



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 19, 1995

Mr. Yuri A. Calderón
Assistant School Attorney
Houston Independent School District
Hattie Mae White Administration Building
3830 Richmond Avenue
Houston, Texas 77027-5838

OR95-009

Dear Mr. Calderón:

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# 31025.

The Houston Independent School District (the "school district") received a request for "all written reports detailing any investigation by the HISD professional standards department into test selling activities involving [school district employees]." You claim the requested information is excepted from required public disclosure under sections 552.101, 552.102, 552.103, and 552.111 of the Government Code, the Texas Open Records Act (the "act"). Although we address the school district's arguments, we believe that these arguments have been frivolously raised in blatant disregard of the requirements of prompt disclosure of public information under the act.

You claim that sections 552.101 and 552.102 except the information from required public disclosure. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, 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 articulated 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). Accordingly, we will consider whether any of the information contained in the submitted documents is excepted from required public disclosure under section 552.101 and section 552.102 together.

The scope of public employee privacy is very narrow. See Attorney General Opinion JM-229 (1984); Open Records Decision Nos. 421, 423 (1984); 400 (1983); 336 (1982). Although information relating to an investigation of a public employee may be embarrassing, the public generally has a legitimate interest in knowing about the job performance of public employees. See Open Records Decision Nos. 444 (1986); 400, 405 (1983). Similarly, information regarding a public employee's dismissal, demotion, promotion, or resignation is not excepted from public disclosure. *Id.*; see also Open Records Decision No. 230 (1979) (concluding that the predecessor to section 552.102 did not except from public disclosure an investigative report regarding allegations of misuse of school district employees and materials). We have reviewed the documents submitted for our consideration. None of the information is highly intimate or embarrassing. Furthermore, as the school district should be well aware, there is a legitimate public interest in its release. Thus, the school district may not withhold the requested records under sections 552.101 and 552.102.

We next address your arguments under section 552.111, which 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 1993 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 and has never excepted severable factual information from disclosure. *Id.*; see also *Austin v. City of San Antonio*, 630 S.W.2d 391 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (concluding that statutory predecessor to Gov't Code § 552.111 does not except from disclosure "objective data"); Open Records Decision Nos. 582, 574, 565, 563 (1990); 466, 462 (1987); 424, 420, 419 (1984); 231, 230, 225 (1979); 213, 211, 209, 192 (1978); (1978); 179, 178, 164, 163 (1977); 149, 128 (1976). Likewise, federal court decisions interpreting exemption 5 in the federal Freedom of Information Act, 5 U.S.C. § 552(b)(5), on which section 552.111 was patterned, have held that the federal exemption does not apply to severable factual

information. See, e.g., *Environmental Protection Agency v. Mink*, 410 U.S. 73, 87-9 (1973); *Ethyl Corp. v. Environmental Protection Agency*, 478 F.2d 47, 49-50 (4th Cir. 1973); *General Services Admin. v. Benson*, 415 F.2d 878, 881 (9th Cir. 1969); *Ackerly v. Ley*, 420 F.2d 1336, 1341 (D.C. Cir. 1969); *Boeing Airplane Co. v. Coggeshall*, 280 F.2d 654, 660-61 (D.C. Cir. 1960); *Simons-Eastern Co. v. United States*, 55 F.R.D. 88, 88-89 (N.D. Ga. 1972)

Both of the investigative reports submitted for our review concern internal personnel matters. Furthermore, the documents are essentially a compilation of facts surrounding an incident and a conclusion by the investigation team of whether certain allegations can be sustained based on the available evidence. There is little if any indication of advice, recommendation, or opinion as to the course of action or policy the district should follow in response to the investigation.¹ Moreover, what little information that may be considered advice, opinion, or recommendation does not relate to the deliberative or policymaking processes of the school district.

You suggest that this office should reconsider the interpretation of section 552.111 in Open Records Decision No. 615 (1993) in light of a July 25, 1994 ruling in *Klein Independent School District v. Lett*, No. 93-061897 (80th Dist. Ct., Harris County, Tex., July 25, 1994). This office was not a party to that action. Furthermore, appellate courts in Texas do not rely upon unpublished opinions as authority. *Wheeler v. Aldama-Luebbert*, 707 S.W.2d 213, 216 (Tex. App.--Houston [1st Dist.] 1986, no writ) ("An unpublished opinion of this Court or any other court has no authoritative value."); see also Tex. R. App. P. 90(i) ("Unpublished opinions shall not be cited as authority by counsel or by a court."); *Orix Credit Alliance v. Omnibank*, 858 S.W.2d 586, 593 n.4 (Tex. App.--Houston [14th Dist.] 1993, writ dismissed w.o.j.); *Carlisle v. Philip Morris, Inc.*, 805 S.W.2d 498, 501 (Tex. App.--Austin 1991, writ denied). For this reason, the Office of the Attorney General generally does not consider unpublished rulings in making determinations under the Open Records Act. This office continues to adhere to Open Records Decision No. 615.

We believe that the school district has failed to comply with the act by raising section 552.111 for documents that are clearly not protected from disclosure under the exception. First, this office has concluded in several open records rulings to the school district that under the conclusion in Open Records Decision No. 615, the school district may not withhold records regarding personnel matters. See Open Records Letter Nos. 94-389, 94-394, 94-582 (1994). Secondly, even if this office were to accept your

¹The documents submitted for our review are two sets of an Investigation Summary and Investigation Report on two named employees. Each set consists of approximately 30 pages of factual data and a one paragraph conclusion. Only the conclusion could possibly be considered advice, opinion, or recommendation. However, as noted above, it does not relate to the deliberative or policymaking processes of the school district.

argument that section 552.111 applied to personnel matters, much, if not all, of the information contained in the documents submitted for our review is purely factual in nature, which is clearly not protected from disclosure under any decisions from this office, either prior to or subsequent to Open Records Decision No. 615. *See* Open Records Decision No. 230 (1979) (concluding that a school district's investigative report regarding its employees is not protected by former section 3(a)(11) because it is "wholly factual and does not contain the type of opinion, advice, or recommendation on policy matters"). The investigative reports recount factual occurrences except for, arguably, the investigative team's ultimate conclusion confirming or not confirming the allegations. It is clear that the school district may not withhold the requested information under section 552.111 of the Government Code and had no basis on which to raise this argument in its request for a ruling from this office.

We next address your arguments under 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 be excepted under section 552.103(a), information must relate to litigation that is pending or reasonably anticipated. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4.

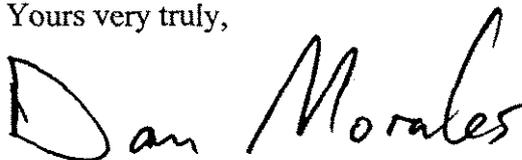
The school district contends that "[g]iven the nature of the allegations underlying the investigations, it is conceivable that the District employees may ultimately be named as parties to litigation of a criminal or civil nature." Section 552.103 requires concrete evidence that the claim that litigation may ensue is more than mere conjecture. *See* Open Records Decision Nos. 518 (1989); 328 (1982). It is well settled that the mere chance of litigation is clearly not sufficient to trigger section 552.103. Open Records Decision Nos. 555 (1990); 518 (1989); 429 (1985); 437 (1986); 417, 416, 410 (1984); 397, 361, 359 (1983); 351, 326, 323, 311 (1982); 289, 288 (1981); 219, 183 (1978); 139 (1976). The school district's claim that future litigation is "conceivable" due to the nature of the investigations is far too nebulous and generalized an argument to satisfy the school district's burden to show how documents relate to reasonably anticipated litigation. Clearly, the school district may not withhold the information under section 552.103. We

believe that the school district has raised section 552.103 in a frivolous manner with no basis in law or fact to claim the exception.

In summary, the school district may not withhold the records at issue under any of the claimed exceptions and must promptly release the records to the requestor. As noted above, the investigative reports do not contain any confidential information protected either by common-law privacy or any confidentiality statute. The school district should be aware by now that sections 552.101 and 552.102 do not protect information concerning the manner in which a public employee performs his or her job. In addition, we believe that the school district also raised sections 552.103 and 552.111 in a frivolous manner, in complete disregard of prior open records decisions concerning both of these exceptions. By raising such frivolous arguments to withhold this information and thereby delaying the prompt release of clearly public information, the school district has failed to comply with section 552.221 of the act. We caution that, in dealing with future requests for information, the school district must promptly release clearly public information and refrain from raising frivolous arguments to the attorney general in order to avoid the act's requirements of public disclosure. If the school district continues to act in this manner, the attorney general will take whatever legal steps necessary to require the school district to conform to the provisions of the Texas Open Records Act.

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

Yours very truly,

A handwritten signature in black ink that reads "Dan Morales". The signature is written in a cursive, flowing style.

Dan Morales
Attorney General of Texas

DM/LRD/LBC/rho

Ref.: ID# 31025

Enclosures: Submitted documents

cc: Mr. Wayne Dolcefino
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(w/o enclosures)