



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

August 6, 1997

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

OR97-1767

Dear Mr. Anderson:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. We assigned your request an identification number, ID# 35218 (TEA ORR No. 323-95).

The Texas Education Agency ("TEA") received a request for copies of an investigation relating to a particular teacher. You have submitted the documents to this office and claim that part of the documents are excepted from disclosure pursuant to sections 552.107, 552.117, 552.122 of the Government Code, and section 21.355 of the Texas Education Code. Additionally, you assert that the documents are excepted in their entirety pursuant to section 261.201 of the Family Code<sup>1</sup> and section 552.103 of the Government Code.

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

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<sup>1</sup>Your original brief and marked documents refer to section 34.08 of the Family Code which has been repealed. Acts 1995, 74th Leg., ch. 262, § 100(a), eff. Jan. 1, 1996. The cited section replaces that noted in your brief.

(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. Additionally, a governmental body must raise this exception within the statutorily mandated ten-day deadline. Gov't Code § 552.301(a). You did not assert that the requested information was excepted from disclosure in your original request for a determination from this office. A governmental body may not raise additional exceptions after the ten-day deadline, absent a showing of a compelling reason for nondisclosure. Open Records Decision No. 515 (1988). You have not shown compelling reasons for nondisclosure. Therefore, you may not withhold the documents pursuant to section 552.103.

You claim that section 261.201 of the Family Code excepts all the requested materials because they relate to an investigation of abuse of a child. Section 261.201 of the Family Code governs reports of abuse or neglect of a child to local and state law enforcement agencies and other agencies responsible for the protection of children. *See* Fam. Code § 261.103. Section 261.201 provides

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, *the files, reports, records, communications, and working papers used or developed in an investigation* under this chapter or in providing services as a result of an investigation. [Emphasis added.]

The bulk of the report documents the particular instructor's teaching history, education, evaluations, etc. The file is primarily a TEA investigative file to determine if the teacher's certification for a particular subject should be granted and/or whether the teacher's existing certifications should be revoked. That portion of the information relating to one allegation of harassment is a relatively small part of the certification investigative file. Additionally, you have not indicated, nor is it clear from the records at issue, whether the

requested records have been provided to any child protective service agency during its investigation. If TEA has in fact provided these records to a child protective service agency, such as Child Protective Services or to a law enforcement agency, TEA must withhold these records from the public pursuant to section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

You assert that certain documents are excepted from public disclosure pursuant to section 552.107 of the Government Code because it is information which was obtained by or on behalf of an attorney representing TEA. Section 552.107(1) excepts from disclosure information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas. Information may be withheld under section 552.107(1), only to the extent that it documents confidences of a governmental representative to its attorney or reveals the attorney's legal advice and opinions. Open Records Decision Nos. 589 (1991), 574 (1990). When invoking this exception, a governmental body bears the burden of explaining how the particular information requested constitutes either a client confidence or a communication of legal advice or opinion protected under 552.107(1). Open Records Decision No. 589 (1991). You have not explained, nor is it apparent from the face of the documents, how the documents are protected by the attorney-client privilege. Therefore, you may not withhold the documents under section 552.107 of the Government Code.

You claim that some of the documents are attorney work product. In Open Records Decision No. 647 (1996), this office established the requirements for withholding information as attorney work product under section 552.111. For information to be considered "attorney work product," a governmental body must first show that the information was created for trial or in anticipation of litigation. In order for this office to conclude that information was created in anticipation of litigation, we must be satisfied that

- a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation.

*Id.* at 4.

Second, the governmental body must show that the work product "consists of or tends to reveal the thought processes of an attorney in the civil litigation process." *Id.* Although the attorney work product privilege protects information that reveals the mental processes, conclusions, and legal theories of the attorney, it generally does not extend to facts obtained by the attorney. *Id.* and authorities cited therein. Upon review of the submitted

documents, we conclude that you have not demonstrated how these documents meet the requirements set forth in Open Records Decision No. 647 (1996). Therefore, you may not withhold the documents as attorney work product under section 552.111.

We next address your assertion that certain information contained in the requested documents must be withheld pursuant to sections 552.024 and 552.117 of the Government Code. These sections provide that a public employee or official may choose to keep private his or her home address, home telephone number, social security number, or information that reveals that the individual has family members. You must withhold this information if, at the time of the request for the information, the employee had elected to keep the information private. Open Records Decision Nos. 530 (1989) at 5, 482 (1987) at 4, 455 (1987). Also, social security numbers that were obtained or maintained by a governmental body pursuant to any provision of law, enacted on or after October 1, 1990, are confidential pursuant to section 405(c)(2)(C)(viii) of title 42 of the United States Code.

You argue that reports of the teacher's scores on tests for certification (EXCET test scores) administered by TEA are excepted from disclosure under section 552.122 of the Government Code. This section excepts test items developed by educational institutions, licensing agencies, or governmental bodies from public disclosure. This office has defined "test item" as "any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated." Open Records Decision No. 626 (1994). This definition necessarily excludes reports of tests scores from the category of test items; scores relating to tests do not reveal the *means* by which knowledge or ability is evaluated. The scores simply reflect the result of such evaluation. Thus, section 552.122 excepts from disclosure such items as exam questions and answer keys. Open Records Decision No. 537 (1990). You may not withhold reports of the teacher's scores on the EXCET test under section 552.122.

Some of the submitted documents consist of evaluations of teacher performance. Section 21.355 of the Education Code makes such items confidential. You have, however, included a copy of the instructor's teaching certificate in this subgroup of documents; we do not believe that a teacher's certificate is an "evaluation of the performance of a teacher" as the phrase is used in section 21.355. *See* Educ. Code § 21.354 (appraisal performance criteria must be based on *job-related* performance). You must release the certificate.

A portion of the documents submitted consist of a transcript and exhibits presented in an open board meeting held in conformity with the Open Meetings Act. These are official records of the public proceeding of a governmental body and may not be withheld from disclosure. Open Records Decision No. 221 (1979). We note, however, that in several instances students names are included in the records. Release of student information by an educational agency or institution is governed by the Family Education Rights and Privacy Act of 1974 ("FERPA"). 20 U.S.C. § 1232g. You must release the transcripts and exhibits with the exception of any information which is protected under FERPA.

For your convenience we have marked the type of information that must be withheld. 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 of the Government Code regarding any other records. If you have questions about this ruling, please contact this office.

Yours very truly,



Loretta R. DeHay  
Assistant Attorney General  
Open Records Division

LRD/LMM/rho

Ref.: ID# 35218

Enclosures:     Marked documents

