



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 31, 1994

Mr. Jack O. Nelson, Jr.
Nelson & Nelson
1220 NationsBank Building
916 Main Street
Lubbock, Texas 79401

OR94-235

Dear Mr. Nelson:

On behalf of the Levelland Independent School District, you ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (formerly article 6252-17a, V.T.C.S.).¹ Your request was assigned ID# 22383.

The Levelland Independent School District (the "district") received an open records request for certain records relating to the investigation of the death of a student by electrocution while he was in shop class. In particular, the requestor seeks the following information:

- 1) All statements from persons who have relevant knowledge or who claim to have been witnesses to the incident in question;
- 2) All invoices for the purchase of or repairs to one certain high pressure cleaner, identified as Delco Cleaning Systems, serial number 85-32486;
- 3) Results of all testing by Dr. Tom R. Burkes and/or Dr. John Craig performed for or on behalf of Levelland I.S.D.; [and]

¹The Seventy-third Legislature repealed article 6252-17a, V.T.C.S. Acts 1993, 73d Leg., ch. 268, § 46. 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.

- 4) Copies of all liability policies issued to the Levelland I.S.D. which would have been in force on or about September 11, 1992.

You argue that rule 166b of the Texas Rules of Civil Procedure permits you to withhold the information requested in items 1 and 3. You also argue that section 101.104(b) of the Texas Tort Claims Act permits you to withhold the insurance policies requested in item 4. Finally, you argue that the information requested in items 1, 2, and 3 is excepted from disclosure under section 552.103(a) of the Government Code (formerly article 6252-17a, section 3(a)(3), V.T.C.S.), that the information requested in items 1 and 3 is excepted from disclosure under section 552.111 of the Government Code (formerly article 6252-17a, section 3(a)(11), V.T.C.S), and that the information requested in item 1 is excepted from disclosure under section 552.117(1)(A) of the Government Code (formerly article 6252-17a, section 3(a)(17)(A), V.T.C.S.).

We conclude that you may not withhold any of the information you submitted for review under rule 166b of the Texas Rules of Civil Procedure or section 101.104(b) of the Texas Tort Claims Act. Similarly, neither section 552.103(a) nor section 552.111 of the Government Code except from required public disclosure any of the information you submitted for review. On the other hand, we also conclude that some of the information requested in item 1 may be excepted from disclosure under section 552.117(1)(A) and that additional information requested in item 1 is excepted from disclosure under the Federal Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g.

Neither rule 166b of the Texas Rules of Civil Procedure nor section 101.104(b) of the Texas Tort Claims Act are exceptions to disclosure under the Open Records Act; rather, they are discovery privileges. The Open Records Act does not except from disclosure information that may be privileged from discovery unless it is covered by one of the specific exceptions to disclosure other than section 552.101. Open Records Decision No. 575 (1990) at 2. Information that may be privileged from discovery is not information considered confidential by law under section 552.101. *Id.* However, some discovery privileges are incorporated into other sections of subchapter C. For example, information covered by the attorney-client privilege is excepted from disclosure under section 552.107. Similarly, an attorney's work product and other information relating to pending or anticipated litigation is excepted from disclosure under section 552.103(a). *Id.* Therefore, we must look to the exceptions you raised under the Open Records Act to determine whether any of the information you submitted for review is excepted from required public disclosure.

Section 552.103(a) excepts from required public disclosure information "relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party." To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision

No. 551 (1990). The mere chance of litigation is not sufficient to trigger section 552.103(a). A governmental body must provide concrete evidence that litigation may ensue. Attorney General Opinion JM-266 (1984) at 4; Open Records Decision No. 328 (1982) at 1. In this case, you indicate that the student's family has not filed suit against the district. Furthermore, the evidence we have received indicates that the student's family plans to sue the manufacturer of the equipment that caused the student's death and not the district or the teacher in whose class the accident happened. Therefore, you have not shown with sufficient concreteness that you reasonably anticipate litigation to which the district will be a party, and you may not withhold any of the documents you submitted from review under section 552.103(a).²

Section 552.111 excepts from disclosure "only those internal agency communications consisting of advice, recommendations, opinions and other material reflecting the deliberative or policymaking processes of the governmental body at issue." Open Records Decision No. 615 (1993) at 5. This exception is intended to protect advice and opinions given on policy matters and to encourage frank and open discussions within an agency in connection with the agency's decision-making processes. *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 412 (Tex. App.--Austin 1992, no writ) (citing *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.)). This section does not protect facts or written observations of facts. Open Records Decision No. 615 at 5. Most of the information you submitted for review as responsive to items 1 and 3 is factual. Furthermore, we do not believe that the recommendations and opinions that are contained in these documents reflect the deliberative or policymaking processes of the district. Rather, these recommendations and opinions concern a past event; they concern the events surrounding the accident, the cause of the accident, and the condition of the equipment that caused the accident. You have not provided us with any indication that this information will be used by the district in any deliberative or policymaking process. Therefore, you may not withhold any portions of the information requested in items 1 and 3 under section 552.111.

On the other hand, the home address and telephone number of the teacher in whose class the accident happened is excepted from required public disclosure if the teacher requested that this information be withheld as provided by section 552.024. Section 552.117(1)(a) permits a governmental body to withhold the home addresses and telephone numbers of current and former employees "except as otherwise provided by Section 552.024." Section 552.024 permits employees of a governmental body to choose whether to allow access to information reflecting their home addresses and telephone numbers. However, if an employee of a governmental body does not specifically elect to

²Although you raise section 552.103(a) only in regards to the information requested in items 1, 2, and 3, we also address its applicability to the information requested in item 4 because you argue that a discovery privilege applies to that information and because the same reasoning applies to all of the requested information.

make his or her home address and telephone number confidential, then this information is subject to required public disclosure. *See* Gov't Code § 552.024(d). Therefore, you may withhold the teacher's home address and telephone number, which we have marked in his statement, if he requested that this information be kept confidential and if he made this request before the district received the open records request at issue here. *See* Open Records Decision No. 530 (1989) at 5 (concluding that a requestor's right of access to a home address and telephone number must be determined at the time the written request for information is made).

Finally, the information requested in item 1 also implicates the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, which has been incorporated into the Open Records Act by section 552.026.³ Section 552.026 provides:

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

FERPA denies federal funds to an education agency or institution if it has a policy or practice of releasing education records or personally identifiable information other than directory information without the written consent of the student's parents. 20 U.S.C. § 1232g(b)(1). "Education records" are defined in FERPA as records that "(i) contain information directly related to a student; and (ii) are maintained by an education agency or institution or by a person acting for such agency or institution." *Id.* § 1232g(a)(4)(A). In this case, the statements you submitted for review are education records because they are maintained by the district and they contain information directly related to students. However, FERPA generally may not be used to withhold an entire document; it may be used to withhold only information that identifies a student or would make the identity of a student easily traceable. Open Records Decision No. 332 (1982) at 3. Furthermore, the FERPA restrictions on disclosing information relating to a student do not apply after that student's death. Open Records Decision No. 524 (1989) at 2-3. Therefore, you must withhold only information that identifies or makes easily traceable the identity of students other than the student who died. We have marked the information that you must withhold.⁴

³This office is not authorized to consider exceptions not raised by the governmental body except when the information at issue is made confidential so that a governmental body does not have the discretion to release the information. A governmental body does not have the discretion to release information excepted from disclosure under FERPA. Open Records Decision No. 470 (1987) at 2.

⁴For the sake of completeness, we also wish to note that you must release information that identifies or makes easily traceable the identity of a particular student to that student's parents and when consent is obtained from that student's parents. *See* 20 U.S.C. § 1232g(a)(1)(A), (b)(1), (b)(2)(A). Therefore, if the requestor in this case obtained the consent of the parents of the students identified in the

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,



Margaret A. Roll
Assistant Attorney General
Open Government Section

MAR/rho

Ref.: ID# 22383, ID# 22414, ID# 22788, ID# 22801,
ID# 22811, ID# 22817, ID# 22843, ID# 23886

Enclosures: Marked documents

cc: Mr. Billy R. Wolfe
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(w/o enclosures)

(Footnote continued)

statements, then you would be required to release to the requestor all the information that we have indicated must be redacted under FERPA.