



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 26, 1996

Mr. Arturo G. Michel
Bracewell & Patterson, L.L.P.
South Tower Pennzoil Place
711 Louisiana St., Suite 2900
Houston, Texas 77002-2781

OR96-0246

Dear Mr. Michel:

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# 32411.

The Victoria Independent School District ("VISD") received a request for: (1) a letter that a law firm sent to the VISD board alleging professional misconduct by a VISD attorney, and (2) an audio tape that a board member submitted to another VISD attorney. By letter dated March 20, 1995 you sought our ruling on whether the letter and tape are excepted from disclosure under chapter 552 of the Government Code. You submitted a copy of the letter to this office for review. You did not submit a copy of the tape, because the tape was in the possession of the Victoria County Sheriff's Department, and VISD did not have access to it.

By letter dated January 3, 1996, we notified you that some or all of the records you submitted for review may be excepted from disclosure under the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, or section 552.114 of the Government Code. We returned the documents to you and advised you to de-identify them or obtain parental consent for release of the documents in accordance with Open Records Decision No. 634 (1995). We further noted that if you re-submitted the de-identified documents by January 19, 1996, we would consider all exceptions, discretionary and mandatory, that you raised in your original request for an opinion.

VISD de-identified the requested letter, and you re-submitted it to us for review by January 19, 1996. You state that the tape is now in the possession of the Corpus Christi Division of the Federal Bureau of Investigation, rather than the Victoria County Sheriff's Department, and that VISD still does not have access to it. On behalf of VISD, you

reassert the exceptions raised in your original request for an opinion. You maintain that the letter is excepted from required public disclosure under sections 552.101 and 552.114 of the Government Code. You maintain that the audio tape is not a public record. In the alternative, you argue that the audio tape is excepted from required public disclosure under sections 552.101 through 552.111 and section 552.114 of the Government Code.

This office does not determine the applicability of FERPA to requested information or the applicability of section 552.114 to requested information insofar as that information is protected by FERPA. See Open Records Decision No. 634 (1995) at 7. Here, section 552.114 does not except from disclosure any information in the letter that VISD has not already redacted in compliance with FERPA.¹ Therefore, we do not address your claim that portions of the letter that identify a student are protected by section 552.114.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet the criteria set out 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 disclosure if (1) the information contains highly intimate or embarrassing facts the release 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. In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information such as that relating to 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.

The letter at issue was written to the VISD board by an attorney representing a police officer. The letter complains of the conduct of a VISD attorney in connection with a criminal investigation. There is nothing "intimate or embarrassing" about the substance of the letter. Furthermore, we note that there is a legitimate public interest in the conduct of governmental body employees and, by logical extension, independent contractors employed to act on behalf of governmental bodies. See, e.g., Open Record Decision Nos. 444 (1986), 405 (1983).²

¹FERPA and section 552.114 may not be used to withhold whole documents. The educational institution must delete all information to the extent "reasonable and necessary to avoid personally identifying a student" or one or both of his parents. Open Records Decision Nos. 332 (1982), 206 (1978).

²You assert that the VISD attorney has a section 552.101 interest in withholding the letter on the basis of a false-light privacy. Information actionable under the tort doctrine of false-light privacy is not within section 552.101 protection of information deemed confidential by law. Open Records Decision No. 579 (1990). Therefore, we do not address this claim.

You also assert that the letter is protected from required public disclosure by the informer's privilege under section 552.101. The informer's privilege protects the identity of one who reports a violation or possible violation of the law to officials having the duty of enforcing that law. See *Roviaro v. United States*, 353 U.S. 53, 59 (1957). However, once the identity of the informer is known to the subject of the communication, the privilege is no longer applicable. Open Records Decision No. 202 (1978) at 2. The informer's privilege does not apply here, because the VISD board is not responsible for enforcing the specific laws which were allegedly violated by the VISD attorney named in the letter. Furthermore, we note that the letter does not identify the individual making these allegations.

You contend that the second item requested, "a copy of the audio tape [a] school trustee . . . submitted to the school district's attorney in front of other trustees during a closed session the night of March 9, 1995," is not "public information" subject to the Open Records Act. Section 552.002 defines the term "public information" to include information that is "collected, assembled, or maintained . . . (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." Gov't Code § 552.002(a) (emphasis added). You state that a board member received a copy of the audio tape and delivered it to a member of your law firm at a board meeting. That attorney then gave the audio tape to the Victoria County Sheriff. The tape is now in the hands of the Corpus Christi Division of the Federal Bureau of Investigation. You state that the

knowledge we have of the tape is based on the representation of the VISD's local counsel . . . that he had listened to another copy of the same tape recording or a version of the same tape recording, and that it is a recording of his private telephone conversations that he made from the telephone at his residence without the consent or knowledge of the parties to the conversation.³

You assert that the audio tape is not currently in the possession of VISD and that VISD has no right of access to it. Based on your account of the facts, it appears that this particular audio tape is not maintained by VISD, nor does VISD have a right of access to it. Therefore, the requested audio tape, until returned to VISD, is not public information subject to the act, at least with respect to VISD.

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

³We do not address whether the second audio tape is public information as it does not appear to have been requested, and it is unclear to whom the second tape belongs. We note, however, that 18 U.S.C. § 2511(1)(c) prohibits the disclosure of illegally intercepted telephone communications.

determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in cursive script that reads "Karen Hattaway". The signature is written in black ink and is positioned above the typed name.

Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref: ID# 32411

Enclosures: Submitted documents

cc: Mr. Timothy Delaney
The Victoria Advocate
P.O. Box 1518
Victoria, Texas 77902
(w/o enclosures)