



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 26, 1996

Mr. David A. Anderson
Chief Legal Counsel
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR96-2260

Dear Mr. Anderson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 37879.

The Texas Education Agency (the "TEA") received a request for the following information:

[A]ny and all audits conducted or headed by your agency regarding the Somerset School District, Somerset[,] Texas for the time period of August 1994 through the present. This includes, but is not limited to, audits resulting from the TEA's intervention in the district which began Feb. 21, 1995;

and

any and all investigative reports, memos and correspondence by the TEA management team and/or staff regarding the team's intervention in Somerset School District, which began Feb. 21, 1995.

You contend that much of the requested information is excepted from required public disclosure pursuant to sections 552.101, 552.103, 552.107, and 552.111 of the Government Code.

You contend that certain correspondence between the TEA and the attorney for the Somerset Independent School District Superintendent is excepted from required public disclosure by sections 552.103 and 552.107. Section 552.103(a) excepts information relating

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. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. We note that once information has been obtained by all parties to the litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Moreover, section 552.107 does not apply to communications that are not confidential. Open Records Decision No. 574 (1990). Because this information has been transferred between the TEA and the superintendent's attorney, we conclude that this information may not be withheld under either section 552.103 or 552.107.

You also assert that other correspondence and reports are excepted from required public disclosure by sections 552.101 and 552.111 of the Government Code. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You assert that some of the information must be withheld under section 552.101 in conjunction with the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. See 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) (emphasis added). A "student"

includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

Id. § 1232g(a)(6) (emphasis added). Although the TEA may be an "educational institution" for some purposes, it is not an institution attended by students. The records you seek to withhold were never "education records" maintained by the Somerset Independent School District and, therefore, cannot be deemed "education records" in the hands of the TEA.

You also assert that this information must be withheld under section 552.101 because it may involve the privacy interests of a third party. Information must be withheld under section 552.101 in conjunction with *common-law* privacy, but only if the information is

highly intimate or embarrassing *and* it is of no legitimate concern to the public. *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). This office has previously held that common-law privacy does not protect facts about a public employee's misconduct on the job or complaints made about his or her performance. See Open Records Decision Nos. 438 (1986), 219 (1978), 230 (1979). Moreover, we find no information contained in the information provided to this office that is highly intimate and embarrassing. We conclude that you may not withhold any of the requested information under section 552.101 of the Government Code.

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 Open Records Decision No. 615 (1993), this office concluded that section 552.111 excepts from required public disclosure 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. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* You argue that "the subjects covered by the investigation, the subsequent report, and pending and anticipated litigation will be the bases for the development of Agency policy(ies) regarding the subject issues." We have reviewed the information at issue and conclude that, although the information contains some advice, recommendations, and opinions, none of the information directly relates to TEA's policymaking functions. Consequently, none of the information may be withheld under section 552.111.

In conclusion, you must release all of the information you seek to withhold. 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 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Todd Reese". The signature is written in a cursive style with a long horizontal line extending to the right.

Todd Reese
Assistant Attorney General
Open Records Division

RTR/rho

Ref: ID# 37879

Enclosures: Submitted documents

cc: Ms. Cindy Ramos
San Antonio Express-News
P.O. Box 2171
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(w/o enclosures)