine internal administrative and personnel matters" *Id.* A teacher evaluation constitutes a routine internal personnel matter and, therefore, may not be excepted from public disclosure 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 contact this office.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee

MRC/LBC/lmm

Ref.: ID# 19794

Enclosures: submitted documents
Open Records Decision No. 615

cc: Ms. Bobbie Duncan
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Odessa, Texas 79761
(w/o enclosures)