



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

June 4, 1998

Mr. George J. Petras IV  
Henslee, Fowler & Hepworth  
800 Frost Bank Plaza  
816 Congress Avenue  
Austin, Texas 78701-2443

OR98-1383

Dear Mr. Petras:

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# 115601.

The Comal Independent School District (the "school district"), which you represent, received a request for copies of all records relating to the school district's investigation of allegations against the requestor. You contend that the requested documents are excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted documents, exhibits B through D.

You claim that certain rules of civil evidence and civil procedure make the requested documents confidential. We note, however, that the Open Records Act differs in purpose from statutes and procedural rules providing for discovery in judicial proceedings. Attorney General Opinion JM-1048 (1989); *see* Open Records Decision No. 575 (1990) (section 552.101 does not encompass discovery privileges); Gov't Code § 552.006 (chapter 552 does not authorize withholding public information or limit availability of public information to public except as expressly provided by chapter 552). The provisions of civil evidence and civil procedure to which you cite regulate discovery in court proceedings and not the availability of information under the Open Records Act.

You also claim that all of the submitted documents are excepted from disclosure under section 552.103. Section 552.103(a) 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 secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990). Litigation cannot be regarded as "reasonably anticipated" unless the governmental body provides concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 452 (1986), 331 (1982), 328 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision Nos. 452 (1986), 350 (1982). In this case, we find that you have not established that the school district reasonably anticipates litigation. Thus, the school district may not withhold any of the requested documents pursuant to section 552.103(a).

Next, you contend that some of the submitted records constitute 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. The first requirement that must be met to consider information "attorney work product" is that the information must have been 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.

*See National Tank*, 851 S.W.2d at 207. A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204.

The second requirement that must be met is that the work product "consists of or tends to reveal the thought processes of an attorney in the civil litigation process." Open Records Decision No. 647 (1996) at 4. 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. Having reviewed the documents at issue, we conclude that you have not met the two-pronged test for withholding these documents as attorney work product.

You argue that the documents labeled exhibit B are excepted from disclosure under section 552.102. 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.). Accordingly, we will consider your section 552.101 and section 552.102 claims together.

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 Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In *Industrial Foundation*, the Texas Supreme 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. *Id.* at 685. The 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. *Id.* at 683. Having reviewed the information in exhibit B, we find that most of it is not protected by the common-law right to privacy. *See* Open Records Decision Nos. 473 (1987) (public has legitimate interest in job performance of public employees), 470 (1987) (public employee's job performance does not generally constitute his private affairs).

One document in exhibit B does contain information that is protected by the common-law right to privacy. *See* Open Records Decision No. 600 (1992) (common-law privacy right applied to personal financial information). We have marked this document accordingly. The school district must withhold this document from disclosure under section 552.101.

In addition, exhibit B contains an I-9 form. The disclosure of I-9 forms is governed by title 8, section 1324a of the United States Code, which provides that the form "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Thus, the I-9 form in exhibit B is excepted from disclosure under section 552.101 as information made confidential by law and may be released only in compliance with the federal laws and regulations governing the employment verification system.

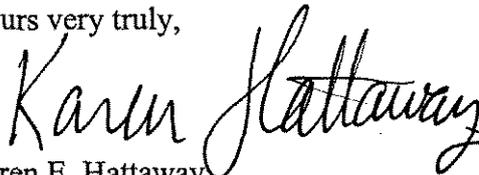
Section 552.117 may also be applicable to some of the information in exhibit B. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 (1989) at 5. Therefore, the school district may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the school district must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. The school district may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential.

We note that social security numbers may also be excepted from required public disclosure under section 552.101 in conjunction with federal law. The 1990 amendments to the federal Social Security Act, § 42 U.S.C. § 405(c)(2)(C)(viii)(I), make a social security number confidential if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994).

Finally, you claim that the documents labeled exhibit C are protected by the attorney-client privilege. Section 552.107(1) protects information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions. Open Records Decision No. 574 (1990) at 5. Section 552.107(1) does not except purely factual information from disclosure. *Id.* For example, section 552.107(1) does not protect information gathered by an attorney as a fact-finder, a factual recounting of events, or the documentation of calls made, meetings attended, and memos sent. *Id.* We have marked the information in exhibit C that is protected by section 552.107(1). The remaining information in these documents must be released to the requestor.

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 any questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway  
Assistant Attorney General  
Open Records Division

KEH/ch

Ref: ID# 115601

Enclosures: Marked documents and tape

cc: Ms. Beth Wallace  
2001 Tuttle Road  
San Antonio, Texas 78209  
(w/o enclosures)