



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 7, 1994

Mr. David M. Feldman
Feldman & Associates
12 Greenway Plaza, Suite 1202
Houston, Texas 77046

OR94-814

Dear Mr. Feldman:

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 (former V.T.C.S. article 6252-17a). Your request was assigned ID# 26660.¹

In your capacity as attorney for the Houston Independent School District ("HISD"), you have asked this office to provide a ruling with respect to a request for records regarding the HISD Alternative Certification Program ("ACP") from Dick DeGuerin to Dr. Rod Paige, Superintendent of Schools, dated May 17, 1994. That request seeks in pertinent part "records, notes, memoranda, or correspondence regarding an investigation by [HISD] of the [ACP]."² You contend that the requested information is excepted from required public disclosure under sections 552.101, 552.103, 552.108, and 552.111 of the Government Code.

First, we address your assertion that all of the submitted information is excepted from required public disclosure under section 552.101 which excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You have not cited any constitutional provision or statute which would make this information confidential, nor are we aware of one. Therefore, we assume that you intend to assert that the information is protected under common law.

¹As this office informed you by letter dated September 22, 1994, your requests made on behalf of HISD to this office for rulings on other requests for records also assigned ID# 26660 have been closed.

²Because you have not sought a ruling with regard to the first item sought by the requestor, we do not address it.

For information to be protected from public disclosure under the common-law right of privacy incorporated by section 552.101, the information must meet the criteria set out by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court stated that

information . . . is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law 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.

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing former V.T.C.S. article 6252-17a, section 3(a)(1)). In *Industrial Foundation*, the Texas Supreme Court considered information relating to the following topics intimate and embarrassing: sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

We have reviewed the information submitted by HISD. None of it is intimate and embarrassing under *Industrial Foundation*. Moreover, the information relates to either the qualifications or job performance of public employees, both of which are matters of legitimate public interest. See Open Records Decision Nos. 470 (information about a public employee's job performance is of legitimate public interest), 455 (information about applicant's qualifications is of legitimate public interest) (1987). Therefore, we conclude that none of the information you submitted may be excepted under section 552.101.

Section 552.103 excepts from required public disclosure information relating to litigation "to which the state or a political subdivision is or may be a party." Gov't Code § 552.103(a)(1). Thus, for section 552.103 to apply, the information must relate to litigation to which HISD is or may be a party. 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). 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 V.T.C.S. article 6252-17a, section 3(a)(3) exception).

In your May 27, 1994 letter, you informed us that HISD's alternative certification program ("ACP") was being investigated by HISD as well as the Harris County District Attorney's Office ("district attorney") and the United States Immigration and Naturalization Service ("INS"). But you provided us with no information that would demonstrate that HISD reasonably anticipates that any of these investigations will lead to litigation to which HISD will be a party. Accordingly, we conclude that the submitted documents may not be withheld under section 552.103.

Section 552.108 provides that:

(a) A record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure].

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure].

Where an incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information that relates to the incident. Open Records Decision Nos. 474 (1987); 372 (1983). Certain factual information generally found on the front page of police offense reports, however, is public even during an active investigation. *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976) at 3-4 (listing factual information available to the public).

After a file has been closed, either by prosecution or by administrative decision, the availability of section 552.108 is greatly restricted. Open Records Decision No. 320 (1982). The test for determining whether information regarding closed investigations is excepted from public disclosure under section 552.108 is whether release of the records would unduly interfere with the prevention of crime and the enforcement of the law. Open Records Decision No. 553 (1990) at 4 (and cases cited therein). A governmental body claiming the "law enforcement" exception must reasonably explain how and why release of the requested information would unduly interfere with law enforcement and crime prevention. Open Records Decision No. 434 (1986) at 2-3.

We conclude that the requested information may not be excepted from required public disclosure under section 552.108. HISD is not a law enforcement agency. It may not assert section 552.108 to withhold documents generated in the course of its own investigation unless the release of the information would unduly interfere with the investigation of a law enforcement agency. *See* Attorney General Opinion MW-575 (1982) at 1; Open Records Decision No. 493 (1988) at 2. While HISD asserts that the

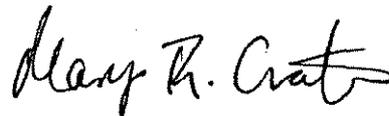
release of the requested information would interfere with the INS and district attorney investigations, it has failed to provide this office with a letter from either law enforcement agency confirming that the release of the information would do so, despite our requests for such confirmation. Nor have you otherwise demonstrated that release of the information would interfere with these investigations. Furthermore, you informed us by telephone that an INS representative stated that release of the requested information *would have* interfered with its investigation while the investigation was ongoing.³ Apparently, there are no INS objections to the release of the information at this time.

Finally, you assert that the requested information is excepted from required public disclosure under section 552.111. 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 a recent opinion that reexamined the section 552.111 exception, this office concluded that section 552.111 excepts from public disclosure only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body at issue. Open Records Decision No. 615 (1993) at 5. The policymaking functions of an agency, however, do not encompass routine internal administrative and personnel matters. *Id.* Furthermore, section 552.111 does not except purely factual information from disclosure. *Id.*

We have reviewed the information submitted by HISD. The information is generally factual. Moreover, it deals with routine administrative and personnel matters, and does not reflect the policymaking processes of HISD. Therefore, we conclude that none of this information may be excepted from required public disclosure under section 552.111.

In sum, the requested information must be released. If you have questions about this ruling, please contact our office.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Open Government Section

MRC/LRD/rho

³We understand that the INS investigation has been completed.

Ref: ID# 26660

Enclosures: Submitted documents

cc: Mr. Dick DeGuerin
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(w/o enclosures)