



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 27, 1994

Mr. James R. Raup
McGinnis, Lochridge & Kilgore, L.L.P.
1300 Capitol Center
919 Congress Avenue
Austin, Texas 78701

OR94-416

Dear Mr. Raup:

On behalf of the Austin Independent School District (the "district"), you ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552.¹ Your request was assigned ID# 21023.

The district has received an open records request for the following information:

1. All records in any form pertaining to complaints against Frances Bush--Principal of Porter Middle School, Marsha Adams--Assistant Principal of Porter Middle School, Priscilla Bangs--Counselor at Porter Middle School and Ms. Weaver--teacher at Porter Middle School and any action taken in response to those complaints including, but not limited to, complaints about performance, policies, conduct and emotional or psychological fitness whether made by parents, students, teachers, faculty, staff, the general public or others.
2. All records in any form pertaining to our allegations against Frances Bush and others at Porter Middle School . . . and actions taken by A.I.S.D. in response to those allegations including, but not limited to, statements, investigative reports, conclusions and summaries, notes and correspondence.

¹We note that the Seventy-third Legislature repealed V.T.C.S. article 6252-17a. 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.

3. All records in any form pertaining to the [district's] policies for employees regarding the treatment of parents and students, responses to requests made under the Texas Open Records Act, providing school records to parents and the suspension of students' rights to participate in extra-curricular activities.
4. All records in any form pertaining to the psychological and emotional status and fitness of Frances Bush--Principal of Porter Middle School.
5. A receipt for records signed by [the requestor] and tendered to Jan Shoulty's secretary at Porter Middle School, on December 18, 1992
6. All records in any form pertaining to my son's . . . second mid-six-weeks progress report from fall 1992 at Porter Middle School.
7. All records in any form pertaining to problems in the educational environment at Porter Middle School which have been identified within the last six months by Frances Bush's superiors, to proposed or actual restructuring of Porter Middle School currently underway or planned to be implemented and proposed or implemented solutions to those problems identified above.
8. All records in any form pertaining to [requestor's son] which have not been previously produced including, but not limited to, academic, counseling and disciplinary records in the possession or control of anyone [in the district] whether located in the central files of [the district] or the individual files of employees of [the district].

The district does not object to releasing the information in categories 3, 5, 6, and 8. You have submitted for our review, however, documents responsive to the requests in categories 1, 2, 4, and 7. The first set of documents submitted for our review are grouped as categories 1 and 2; a second set of documents submitted at a later date are marked as categories 1, 2, and 3.² You contend that these documents are excepted from disclosure by sections 552.101 (former section 3(a)(1)), 552.102 (former section 3(a)(2)), 552.103

²For purposes of clarification and simplicity, we will refer to the documents as set 1, categories 1 and 2, or set 2, categories 1, 2, and 3.

(former section 3(a)(3)), 552.108 (former section 3(a)(8)), 552.111 (former section 3(a)(11)), and 552.114 (former section 3(a)(14)) of the Government Code. We will address your arguments in turn.³

First, you contend that all of the documents you have submitted for our review are protected from disclosure by section 552.103(a), which excepts from disclosure information

(1) 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 or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

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). Although you assert that there is pending or threatened litigation relating to these documents, you have not provided any evidence to support this allegation. Thus, because you have not explained how section 552.103(a) applies to this request for information, you may not withhold the documents under this provision.

You also contend that any reference in the responsive documents in set 1, category 2 relating to Ms. Bush's "psychological or emotional fitness" is protected from disclosure under sections 552.101 and 552.102. Section 552.101 of the act excepts from disclosure "information considered to be confidential by law, either constitutional,

³We note that you have raised section 552.108 in a supplemental letter to this office dated August 4, 1993. You received a request for the information on June 24, 1993. Consequently, you failed to raise section 552.108 within the ten days required by section 552.301(a) (former section 7(a)) of the act. When a governmental body fails to request a decision regarding a particular exception within ten days of receiving a request for information, the information at issue is presumed public. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this presumption. See *id.* Normally, a governmental body can overcome the presumption of openness by a compelling demonstration that the governmental body should not release the requested information to the public, *i.e.*, that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 (1977) at 2. You have not shown compelling reasons why section 552.108 should apply to this request for information. Therefore, we do not consider your section 552.108 arguments in this ruling. We note, however, that other exceptions you raise in your August 4, 1993, letter were properly raised in your July 2, 1993, letter within the ten day time period required by section 552.301(a).

statutory, or by judicial decision." Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 552.102 excepts information in personnel files only if it meets the test under section 552.101 for common-law invasion of privacy. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Under common-law privacy, information may be withheld 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.

Industrial Found. v. Texas Indus. Accident Bd., 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Previous decisions of this office have held that information regarding emotional or mental distress is protected from disclosure by common-law privacy. See, e.g., Open Records Decision Nos. 470 (1987); 343 (1982). We have reviewed the documents which you have submitted in set 1, category 2, and conclude that most of the references to Ms. Bush's psychological or emotional fitness and mental health are protected from disclosure by the doctrine of common-law privacy. We have marked the information that the district must withhold on the basis of common-law privacy under sections 552.101 and 552.102 of the Government Code.

You next argue that section 552.111 excepts some of the information from required public disclosure. Section 552.111 excepts "[a]n interagency or intraagency 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), this office reexamined the predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ) and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. 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. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. While some of the documents submitted for our review pertain to the policy functions of the district, some of the information contained in these documents is purely factual. Moreover, some of the requested information relates to a personnel matter, *i.e.*, the job performance of a principal in the school district. We have marked those portions of the documents that may be withheld under section 552.111.

You also contend that section 552.114 excepts the documents in set 1, category 1 and all of the categories in set 2 from disclosure. Section 552.114 excepts "information in a student record at an educational institution funded wholly or partly by state revenue."

Section 552.026 incorporates the federal Family Educational Rights and Privacy Act of 1974 ("FERPA") into the Open Records Act, providing:

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.

FERPA provides in part:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student

20 U.S.C. § 1232g(a)(1)(A). Section 1232g(b)(1) of FERPA provides that:

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 . . .) of students without the written consent of their parents to any individual, agency, or organization.

"Education records" are defined in FERPA as records that:

- (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). Therefore, FERPA specifically gives a parent the right to inspect the education records of their child only. The school district must delete information to the extent that it personally identifies another 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 other students or their parents must be withheld from this requestor, unless you receive written authorization from the students, if they are over the age of 18, or their legal guardians to release the information. *See* 20 U.S.C. § 1232g(b)(1). We note that several of the documents contain information which would tend to identify other

students. We have marked the types of information that must be withheld under sections 552.114 and 552.026 unless the school district has written authorization to release such information.⁴ However, the remaining information must be released except for that information protected from disclosure as indicated above.⁵

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
Open Government Section

LRD/JCH/MRC/rho

Ref.: ID# 21023

Enclosures: Open Records Decision No. 615
Marked documents

⁴We note that there are some poor quality copies of illegible handwritten notes created by district employees. To the extent this office could discern identifiable information concerning a student, it was marked for the district to withhold. If the district has better quality copies of these documents that contain additional information that identifies students, then this information must similarly be withheld.

Also, one of the documents is a student's handwritten statement about a teacher. This office has previously held that such information is protected from disclosure under FERPA. Open Records Decision No. 224 (1979) (concluding that FERPA prohibits disclosure of handwritten evaluations by students of university faculty member).

⁵We note that some of the records submitted for our review contain the home address and telephone number of a district employee. The act allows public employees and former employees to elect whether the public has access to their home address and telephone number. See Gov't Code §§ 552.024, .117. The employee must state his or her choice, in writing, within 14 days of beginning employment; or after service ends, within 14 days of terminating employment. *Id.* § 552.024(b). If the employee or former employee chooses to prohibit access to this information, it must be withheld from disclosure under section 552.117. If the employee or former employee does not affirmatively elect to prohibit disclosure, this information will be subject to public disclosure. *Id.* § 552.024(d). We note, however, that if an employee has failed to prohibit disclosure of this information, he may not do so in response to an open records request for the information. See Open Records Decision No. 530 (1989). We are unable to determine from the information submitted for our review whether any district employees elected in writing to withhold their home addresses and telephone numbers from required public disclosure. If they have not done so within the parameters of section 552.024, the information must be released.