



September 27, 1999

Mr. Aric J. Garza  
Escamilla & Poneck, Inc.  
1200 South Texas Building  
603 Navarro Street  
San Antonio, Texas 78205-1826

OR99-2706

Dear Mr. Garza:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 128203.

The Edgewood Independent School District (the "district") received a request for information relating to an investigation of a teacher's alleged assault on a student. You seek to withhold the requested information under sections 552.101<sup>1</sup>, 552.103, 552.107, 552.108, and 552.111 of the Government Code.

Section 552.103(a) 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.

---

<sup>1</sup>We do not address your section 552.101 claim in detail for the reasons set out in footnote 3, *infra*.

You advise that the student who was allegedly assaulted by the teacher has filed criminal assault charges against the teacher and that the matter is pending in a Bexar County Justice of the Peace Court. In our opinion, this scenario is not a basis for excepting the requested information under section 552.103. The district would not be a party to a criminal prosecution of the teacher, nor, in our opinion, would the teacher be a party "as a consequence of" his employment. None of the information at issue may be withheld under section 552.103.

Section 552.108(a)(1) excepts from required public disclosure

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]

Again, you advise that the requested information relates to a pending criminal prosecution by the Bexar County District Attorney's Office of the teacher who was investigated. You state that the district has released pertinent investigative materials to the district attorney. You contend that release by the district of the requested information would interfere with the pending prosecution. By letter of September 1, 1999, this office requested that you provide, within 7 days, a letter from the Bexar County District Attorney in support of your claim that release of the information at issue would interfere with the pending prosecution. *See* former § 552.303(d) of the Government Code.<sup>2</sup> We have to date received no response to our September 1 letter. Accordingly, we have no basis for finding that release of the information would interfere with the pending prosecution. None of the information may be withheld under section 552.108.

Section 552.107(1) protects 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 Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct." *See* Open Records Decision No. 574 (1990).<sup>3</sup>

---

<sup>2</sup>Section 552.303(d) was amended effective September 1, 1999. The former law, however, applies to your request. *See* Act of May 25, 1999, 76<sup>th</sup> Leg., R.S., S.B. 1951, §§ 22, 36, 37.

<sup>3</sup>Although you raise the attorney-client privilege in the context of section 552.101 of the Government Code, this privilege is more properly deemed to be an aspect of section 552.107(1). *See* Open Records Decision No. 574 (1990). You also contend that some of the information is attorney "work product" excepted under section 552.101 in conjunction with the Texas Rules of Evidence and the Texas Rules of Civil procedure. However, discovery and evidentiary privileges do not apply so as to make information confidential under section 552.101. *See* Open Records Decision Nos. 575(1990), 574 (1990).

In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and confidential attorney-client communications. *Id.* Accordingly, these two classes of information are the only information contained in the records at issue that may be withheld pursuant to the attorney-client privilege. With respect to most of the information for which you claim the attorney client privilege, you have not, in our opinion, shown that the material constitutes either client confidences or attorney advice. We have marked one letter which we have determined you may withhold under section 552.107(1).

Section 552.111 excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. Open Records Decision No. 615 (1993). The purpose of this section is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). In Open Records Decision No. 615 at 5, this office held that

to come within the [section 552.111] exception, information must be related to the *policymaking* functions of the governmental body. An agency's policymaking functions do not encompass routine internal administrative and personnel matters . . . . [Emphasis in original.]

Section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 615 (1993). In our opinion, most of the information for which you claim the protection of section 552.111 consists of factual information which is not within the scope of that exception. The only portions of the information at issue which might fall within the ambit of section 552.111, we have already permitted you to withhold under section 552.107(1). Therefore, no information may be withheld under section 552.111.

We note finally that the submitted information identifies various district students. Section 552.026 of the Government Code provides as follows:

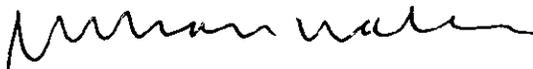
This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

The Family Educational Rights and Privacy Act of 1974 ("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 or permit inspection of 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). The term "education records," however, does not include "records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement." 20 U.S.C. § 1232g(a)(4)(B)(ii). 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 Records Decision Nos. 332 (1982); 206 (1978). Therefore, except for "law enforcement" records, which are not subject to the FERPA requirement, you must, prior to release of the requested information, redact identifying information pertaining to students unless you receive permission to release the information from the parent of the student or from the student himself if qualified to do so as specified above.

Except for the material which is subject to FERPA, and the letter we have permitted you to withhold under section 552.107(1), you must release the requested information. 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,



William Walker  
Assistant Attorney General  
Open Records Division

WMW/ch

Ref: ID# 128203

Encl. Submitted documents

cc: Mr. Michael Latimer  
Harkins, Latimer & Dahl, P.C.  
405 N. St. Mary's Street, Suite 424  
San Antonio, Texas 78205-1722  
(w/o enclosures)