



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

August 22, 1994

Mr. Robin Collins  
Ms. Patricia A. Macias  
Rodriguez, Lewis & Collins  
800 Wyoming, Suite A  
El Paso, Texas 79902

OR94-465

Dear Mr. Collins and Ms. Macias:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 25167.

The Ysleta Independent School District ("YISD") has received requests for information regarding disciplinary action taken against a teacher at a YISD alternative school from both the teacher and his representative. YISD states that all of these requests seek the same information, which it has submitted to this office. It has asked us to address these requests together. We refer to them as the "first request." In addition, YISD has received another request for information regarding disciplinary action taken against a special education teacher from the same representative, which we refer to as the "second request." YISD asserts that information responsive to the first request is excepted from required public disclosure by sections 552.101, 552.103 and 552.114 of the act. YISD asserts that information responsive to the second request is excepted from required public disclosure by sections 552.101 and 552.114 of the act.

First, we address your assertion that the information sought in the first request is excepted from required public disclosure under section 552.103. That provision excepts from required public disclosure information relating to litigation "to which the state or political subdivision . . . is or may be a party." Gov't Code § 552.103(a)(1). Section 552.103 requires concrete evidence that litigation is realistically contemplated; it must be more than mere conjecture. Open Records Decision Nos. 518 (1989) at 5; 328 (1982). Thus, to secure the protection of this exception, 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); *see also* Open Records Decision No. 588 (1991) (contested case under statutory predecessor to Administrative Procedure Act is litigation for purposes of former section 3(a)(3) exception).

In support of YISD's claim that the requested information relates to pending or reasonably anticipated litigation, you assert as follows:

[T]he employee teacher in question has been involved in numerous grievances, EEOC charges, and complaints including a federal action currently in litigation. The employee teacher has alleged discrimination and harassment on the basis of national origin. The actions complained of span a period of about four to five years. Therefore it is expected that litigation arising from the information in question can be reasonably anticipated or that this incident will be included in the existing action as another example of harassment.

Given that you suggest that the incident in question may some day be included in the existing action, it is clear that the requested information does not relate to that action at this point in time. Thus, YISD has not demonstrated that the requested information relates to the pending litigation. Furthermore, YISD provides no basis for its assertion that it may be reasonably anticipated that the incident will be included in the existing action, other than the fact that the action is ongoing. YISD's contention that the requested information relates to some other litigation that may be reasonably anticipated in the future appears to be based solely on the requestor's past litigiousness. These contentions are too conjectural to support a section 552.103 claim. Therefore, we conclude that information responsive to the first request may not be excepted from required public disclosure under section 552.103.

Next, we consider whether two documents responsive to the first request are confidential under a statute that you appear to have overlooked. Included in the documents submitted by YISD in response to the first request are two evaluations of students prepared by a psychologist. These evaluations appear to have been conducted by the psychologist for the purpose of determining the veracity of the students' allegations regarding the teacher. Section 611.002(a) of the Health and Safety Code provides that "[c]ommunications between a patient and a professional, and the records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential." On their face, the evaluations appear to be subject to section 611.002. Section 611.004 of the Health and Safety Code provides that a person who receives information from confidential communications or records "may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the person first obtained the information." Health & Safety Code § 611.004(d). We assume that YISD obtained the evaluations with the written consent of the students' parents. *See id.* § 611.004(a)(4). YISD may not disclose the evaluations except to the extent that disclosure is consistent with the authorized purposes for which YISD first obtained them.

In addition, you appear to have overlooked a statute which may make confidential the information sought in the second request. It appears that the allegations of child abuse at issue are being investigated by the Texas Department of Protective and Regulatory Services ("DPRS") and/or local law enforcement authorities. Subchapter A of chapter 34 of the Family Code governs investigations of allegations of child abuse. "[T]he reports, records, and working papers used or developed in an investigation made under [subchapter A] are confidential and may be disclosed only for purposes consistent with the purposes of this code under regulations adopted by the investigating agency." Fam. Code § 34.08(a). To the extent that the information responsive to the second request is being used in an ongoing investigation of the allegations by DPRS or local law enforcement authorities, it may be released only under regulations adopted by the investigating agency.

Section 552.114 exempts from required public disclosure student records of educational institutions funded by state revenue. In addition, section 552.026 of the act incorporates the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, into the act. FERPA prohibits an educational institution that receives federal revenue from releasing "education records" without written consent. 20 U.S.C. § 1232g(b)(1). "Education records" are defined as records that contain information directly related to a student and that are maintained by an educational institution. *Id.* § 1232g(a)(4)(A). Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision No. 332 (1982); 206 (1978). This office generally applies the same analysis under section 552.114. Open Records Decision No. 539 (1990).

With respect to the first request, a number of the records you have submitted for our review contain the names of students and/or their parents and information that might identify them. This information, which we have marked, is confidential under FERPA and section 552.114 and must be redacted.<sup>1</sup> The remainder of the documents, however, are not confidential under FERPA and section 552.114.<sup>2</sup>

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<sup>1</sup>If YISD determines that release of the psychologists' evaluations to the requestor is consistent with the authorized purposes for which YISD first obtained them, YISD should release them, redacting the information we have marked as protected under section 552.114 and FERPA. Section 552.114 and FERPA require YISD to obtain the student's parents' specific written consent before releasing the evaluations to the requestor in unredacted form.

<sup>2</sup>We note that there are a number of handwritten documents that appear to have been handwritten by YISD officials. (If these documents were handwritten by students, which does not appear to be the case, they must be withheld in their entirety to avoid identifying the student authors by their handwriting.) Some of these documents, *i.e.*, the student interview questionnaires, are very difficult to decipher. We have reviewed these records to the best of our ability to mark the names of students and any other information that would identify them for redaction. YISD must obtain legible copies of these documents and must redact any other student names and identifying information from these documents before releasing them.

With respect to records responsive to the second request, to the extent they are not confidential under the Family Code, they contain the names of students and/or their parents and information that might identify them. This information, which we have marked, is confidential under FERPA and section 552.114 and must be redacted. The remainder of the documents, however, are not confidential under FERPA and section 552.114.

You also assert that the information responsive to both the first and second requests is confidential under section 552.101 because it relates to possible violations of the law. We assume that you intend to invoke the informer's privilege which protects the identity of persons who report violations of the law to officials having the duty of enforcing particular laws. *See Roviario v. United States*, 353 U.S. 53, 59 (1957). The privilege excepts the informer's statement itself only to the extent necessary to protect the informer's identity. Open Records Decision No. 549 (1990) at 5. Once the identity of the informer is known to the subject of the communication, the exception is no longer applicable. Open Records Decision No. 202 (1978) at 2.

With respect to the first request, the redactions required by FERPA are sufficient to protect any informer's identity. Therefore, we need not consider whether the privilege applies. With respect to the records responsive to the second request, to the extent these records are not confidential under the Family Code, the FERPA redactions are sufficient to protect any parent informer's identity. The names of the school personnel who reported allegations of abuse and any other information that would tend to identify them may be withheld under the informer's privilege. *See Open Records Decision No. 176 (1977)* (informer's privilege protects identity of person who reports abuse under chapter 34 of the Family Code). This information may not be withheld under the informer's privilege if the identity of the informer is known to the teacher who is the subject of the allegations.

If you have questions about this ruling, please contact our office.

Yours very truly,



Mary R. Crouter  
Assistant Attorney General  
Open Government Section

MRC/SLG/rho

Ref.: ID# 25167

Enclosures: Marked documents

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