



May 25, 2000

Ms. Jennifer Lehmann  
Escamilla & Poneck  
1200 South Texas building  
603 Navarro Street  
San Antonio, Texas 78205-1826

OR2000-2065

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# 135610.

The San Antonio Independent School District (the "district"), which you represent, received a request for employment records of a former district employee. You claim that the requested information is exempted from disclosure under sections 552.101, 552.102, 552.108, 552.111, and 552.114 of the Government Code, or by section 1232g of title 20 of the United States Code, the Family Educational Rights and Privacy Act of 1974 ("FERPA"). You have submitted responsive information, identified as exhibits "B-1, B-2A, B-2A and B-2B, B-2B, B-2C, B-2D, B-2E, B-2F, B-3," to this office for review. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 exempts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses the common law right to privacy. Section 552.102 of the Government Code 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 Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Information may be withheld from the public under the common law right of privacy 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. *Industrial Found. v. Texas Industrial Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision No. 611 at 1 (1992). Records of criminal investigations regarding sexual abuse of children are generally exempted by common law privacy. Open Records Decision No. 440 (1986). However, here we note that all student

identities, including the identities of the purported victims, have been redacted from the submitted materials. We conclude that the common law privacy rights of these children are not implicated by the release of the submitted information. *See Star Telegram v. Doe*, 915 S.W.2d 471 (Tex. 1995). Further, the common law right of privacy does not protect facts about a public employee's misconduct on the job or complaints made about his performance. *See Open Records Decision Nos. 438 (1986), 219 (1978), 230 (1979)*. Nor are the reasons for an employee's resignation ordinarily excepted from disclosure by constitutional or common law privacy. *Open Records Decision No. 329 (1982)*. The submitted materials concern allegations of job related misconduct by a public school teacher and that teacher's subsequent resignation. We conclude that none of the submitted information is excepted from disclosure by section 552.101 or 552.102 of the Government Code.

Section 552.108 of the Government Code excepts from public disclosure information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime. You assert that the materials in exhibit B-1 were created by an officer of the San Antonio Police department and that these materials are excepted from disclosure by 552.108(a)(2) and 552.108(b)(2). These two subsections except from public disclosure information from investigations or prosecutions that had a final result other than conviction or deferred adjudication. We construe your position to be that the underlying investigation has closed and that the case either was not prosecuted or that the prosecution did not result in conviction or deferred adjudication. Note that basic information is not excepted from disclosure by section 552.108. Gov't Code 552.108(c). However, we conclude that the information in exhibit B-1 is not "basic" and therefore this information may be withheld under section 552.108.

You contend that the materials submitted as exhibit B-2C are excepted from disclosure by section 552.111 of the Government Code. This section excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In *Open Records Decision No. 615 (1993)*, this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions do not encompass internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *City of Garland v. Dallas Morning News*, 43 Tex. Sup. Ct. J. 303 (Jan.13, 2000) (personnel communications not relating to agency's policymaking not excepted from public disclosure pursuant to section 552.111); *Lett v. Klein Indep. Sch. Dist.*, 917 S.W.2d 455 (Tex. App.-Houston [14<sup>th</sup> Dist.] 1996); *Open Records Decision No. 613 (1993)*. In this case, the materials submitted as exhibit B-2C consist solely of communications relating to a specific personnel matter, and thus are not excepted under section 552.111 of the Government Code.

We also note that your comments include references to Texas Rules of Civil Procedure. We construe those comments as asserting an attorney work product exception for exhibits B2-A, B2-B, B2-D and B2-F. To withhold attorney work product from disclosure under section 552.111 a governmental body must demonstrate that the material was created for trial or in anticipation of civil litigation. Open Records Decision No. 647 (1996). You have not provided any comment that establishes that these materials were create for trial or in anticipation of litigation. Therefore, the materials are not protected as attorney work product. We conclude that you have not demonstrated that any of the submitted materials may be withheld under section 552.111 of the Government Code.

You also contend that information is excepted by section 552.114 and FERPA. Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. 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). "Education records" means those records that contain information directly related to a student that are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990). Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." See Open Records Decision Nos. 332 (1982), 206 (1978). As previously noted, the identities of students have been redacted from the submitted information. We therefore conclude that most of the submitted information is not subject to FERPA withholding requirements and is not excepted from disclosure by section 552.114 of the Government Code. However, the materials in exhibits B2-A and B2-D include some notes, which may be in the handwriting of one or more students. Since this type of information would tend to identify the student who wrote those notes, we conclude that, in the event that the notes were written by a student, the notes must be withheld under FERPA and section 552.114 of the Government Code.

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

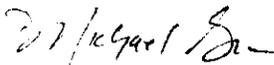
full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit 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,



Michael Jay Burns  
Assistant Attorney General  
Open Records Division

MJB/nc

Ref: ID# 135610

Encl Submitted documents

cc: Ms. Mary Anne Biggs  
Rappahannock County Public Schools  
6 Schoolhouse Road  
Washington, Virginia 22747  
(w/o enclosures)