



June 25, 1999

Mr. Jay Youngblood
Henslee, Fowler, Hepworth & Schwartz
Attorneys at Law
1114 NationsBank Building
110 North College Avenue
Tyler, Texas 75702

OR99-1768

Dear Mr. Youngblood:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 125297.

The Chapel Hill Independent School District (the "district"), which you represent, received two open records requests from an attorney representing two district students and their families for all records pertaining to allegations against two former teachers. You have submitted to this office as responsive to the requests two categories of information which, for purposes of this ruling, we will categorize as the teachers' "personnel records" and "investigation records." You contend that the requested records are excepted from required public disclosure pursuant to sections 552.101, 552.102, 552.103, 552.108, and 552.026 and 552.114 of the Government Code.

Because sections 552.103 and 552.108 are the more inclusive exceptions you raise, we will discuss these exceptions first. Section 552.103(a) of the Government Code, known as the litigation exception, excepts from required public 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 the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991) at 1. The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986) and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* In this instance, you have not provided this office with any evidence that the requestor's clients intend to bring suit against the district. We do not believe that the mere fact that an open records request is made by an attorney on behalf his clients is sufficient to invoke the protection of section 552.103. *See* Open Records Decision No. 361 (1983). The district may not withhold any of the requested information under this exception.

Section 552.108 of the Government Code excepts from public disclosure certain information "held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime." You have not demonstrated that any of the requested information meets this criteria. The district may not withhold the information under section 552.108.

Information is excepted from disclosure under section 552.101 of the Government Code, in conjunction with the common-law right to privacy, if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). You also raise section 552.102, which protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The protection of section 552.102 is the same as that of the common-law right to privacy under section 552.101. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Consequently, we will consider these two exceptions together.

This office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), and information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987).

After reviewing the information at issue, we conclude that none of the information at issue implicates the former teachers' privacy interests. The scope of section 552.102(a) protection is very narrow. *See* Open Records Decision No. 336 (1982). *See also* Attorney General

Opinion JM-36 (1983). The information at issue pertains solely to the former teachers' actions as public servants, and as such cannot be deemed to be outside the realm of public interest. *See* Open Records Decision No. 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees). Section 552.102 was not intended to protect the type of information at issue here. To the extent that the students' privacy interests are implicated by this information, the requestor has a special right of access to that information pursuant to section 552.023 of the Government Code. Consequently, the district may not withhold any of the requested information from the requestor pursuant to common-law privacy.¹

Finally, we address whether the district must withhold the "investigation records" pursuant to sections 552.026 of the Government Code. You contend these records constitute "education records" made confidential under the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"). 20 U.S.C. § 1232g.² Section 552.026 of the Government Code provides as follows:

This chapter 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.

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). When a student has attained the age of eighteen years or is attending an institution of postsecondary education, the student holds the rights accorded by Congress to inspect these records. 20 U.S.C. § 1232g(d). "Education records" means those records that contain information directly related to a student and 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).

Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open

¹We note, however, that some of the documents at issue contain the home address and social security number of the former teachers. The district must withhold this information pursuant to section 552.117(1) of the Government Code, but only if the teachers have elected to keep this information confidential in accordance with section 552.024 of the Government Code prior to the district's receipt of the current open records request. *See* Open Records Decision No. 530 (1989).

²Because we resolve your request under the provisions of FERPA, we need not otherwise address your claims under section 552.114 of the Government Code.

Records Decision Nos. 332 (1982), 206 (1978). You have redacted from the records at issue the information that identifies certain students. The district must withhold the redacted information from the requestor unless the district receives permission to release the information from the respective parent of the students or from the students themselves, if qualified to do so as specified above. The remaining requested records, however, must be released at this time.

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.

Sincerely,

A handwritten signature in cursive script that reads "Kay Hastings".

Kay Hastings
Assistant Attorney General
Open Records Division

KH/RWP/eaf

Ref.: ID# 125297

Encl: Submitted documents

cc: Mr. Jimmy Negem
Negem, Bickham & Clark
440 South Vine
Tyler, Texas 75702
(w/o enclosures)