



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 30, 1994

Ms. Laura S. Groce
Henslee, Ryan & Groce
Great Hills Plaza
9600 Great Hills Trail, Suite 300 West
Austin, Texas 78759-6303

OR94-807

Dear Ms. Groce:

As counsel for Ennis Independent School District (the "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. Your request was assigned ID# 29444.

The school district received a request for "any and all documents which touched upon or concerned the quality of my . . . performance as an employee of the . . . [s]chool [d]istrict." Initially, you asserted that all of the requested information is excepted from required public disclosure based on section 552.103 of the Government Code. In subsequent correspondence to this office, you also asserted that portions of the requested information are excepted from required public disclosure under sections 552.101, 552.102, and 552.111 of the Government Code.

Section 552.103 of the Government Code excepts from required public disclosure information that relates to pending or reasonably anticipated litigation to which a governmental body is a party. *See* Open Records Decision No. 551 (1990). You assert that the school district expects to be made a party to litigation.

The information you enclosed indicates that the former employee hired an attorney and pursued an administrative complaint against the school district concerning the conduct of her former principal. In her original complaint, the complainant sought various remedies for damages she suffered, including reimbursement for all medical and counseling expenses. The complainant has pursued her complaint through three procedural levels. The school district has denied her grievance at each level. You say the complainant's attorney stated that he intended to file a lawsuit against the school district. You also say that "the file is amply documented with the evidence of . . . threats of suit."

Section 552.103 requires concrete evidence that the claim that litigation may ensue is more than mere conjecture. Open Records Decision No. 518 (1989). A mere threat to sue is not sufficient to establish that litigation is reasonably anticipated. *See* Open Records Decision No. 331 (1982). There must be some objective indication that the potential party intends to follow through with the threat.

On the other hand, several threats to sue and the hiring of an attorney for the purpose of carrying out the threat is evidence that litigation is reasonably anticipated against a governmental body. *See* Open Records Decision No. 288 (1981). Moreover, when an attorney for the potential opposing party makes a demand for disputed payments and threatens to sue if suitable payments are not made promptly, the exception applies. *See* Open Records Decision No. 346 (1982).

The file indicates that the complainant has dismissed her attorney. In addition, the information you enclosed contains no statement from the complainant or her former attorney of an intent to sue the school district. The most recent correspondence from the complainant, dated September 19, 1994, in which she appeals the school district's decision to deny her Level III grievance, contains no threat to sue. Nor does that correspondence advise that the complainant has hired another attorney.

Thus, you have provided no evidence that the complainant is represented by an attorney or that she intends to sue the school district. We note that the principal who was the object of the complaint has resigned, making many of the remedies sought in the former employee's complaint moot. Based on the information you have provided, we do not believe that litigation is reasonably anticipated in this case.¹ We, therefore, conclude that the school district may not withhold the requested information based on section 552.103 of the Government Code.

You raised other exceptions to the required public disclosure of the requested information on October 18, 1994. However, the request is dated September 19, 1994, and the stamp on the request indicates that the school district received the request on September 21, 1994. Section 552.301(a) provides that:

A governmental body that receives a written request for information that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has

¹We note that you do not assert that the requested information relates to pending litigation. You have not stated, nor are we aware, that the three administrative proceedings during which the school district heard the complaint were subject to the Administrative Procedure Act ("APA"), section 2001 of the Government Code. This office considers administrative proceedings subject to the APA to be litigation for purposes of section 552.103 of the Government Code. *See* Open Records Decision No. 588 (1991).

not been a previous determination about whether the information falls within one of the exceptions. The governmental body must ask for the attorney general's decision within a reasonable time but not later than the 10th calendar day after the date of receiving the request.

The school district did not raise the other exceptions within the 10-day period following the receipt of the open records request. Thus, the school district failed to seek our decision within the 10-day period mandated by section 552.301(a).

When a governmental body fails to request an attorney general decision within 10 days of receiving an open records request, the information at issue is presumed public. Gov't Code § 552.302; *see Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 380 (Tex. App.--Austin 1990, no writ). In order to overcome this presumption, a governmental body must provide compelling reasons as to why the information should not be disclosed. *Hancock*, 797 S.W.2d at 381. Thus, the school district must show compelling reasons why these exceptions should be considered.

The school district does not provide any specific compelling reasons to overcome the presumption that the requested information is public. The school district raises sections 552.101 of the Government Code in conjunction with the attorney-client and the work product privileges. The school district also raises sections 552.111, and 552.102.

Section 552.101 of the Government Code excepts from required public disclosure information that is confidential by law, either constitutional, statutory, or by judicial decision. However, discovery privileges are not covered by section 552.101 of the Government Code. Open Records Decision No. 575 (1990) at 2. Information within the attorney-client privilege of the Rules of Civil Procedure may be excepted from required public disclosure under section 552.107(1) of the Government Code. *See id.*; Open Records Decision No. 574 (1990). However, section 552.107(1) is waived if a governmental body does not raise it in a timely manner. *See* Open Records Decision Nos. 630 (1994); 515 (1988). Thus, the school district has waived section 552.107(1) and may not withhold any of the requested information based on that exception.

Nor may the school district withhold the requested information pursuant to section 552.101 in conjunction with the work product privilege. An attorney's work product may be excepted under section 552.103, the litigation exception, only if the requirements for that exception are met. *See* Open Records Decision Nos. 574 at 6; 575 at 2. As we determined above, the school district has not met the requirements for protection from required public disclosure under section 552.103.

Furthermore, the school district may not withhold the requested information based on section 552.111. Your claim that portions of the requested information are excepted under section 552.111 does not provide a compelling reason why such information should not be released. See Open Records Decision No. 515.

You contend that section 552.102 of the Government Code excepts from required public disclosure the name of another school district employee who has lodged a complaint against the school district. Section 552.102 provides that

Information is excepted from the requirements of Section 552.021 if it is information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

The test for determining whether information may be withheld from required disclosure under section 552.102 is the test formulated by the Texas Supreme Court in *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. *Hubert v. Harte-Hanks Tex. Newspaper*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. See *Industrial Found.*, 430 U.S. 931. A showing that information is confidential under the common-law right to privacy provides a compelling demonstration that requested information should not be released. See Open Records Decision No. 71 (1975).

Because there is a legitimate public interest in the activities of public employees in the workplace, information about employees is commonly held to be available to the public under the *Industrial Foundation* test. See, e.g., Open Records Decision No. 444 (1986) at 6. We believe the public has a legitimate interest in the identity of the other complainant. Thus, the school district may not withhold the name of the other complainant based on section 552.102 of the Government Code.

We note that the information contains the names of students in the school district. Section 552.026 of the Government Code incorporates the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, into the Open Records Act. FERPA provides that no federal funds will be made available

to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of their parents.

20 U.S.C. § 1232g(b)(1). "Education records" are those records, files, documents, and other materials 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.

20 U.S.C. § 1232g(a)(4)(A). FERPA requires an educational agency to withhold from required disclosure information identifying or tending to identify students or their parents. *See* Open Records Decision No. 332 (1982). We have marked the portions of the requested information that the school district must withhold based on section 552.026 of the Government Code. The remaining information must be released.

Finally, we note that the information contains several certified agendas of closed meetings of the school district board. Section 551.104(c) of the Government Code states that "the certified agenda . . . of a closed meeting is available for public inspection and copying only under a court order issued under subsection (b)(3) [of section 551.104]." Thus, the school district must withhold the certified agendas under section 552.101 of the Government Code as information made confidential by statutory law. *See* Open Records Decision No. 495 (1988).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Open Government Section

KHG/MRC/rho

Ref.: ID# 29444

Enclosures: Marked documents

cc: Ms. Melinda G. Campbell
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(w/o enclosures)