



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 27, 1993

Mr. Mike Atkins
Attorney
McMahon, Tidwell, Hansen, Atkins & Fowler, P.C.
4001 East 42nd, Suite 200
Odessa, Texas 79762

OR93-574

Dear Mr. Atkins:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (former V.T.C.S. article 6252-17a).¹ Your request was assigned ID# 18584.

The Ector County Independent School District (the "district") received an open records request for all of the district's records pertaining to each district employee or past employee against whom any written complaint or grievance was lodged at the Level II or Level III level² between January 1, 1990 and the date of the request. Specifically, the requestor seeks the following documents:

The full name and title of the employee; a detailed description of all complaints or grievances made against the person while employed by [the district]; actions taken as a result of each complaint; the dates of the complaints; the nature and date of all disciplinary actions taken against the employee (oral or written reprimand, suspension, termination, etc.); a detailed description of the acts or

¹The 73rd Legislature has repealed article 6252-17a, V.T.C.S. Acts 1993, 73d Leg. ch. 268, § 46, at 988. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

²You explain that a Level II hearing is a meeting between the employee and the district's superintendent or his designee. A Level III hearing is an appeal from the Level II hearing and involves the employee placing the matter on the agenda of a school board meeting.

infractions that resulted in the disciplinary measures; and the current disposition of each matter.

Except for the information already contained in the district's files, you state that the district does not possess "a detailed description of all complaints or grievances made against the person while employed" by the district.³ You contend that the requested documents to the extent they are held by the district come under the protection of sections 552.101 (former section 3(a)(1)), 552.102(a) (former section 3(a)(2)), 552.111 (former section 3(a)(11)), and 552.114 (former section 3(a)(14)) of the Open Records Act.

Section 552.111 excepts from required public disclosure "an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993) (copy enclosed), this office reexamined this exception and held that it excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policy-making processes of the governmental body at issue. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *Id.* at 5-6. As the information submitted to us for review relates to internal administrative and personnel matters, we conclude that section 552.111 does not except it from required public disclosure.

You next contend that the requested files must be withheld from the public pursuant to section 552.101⁴ in conjunction with Government Code sections 551.074 and 551.104(c) (former sections 2(g) and 2A(c)) of the Open Meetings Act, chapter 551 of the Government Code (former V.T.C.S. art. 6252-17). Section 551.074 of the Open Meetings Act allows the school board to consider an employee's grievance during an executive session unless the employee specifies otherwise, while section 551.104(c) makes the agendas of executive sessions confidential. Although certified agendas and tape recordings of executive sessions must be kept confidential pursuant to section 551.104(c) of the Open Meetings Act, that section applies *only* to the certified agendas and tape recordings; it does not extend to information that is prepared independently of the executive session and that is taken into the executive session for consideration. *See* Open Records Decision No. 485 (1987). Whether such information must be disclosed depends solely on whether it falls within one of the Open Records Act's specific exceptions to disclosure. *Id.* Consequently the grievance files are not deemed confidential by the Open Meetings Act merely because they may have been reviewed by school board members during an executive session.

³The Open Records Act does not require a governmental body to disclose information that does not exist. *See* Open Records Decision No. 342 (1982). The district therefore need not comply with this aspect of the request.

⁴Section 552.101 of the act protects "information considered to be confidential by law, either Constitutional, statutory, or by judicial decision."

Section 552.101 of the Open Records Act also protects information coming within the common-law right to privacy. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). To be protected from required disclosure, 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 primarily to the employees' and former employees' actions as public servants, and as such cannot be deemed to be outside the realm of public interest. *See, e.g.*, Open Records Decision No. 444 (1986). We have, however, marked a few small portions of the documents that the district must withhold that implicate the employees' or others' privacy interests. *See, e.g.*, Open Records Decision No. 455 (1987) at 5 (privacy doctrine applies to kinds of prescription drugs a person takes).⁵

Finally, we address the applicability of section 552.114. Section 552.114 requires the district to withhold "student records at educational institutions funded wholly, or in part, by state revenue" Section 552.026 (former section 14(e)) of the Open Records Act provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

The Family Educational Rights and Privacy Act of 1974, which is informally known as "the Buckley Amendment," provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases education records (or personally identifiable information contained therein other than directory information) of students without the written consent of the parents to anyone but certain enumerated federal, state, and local officials and institutions. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that "contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution." *Id.* § 1232g(a)(4)(A).

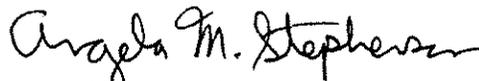
For purposes of the Buckley amendment, the records at issue here constitute "education records" to the extent that they contain information about identifiable students. However, information must be withheld from required public disclosure pursuant to

⁵You also seek to withhold this information under section 552.102(a) (former section 3(a)(2)) of the Open Records Act. Section 552.102(a) protects personnel file information only if its release would cause an invasion of privacy under the test articulated for section 552.101. *Hubert*, 652 S.W.2d at 550; *see also* Open Records Decision No. 441 (1986). Accordingly, our discussion of section 552.101 here resolves the applicability of section 552.102(a) as well.

section 552.114 only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982); 206 (1978); *see also Kneeland v. National Collegiate Athletic Association*, 650 F. Supp. 1076, 1090 (W.D. Tex. 1986) (educational records are public where personally identifiable information is deleted), *rev'd on other grounds* 850 F.2d 224 (5th Cir. 1988). We have marked those portions of the records that identify or tend to identify particular students. *See* 34 C.F.R. § 99.3; *see also* Open Records Decision No. 224 (1979) (handwritten documents make identity of writer "easily traceable").⁶ The district must release all remaining information, except as discussed above.⁷

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 our office.

Yours very truly,



Angela M. Stepherson
Assistant Attorney General
Open Government Section

AMS/RWP/rho

Ref.: ID# 18584

Enclosures: Open Records Decision No. 615
Marked documents

cc: Mr. M. Olaf Frandsen
Editor, Odessa American
P.O. Box 2952
Odessa, Texas 79760-2952
(w/o enclosures)

⁶As to one category of documents, the counselor's "Daily Logue" sheets contained in Exhibit B-3, we were unable to determine which entries contained information that would identify or tend to identify students. We have marked some of these documents as examples. However, you must review all of the "Daily Logue" sheets and redact any information that identifies students. The remainder of the information contained in these documents must be released.

⁷We note that although this office previously ruled in Open Records Letter OR92-382 (1992) that some of the records in one of the requested personnel files were protected in their entirety under former section 3(a)(14), upon further consideration this office has determined that those records should be released in "de-identified" form. OR92-382 is hereby overruled to the extent of conflict.

Ms. Gaylin Sutphen
306 E. 42nd Street
Odessa, Texas 79762
(w/o enclosures)

Mr. Bob Garcia, Jr.
115 W. 15th Street
Odessa, Texas 79761
(w/o enclosures)

Mr. Dohn S. Larson
Attorney at Law
Texas Classroom Teachers Association
P.O. Box 1489
Austin, Texas 78767
(w/o enclosures)