



May 1, 2000

Ms. Jennifer L. Lehmann
Escasmilla & Poneck, Inc.
1200 South Texas Building
603 Navarrow Street
San Antonio, Texas 78205-1826

OR2000-1689

Dear Ms. Lehmann:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 134658.

The San Antonio Independent School District (the "district"), which you represent, received a request for all documentation regarding a grievance against Rhodes Middle School Principal Andrew Rodriguez. You state that the district has released some of the requested information. However, you wish to withhold portions of the requested information from disclosure under sections 552.101, 552.102, 552.103, and 552.131 of the Government Code. Initially, the district also raised sections 552.107 and 552.111 but did not pursue argument of these exceptions in its brief. We have considered the exceptions you claim and reviewed the submitted information.

You state that Exhibit B is the investigator's telephone log of calls made to the teachers created during an investigation regarding teacher evaluations. You further state that this log was compiled in order to make a recommendation to the Superintendent regarding Mr. Rodriguez' future employment and possible disciplinary action. You argue that the information is excepted from disclosure because it "reflects personnel information" about the Rhodes Middle School teachers and Mr. Rodriguez. You raise sections 552.101 and 552.102 of the Government Code, both of which protect from disclosure a person's private information. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App-Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Government Code.

Industrial Found. v. Texas Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Thus, information must be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992).

After reviewing Exhibit B, we find that it does not contain any information that is protected by a right of privacy. The public has a legitimate interest in having access to information concerning the job performance of government employees. Open Records Decision No. 444 (1986); *see also* Open Records Decision No. 329 (1982) (reasons for public employee's demotion, dismissal, or resignation are of legitimate public interest). As the information in Exhibit B concerns a government employee's job performance, there is a legitimate public interest in the information. Accordingly, we find that sections 552.101 and 552.102 do not except from disclosure the information you wish to withhold in Exhibit B.

You next argue that the information is "work product" excepted from disclosure under section 552.101 in conjunction with Rule 192.5 of the Texas Rules of Civil Procedure. 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). Attorney work product is properly claimed under section 552.103 or section 552.111. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the documents at issue were created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) 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 2) the party resisting discovery or release 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. We do not believe that you have established that the information in Exhibit B meets this test. Accordingly, the district may not withhold the information as attorney work product.

You also contend that the information is excepted from disclosure under section 552.103. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which a governmental body is or may be a party. To show that section 552.103(a) is applicable, the district must demonstrate that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *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 at 4 (1990). The district must meet both prongs of this test for information to be excepted under section 552.103(a). This office has held that contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103. Open

Records Decision No. 588 at 7 (1991). Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the district must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You state that, “Based on the above, these statements should be protected as they have been compiled in preparation of anticipated administrative hearings and possible criminal actions.” Further you state that, “The Attorney General has ruled that in certain circumstances a case contested under the Administrative Procedure Act, Chapter 2001 of the Government Code, can constitute litigation.” Lastly, you state that, “. . . there is the potential for administrative hearings initiated by the current principal.” However, after review of your arguments under section 552.103, we do not believe you have furnished evidence that litigation is realistically contemplated and is more than mere conjecture. Therefore, you may not withhold Exhibit B under section 552.103.

Finally, you argue that some of the requested information is protected from disclosure by section 552.131 of the Government Code, which reads in pertinent part:

- (a) “Informer” means a student or former student or an employee or former employee of a school district who has furnished a report of another person’s or persons’ possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.
- (b) An informer’s name or information that would substantially reveal the identity of an informer is excepted from the requirements of Section 552.021.
- (c) Subsection (b) does not apply:
 - (1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student’s or former student’s name; or
 - (2) if the informer is an employee or former employee who consents to disclosure of the employee’s or former employee’s name; or
 - (3) if the informer planned, initiated, or participated in the possible violation.

You explain that the information in Exhibit B deals specifically with alleged violations of criminal law, including tampering with government documents, fraud, forgery and alleged violations of district policy and the Code of Ethics for Professional Educators. You claim that release of the names of Rhodes Middle School teachers in Exhibit B would reveal which teachers participated in the investigation and this would defeat the purpose of section 552.131. Section 552.131 does not protect the identity of persons that merely participate in an investigation. Section 552.131 only provides for the protection of the identity of an informer of a possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority. Additionally, it does not protect the identity of a person who planned, initiated, or participated in the possible violation. Gov't Code § 552.131(c)(3). You indicate that some of the teachers listed in Exhibit B reported the alleged wrongdoings, and some consented to the alleged wrongdoings. However, you do not identify which teachers were merely participants in the investigation, which consented to the wrongdoings or which furnished a report of a person's possible violation of criminal, civil or regulatory law. Consequently, you have not established the applicability of section 552.131 to the information. Therefore, you may not withhold from disclosure any information in Exhibit B based on section 552.131.

However, Exhibit B includes teachers' home telephone numbers. Section 552.117 of the Government Code excepts from disclosure the home addresses, telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who requests that this information be kept confidential in accordance with 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 at 5 (1989). The district must withhold this type of information pursuant to section 552.117 if the respective teacher had elected to keep this information confidential at the time of the district's receipt of the current records request.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

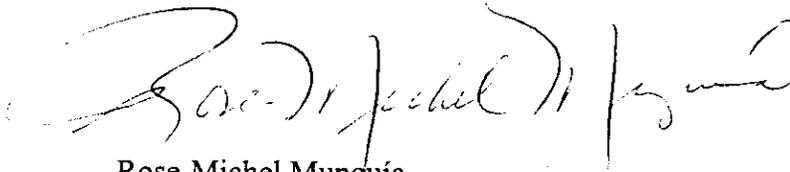
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Rose-Michel Munguía
Assistant Attorney General
Open Records Division

RMM/jc

Ref: ID# 134658

Encl. Submitted documents

cc: Mr. Bob Comeaux
American Federation of Teachers
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(w/o enclosures)