

THE ATTORNEY GENERAL  
OF TEXAS

JIM MATTON  
ATTORNEY GENERAL

October 25, 1990

Ms. Merri Schneider-Vogel  
Bracewell & Patterson  
Attorney for Sheldon I.S.D.  
2900 South Tower Pennzoil Place  
Houston, Texas 77002-2781

OR90-516

Dear Ms. Schneider-Vogel:

You ask whether certain information maintained by the Sheldon Independent School District is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 9691.

We have considered the exceptions you claimed, and have reviewed the documents at issue. The documents at issue are identified in your request for an open records decision as exhibits B through F.

Exhibit B consists of unused affidavits prepared for the school district by its legal counsel. You assert that these affidavits are protected from public disclosure by the attorney client privilege as incorporated into the Open Records Act by section 3(a)(1). You further assert that this material is within the protection of Rule 166b(3)(a) of the Texas Rules of Civil Procedure and Rule 503 of the Texas Rules of Civil Evidence. A previous determination of this office, Open Records Decision No. 462 (1987), a copy of which is enclosed, resolves your request. The affidavits do not reveal any confidential communication between attorney and client, and, accordingly are not within the attorney-client privilege. Moreover, discovery and evidentiary privileges relating to litigation are not relevant. Section 3(a)(3) of the Open Records Act serves to protect the litigation interests of governmental bodies. However, you have not asserted that litigation is either pending or reasonably anticipated with respect to the subject matter of the requested information. (See also, Open Records Decision No. 551 (1990).

Exhibit C consists of the statement of an individual. You assert that Exhibit C is excepted from public disclosure by Rule 166b(3)(c) of the Rules of Civil Procedure. As noted above this privilege is relevant only to litigation.

Exhibit D consists of letters from attorneys retained by the school district. These letters are essentially

communications with respect to matters with respect to which legal advice had been sought by the school district. Included in Exhibit D is a billing statement which is sufficiently detailed to reveal matters with respect to which legal advice had been sought. Accordingly, Exhibit D may be withheld under the attorney-client privilege. However, the amount billed may not be withheld. Open Records Decisions Nos. 399 (1983), 304 (1982); V.T.C.S., art. 6252-17a, § 6(3).

Exhibit E consists of letters from an attorney retained by the school district to potential witnesses with regard to an investigation conducted on behalf of the school district. You assert that this material is excepted from public disclosure by Rule 166b(3)(a) of the Rules of Civil Procedure. As noted above this privilege is only applicable to litigation. You further assert that Exhibit E is excepted by section 3(a)(3); however there has been no showing that litigation is pending or reasonably anticipated with regard to this matter. Accordingly, section 3(a)(3) is inapplicable. See Open Records Decision No. 551 (1990).

Exhibit F is a report submitted to the school district by an attorney retained by the school district. You assert that Exhibit F is excepted from public disclosure under sections 3(a)(1) (attorney-client privilege and attorney work product), and 3(a)(11). The assertion of attorney work product has been discussed above and it is inapplicable. With respect to attorney-client privilege, a previous determination of this office, Open Records Decision No. 462, at 11, resolves your request. In conducting the investigation, the attorney was acting as an investigator rather than as an attorney. Accordingly, the asserted exception is inapplicable.

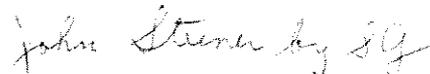
Section 3(a)(11) excepts from public disclosure advice, opinion, or recommendation used in the deliberative process within an agency or between agencies. Open Records Decision No. 470 (1987). Exhibit F is largely a factual recitation of the investigation conducted by the attorney and is not excepted by § 3(a)(11). However, the section entitled Conclusions and Observations consists of the opinion and recommendations of the investigator and may be withheld under section 3(a)(11).

Finally, you do not assert the Family Rights and Privacy Act (FERPA), 20 U.S.C. section 1232g. However, section 14(e) of the Open Records Act provides that nothing in the act shall be construed to require the release of information in education records except in conformity with FERPA. FERPA and the regulations adopted thereunder, 34 C.F.R. part 99, make confidential "information directly related to a student" and "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). In this context, "disclosure" means "to permit access to or the release, transfer, or other communication of education records or the personally identifiable information contained in those records, to any party, by any means . . . ." 34 C.F.R. § 99.3. Personally identifiable references to at least three students occur in the materials submitted for our inspection. There may be more references which we were unable to identify as we do not know the names of students in attendance in the school district. Likewise, we are not in a position to determine what information would make a record "personally identifiable" with respect to a student. However, FERPA prohibits the release of such information. Though we find your asserted exceptions inapplicable with respect to Exhibits B, C, E, and part of exhibit F, you may not release information made confidential by FERPA. For guidance on the application of FERPA, you may wish to contact the Family Policy and Regulation Office, Department of Education, at (202) 401-2057.

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 OR90-516.

Yours very truly,



John Steiner  
Assistant Attorney General  
Opinion Committee

JS/le

Ref.: ID# 9691

Enclosure: Open Records Decision No. 462  
Submitted Documents

cc: James O. Pullen  
12815 Lakeside Terrace  
Houston, Texas 77044