



THE ATTORNEY GENERAL  
OF TEXAS

JIM MATTOX  
ATTORNEY GENERAL

March 21, 1989

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Mr. Webb:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 5538; this decision is OR89-95.

Under the Open Records Act, all information held by governmental bodies is open unless the information falls within one of the act's specific exceptions to disclosure. The act places on the custodian of records the burden of proving that records are excepted from public disclosure. If a governmental body fails to claim an exception, the exception is ordinarily waived unless the information is deemed confidential under the act. See Attorney General Opinion JM-672 (1987). The act does not require this office to raise and consider exceptions that you have not raised.

The College Station Independent School District received an open records request for the personnel records of a former teacher. You state that the district intends to release portions of the personnel file, but you contend that subsections 3(a)(1), 3(a)(2), and 3(a)(11) of the Open Records Act protect the remaining documents from required public disclosure. You also contend that section 14(e) of the act proscribes the release of "educational records."

Section 14(e), in conjunction with section 3(a)(14) of the act, protects student records at educational institutions funded wholly, or in part, by state revenue. "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

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for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A). The Family Educational Rights and Privacy Act of 1974, which is informally known as "the Buckley Amendment," provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases education records other than directory information without the written consent of the parents to anyone but certain numerated federal, state, and local officials and institutions. See 20 U.S.C. § 1232g, subsections (a)(1)(A), (a)(2), (b)(1).

For purposes of the Buckley amendment, many of the documents submitted to this office constitute "education records" to the extent that they contain information about identifiable students. You may withhold Document Nos. 2, 3, 11, 12, and 13 in their entirety, and those portions of Document Nos. 4, 8, 9, and 10 that we have marked as being protected by section 3(a)(14).

Section 3(a)(11) of the act excepts inter-agency 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 deliberative process. Open Records Decision No. 464 (1987). 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.).

Section 3(a)(11) does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 450 (1986). If, however, the factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make separation of the factual data impractical, that information may be withheld. Open Records Decision No. 313 (1982).

You may withhold those portions of Document Nos. 1, 4, and 7 that we have marked as being protected by section 3(a)(11).

Section 3(a)(2) protects "information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The test for

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section 3(a)(2) protection is the same as that for information protected by common-law privacy under section 3(a)(1). Section 3(a)(1) protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision," including the common-law right to privacy. Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976), cert. denied 430 U.S. 930 (1977).

Texas courts recognize four categories of common-law privacy: 1) appropriation, 2) intrusion, 3) public disclosure of private facts, and 4) false light in the public eye. In the context of open records questions, the last two of these arise most frequently. The Texas Supreme Court in Industrial Found. of the South v. Texas Indus. Accident Bd., supra, set forth the primary test for "the public disclosure of private facts" privacy protection applicable under section 3(a)(1). Information may be withheld under this category of privacy only if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. See 540 S.W.2d at 683-85. The information at issue here concerns a teacher's actions while performing his educational duties; it cannot be said that the information relates to the teacher's "private" affairs. This category of privacy does not, therefore, pertain to the information you seek to withhold.

A governmental body must withhold information under section 3(a)(1) on the basis of "false light" privacy only if it finds that release of the information would be highly offensive to a reasonable person, that public interest in disclosure is minimal, and that serious doubt exists about the truth of the information. Open Records Decision No. 438 (1986) (copy enclosed). You have not expressed whether the school district has "serious doubt" about the allegations made against the teacher. Based on the evidence submitted to this office, we cannot hold that the requirements for false light privacy protection have been met. Unless you submit to this office within ten days of receipt of this letter additional information indicating that such doubt exists, you must release Document Nos. 5 and 6 in their entirety and all portions of the remaining documents not protected by subsections 3(a)(11) and 3(a)(14).

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Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR89-95.

Yours very truly,

*Open Government Section* *SR*  
*of the Opinion Committee*

Open Government Section  
of the Opinion Committee  
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SLG/RWP/bc

Enclosures: Marked documents  
ORD 438

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