



Office of the Attorney General
State of Texas

August 6, 1993

DAN MORALES
ATTORNEY GENERAL

Mr. Arturo G. Michel
Bracewell & Patterson
100 Congress Ave, Suite 1900
Austin, TX 78701-4052

OR93-503

Dear Mr. Michel:

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# 20400.

The Katy Independent School District (the "school district") has received a request for information concerning students and employees of the school district. Specifically the requestor seeks:

1. the service record of Danny Bryan;
2. the service record of Cynthia Knies;
3. the service record of Hugh Hayes;
4. the service record of Lynn Rosenberg;
5. time sheet information regarding absences of Cynthia Knies while an employee at McDonald Junior High School;
6. any and all correspondence between any persons relating to our request that [our child] be given . . . due credit for serving [on the yearbook staff] - including a memo from Mr. Bennett which Dr. Hayes refused to release when we requested it on March 30, 1993;
7. any and all records and/or scoring sheets pertaining to the cheerleading tryouts which were held at McDonald Junior High on May 8, 1992;

8. any requests for information concerning our correspondence with the [school district] including but not limited to correspondence between the [school district] and Cynthia and/or Fred Knies;
9. correspondence with any other parent requesting a transfer for their child from McDonald Junior High School for any reason;
10. correspondence between the [school district] administration and any attorney or government official regarding the transfers of our children from McDonald to Katy Junior High School;
11. all correspondence between any and all persons regarding any complaints made against Danny Bryan, Cynthia Knies, Lynn Rosenberg and Hugh Hayes during their employment with the [school district], past or present;
12. all correspondence, reports, or other records from Mr. and Mrs. Knies pertaining to [the requestor] or that make specific reference to [the requestor] or [their] family;
13. records relating to any "outside of education" records which would be available under the Open Records Act pertaining to the Knies family or their complaints relative to any employee of the school district or complaints made against them by any other person or school district employee.

You state the school district will release the information requested in items 1 through 4, 6, 8 and the requested information we have designated as item 12. You contend that the school district does not have any information responsive to item 7.¹ You also state that the school district is seeking further clarification from the requestors concerning item 11 and the requested information we have designated as item 13. Accordingly the scope of this ruling will be limited to the requested information in items 5, 9 and 10. You claim this information is excepted from public disclosure under sections 3(a)(1), 3(a)(14) and 14(e) of the Open Records Act.

You contend that item 5, time sheet information regarding the absences of a school district employee while working at McDonald Junior High School, is excepted from disclosure under section 3(a)(1) because the time sheets are coded to show the reason for the absence from work. Section 3(a)(1) excepts "information deemed

¹The Open Records Act applies only to information in existence and does not require a governmental body to prepare new information. Open Records Decision No. 572 (1990).

confidential by law, either Constitutional, statutory, or by judicial decision." In order for information to be protected from public disclosure under the common-law right of privacy as incorporated by 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). The court stated that

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.

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

We have reviewed the time sheets. The codes list general reasons for an employee's absence from work, *e.g.*, vacation, personal illness, family illness, and school business. There is nothing detailed about the nature of the leave nor is there anything intimate or embarrassing about the fact that leave was taken. Attorney General Opinion JM-229 (1984) (the mere fact that an injury or illness has occurred is not protected when it does not reveal *specific* information); Open Records Decision No. 336 (1982) (the fact of injury or illness and the names and dates of employees taking sick leave is public information). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ *ref'd n.r.e.*), the court distinguished the information at issue there, names of candidates for the office of president of a university, from the information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation of the South*, *i.e.*, information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 652 S.W.2d at 551 (discussing *Industrial Foundation of the South*, 540 S.W.2d at 683). As in the *Hubert* case, the information at issue here is clearly distinguishable from the "intimate and embarrassing" information at issue in *Industrial Foundation of the South*. Furthermore, there is a legitimate public interest in the job performance of a public school employee. Open Records Decision No. 470 (1987) (public employee's job performance does not generally constitute his *private* affairs). Accordingly, you may not withhold from public disclosure the time sheets requested in item 5 under section 3(a)(1) of the Open Records Act.

However, three of the documents requested in item 9, correspondence between the school district and parents over student transfers, are excepted from public disclosure as a matter of law. Two of the letters requesting transfers are written by the students' medical

doctors and are confidential under the Medical Practice Act. V.T.C.S. art. 4495b, § 5.08(b) Section 5.08(b) provides

Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

Accordingly, the two transfer letters written by the students' physicians must be withheld from public disclosure under section 3(a)(1) in conjunction with the Medical Practice Act.²

The third letter is written by a certified social worker, licensed professional counselor. Psychological evaluations that are performed by a professional other than a medical doctor, *e.g.*, a psychologist, are governed by the Health and Safety Code, chapter 611. Section 611.002(a) of the Health and Safety Code provides that

[c]ommunications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Accordingly, the letter written by the certified social worker concerning one of her patients must be withheld from public disclosure.

You claim the remaining letters in item 9 and the documents in item 10, correspondence between the school district and any attorney or government official regarding the transfer of the requestors' children, are excepted from disclosure under sections 3(a)(14) and 14(e). Section 3(a)(14) excepts "student records at educational institutions funded wholly, or in part, by state revenue." Section 14(e) incorporates another source of law, specifically, the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), into the Open Records Act, providing:

Nothing in this Act shall be construed to require the release of information contained in education records of any educational agency or institution except in conformity with the provisions of the Family Educational Rights and Privacy Act of 1974, as enacted by

²We note that access to information made confidential by section 5.08(b) of the Medical Practice Act is governed by section 5.08(b). A determination as to the application of this provision to the facts at issue here is beyond the scope of this ruling.

Section 513 of Public Law 93-380, codified as Title 20 U.S.C.A.
Section 1232g, as amended.

V.T.C.S. art. 6252-17a, § 14(e); *see also* Open Records Decision No. 431 (1985).
FERPA provides the following:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of educational records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) . . .) of students without the written consent of their parents to any individual, agency, or organization. //

20 U.S.C. § 1232g(b)(1). "Education records" are records which:

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

Id. § 1232g(a)(4)(A). Sections 3(a)(14) and 14(e) may not be used to withhold entire documents; the school district must delete information only to the extent "reasonable and necessary to avoid personally identifying a particular student" or "one or both parents of such a student." Open Records Decision No. 332 (1982) at 3. Thus, only information identifying or tending to identify students or their parents must be withheld from required public disclosure.

The remaining documents submitted as responsive to item 9 contain personally identifiable information about students or their parents and are, therefore, subject to FERPA.³ For your convenience we have marked the portions of the transfer letters that may be withheld under FERPA. The remaining information must be released to the requestors.⁴

³We note that there were no documents submitted for our review that would be responsive to item 10. However, as the requestors have made a written request for information about their children, you may not withhold the information under FERPA. As you have raised no other sections and we do not have documents to review for common-law privacy, you must release the information requested in item 10.

⁴The purpose and effect of deleting all personally identifiable information from these records is to insure that the privacy interests of the individuals involved are not compromised. Accordingly, this office need not address whether the remaining information is protected by common-law privacy. *See generally Industrial Foundation of the South*, 540 S.W.2d at 683-85.

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,



Loretta R. DeHay
Assistant Attorney General
Opinion Committee

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LRD/LBC/lmm

Ref.: ID# 20400

Enclosures: Marked documents

cc: Mr. and Mrs. Dan Knight
22519 Unicorn's Horn
Katy, Texas 77449

(w/o enclosures)