



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 18, 1995

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

OR95-635

Dear Mr. Calderon:

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# 31201.

The requestor seeks the following information:

- 1) investigative information pertaining to this complaint by teachers and school administrators;
- 2) information, statements, reports filing complaints, writings, and manner in which investigatory information was collected concerning requestor's complaint against a teacher;
- 3) information pertaining to disciplinary actions taken against a teacher and the manner and reasoning behind the action taken;
- 4) complaints, reports, writings, and information concerning the requestor and the manner in which and from whom this information was collected;
- 5) copies of district and state policies for dealing with misconduct of teachers and school administrators;
- 6) names and addresses of the person(s) responsible for professional standards investigations and a copy of all policies, notes, memorandums, amendments to policies, writings and materials pertaining to disciplinary actions taken or considered in correcting teacher and administrator misconduct; and

- 7) a complete and accurate accounting/inventory of any and all written statements, documents, interview notes, written summaries, memorandums, and investigative notes to include, but not limited to, notes of parental contact prepared between 10/1/93 and 10/1/94 (inclusive) relating in any way to concerns being appealed by requestor on behalf of his child.

You claim that four categories of responsive documents exist--a) the investigative report prepared by the Office of Professional Standards containing all investigative material pertaining to the incident relating to the complaint and documentation as to administration's response to the incident; b) portions of a file kept by an administrator about the teacher involved in the complaint; c) the student's (requestor's child) statement about the incident and the requestor's correspondence with the district; and d) the district's policy for dealing with teacher and school administrators' misconduct. You inform us that you will release the information in categories c and d. However, you seek an open records ruling for categories a and b--the investigative report prepared by the Office of Professional Standards and the notes kept by an administrator concerning the teacher about whom the requestor complained. You claim that the information is excepted from disclosure pursuant to sections 552.103, 552.111, and 552.114.¹

You claim that section 552.111 excepts from disclosure certain portions of the documents in categories a and b. Section 552.111 excepts "an 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 Dep't of Pub. 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.

¹In your original brief you claimed that certain portions of the documents were excepted from disclosure pursuant to sections 552.101 and 552.102. As you did not mark the documents to show which exceptions apply to which portions of the information, we returned the documents to you for marking. You returned the documents but you did not mark any of the information as excepted by sections 552.101 and 552.102. We assume from the information presented for our review that you have withdrawn your claim that certain portions of the information are excepted from disclosure pursuant to sections 552.101 and 552.102.

We note, however, that the records entitled "Office of Professional Standards Personnel Investigation Report" contains information that would normally be excepted from disclosure under the doctrine of common-law privacy in conjunction with section 552.101. This same information, however, requires deidentification pursuant to sections 552.114 and 552.026 of the Government Code. Because deidentification adequately protects the privacy interests of the student and his family members, we do not address the doctrine of common-law privacy in this ruling.

The documents 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 the 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. 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 dism'd w.o.j.); *Carlisle v. Philip Morris, Inc.*, 805 S.W.2d 498, 501 (Tex. App.--Austin 1991, writ denied). For this reason and as we stated in Open Records Letter Nos. 95-009 and 95-008 (1995), 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 (1993). You may not withhold any of the requested information under section 552.111 of the Government Code.

You also claim that the requested documents are excepted from disclosure pursuant to section 552.103. Section 552.103(a) excepts 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.

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

You claim that "it is conceivable that the district or its employees may be named as parties to litigation of a criminal or civil nature" and that the requested records are therefore excepted from disclosure under section 552.103(a) "at least until the pertinent statutes of limitation have expired." Section 552.103(b) provides that

For purposes of [section 552.103], the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.

Section 552.103(b) is not a separate exception to disclosure. Open Records Decision No. 518 (1989) at 5. It merely provides a time frame for section 552.103(a). *Id.* Unless a governmental body has met its burden of showing that litigation is pending or reasonably anticipated under section 552.103(a), section 552.103(b) is not applicable. *Id.* In this instance you have not made the requisite showing that the requested information relates to pending or anticipated litigation for purposes of section 552.103(a). Therefore, you may not withhold the requested records pursuant to section 552.103.

The district claims that marked portions of the requested information are excepted from disclosure by section 552.114. Under section 552.114(a), information is excepted "if it is 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. Section 552.026 specifically provides that the act

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.

Gov't Code § 552.026; *see also* Open Records Decision No. 431 (1985). 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

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.

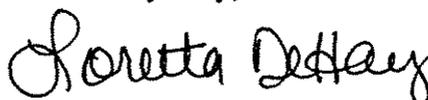
20 U.S.C. §§ 1232g(a)(1)(A), 1232g(b)(1). "Education records" are defined in FERPA as records that:

- (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 required public disclosure, 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). In this instance, since multiple students are involved, deidentification of portions of the records serves to protect the identity of the students. We have marked the information which must be withheld pursuant to section 552.114.² The remaining information must be released.

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 should 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,



Loretta R. DeHay
Assistant Attorney General
Open Government Section

²We have not marked the records that are part of the "Office of Professional Standards Personnel Investigation Report," because we have previously reviewed and marked these records in conjunction with Open Records Letter No. 95-008 (1995). Please refer to the records returned with that ruling for the information that you must withhold in the report in this case. We note, however, that in *this request*, the requestor is the parent of one of the students involved. You may not, as explained above, withhold information in the investigative report that refers to the requestor's son. *See* 20 U.S.C. § 1232g(a)(1)(A).

LRD/LMM/rho

Ref.: ID# 31201

Enclosures: Marked documents

cc: Mr. Ivan J. Mlachak
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(w/o enclosures)