



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 27, 1992

Mr. Cobby A. Caputo
Attorney for Round Rock ISD
Walsh, Judge, Anderson, Underwood
& Schulze, P.C.
811 Barton Springs Road, Suite 500
Austin, Texas 78704

OR92-39

Dear Mr. Caputo:

You previously asked this office for clarification and reconsideration of a prior open records ruling, OR90-552 (1990), to the Round Rock Independent School District (the district) that concerned whether the district is required to release to one of its teachers certain information contained in her administrative files. You have also asked in other correspondence, assigned ID# 12369, whether other information sought by the same teacher in a subsequent open records request must be disclosed to her under the Texas Open Records Act, article 6252-17a, V.T.C.S., or the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (FERPA). In the later open records request, the teacher has asked for the following information:

- 1) All written communications between administrators in the district concerning the teacher;
- 2) All written parental complaints and compliments concerning the teacher; and
- 3) All audio tapes recorded by a named district administrator concerning the teacher.

You contend that all of the information at issue comes under the protection of sections 3(a)(7), 3(a)(11), 3(a)(14), and 14(e) of the Open Records Act. This office hereby modifies OR90-552 and overrules it with this open records ruling to the extent of conflict.

In OR90-552, this office determined that most of the records at issue in that ruling consisted of "education records," as defined by FERPA. *See* 20 U.S.C. § 1232g(a)(4)(A). The ruling recognized that "[t]eachers 'who have been determined . . . to have legitimate educational interests' are permitted to view such records." *See id.* subsection (b)(1)(A). Federal regulations governing the release of education records, however, provide

(a) An educational agency or institution *may* disclose personally identifiable information from an education record of a student without the consent [of the student or the student's parent] if the disclosure meets one or more of the following conditions:

(1) The disclosure is to other school officials, including *teachers*, within the agency or institution *whom the agency or institution has determined to have legitimate educational interests*.

....

(b) This section does not forbid or require an educational agency or institution to disclose personally identifiable information from the education records of a student to any parties under paragraph[] (a)(1) . . . of this section.

34 C.F.R. § 99.31 (emphasis added).

Thus, it is for the district to decide whether the teacher/requestor has a "legitimate educational interest" in access to the student records at issue. Moreover, the above quoted language indicates that the district is permitted but not required to disclose the student records to a requesting teacher who is seeking the records for a "legitimate educational interest." If the district has already established a policy or promulgated a regulation on this matter, its action in this case must be consistent with the policy or regulation. After reviewing the documents at issue, this office has

determined that Exhibits 87, 91, 94, and 95, as well as portions of Exhibit 89, which were among the documents addressed in OR90-552, and all of Exhibit A, portions of Exhibit B, and all audio tape recordings of interviews with students pertaining to the subsequent request are education records; we have marked the information that the district may withhold.¹ If you wish additional guidance on the application of FERPA, you should contact the Family Policy and Regulations Office directly.

You also claim the protection of section 3(a)(7) because

some of these documents ... were created by District Administrators at the request of and for the use of the District's attorney who is investigating and handling the two grievances filed by the teacher/requestor. Documents created by an individual for the use of their attorney in rendering professional legal services are protected by the attorney-client privilege, if the documents are meant to aid the attorney in the rendition of the professional legal services, and are intended to remain confidential.

In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's written advice and privileged communications between an attorney and his client. Open Records Decision No. 574 (1990). Consequently, the privilege will protect only those communications between the district's attorney and employees; communications between district employees and third parties fall outside the ambit of the privilege. See Tex. R. Civ. Evid. 503(b). Communications between district employees and the teacher who has filed the grievances are not within the attorney-client privilege, since she is the party who is adverse to the client school district. Accordingly, the district may withhold only Exhibits 92 and 98 from OR90-552 pursuant to section 3(a)(7).

Section 3(a)(11) of the act 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 deliberative process. Open Records Decision No. 538 (1990). In Open Records Decision No. 429 (1985) at 5, this office indicated that information protected by section 3(a)(11) must be prepared by a person or entity

¹This office assumes that none of the students' parents have given written consent to the release of their child's education records. See 20 U.S.C. § 1232g(b)(1).

with an official reason or duty to provide the information in question. *See also* Open Records Decision Nos. 283, 273 (1981). This helps assure that the information plays a role in the deliberative process; if it does not, it is not entitled to protection under section 3(a)(11). Open Records Decision No. 464 (1987). In this regard, section 3(a)(11) protects opinions of individuals not employed by the district only if the district has sought out their opinions. *See generally* Open Records Decision No. 466 (1987).

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). We have marked those portions of Exhibits 88 and 90 from OR90-552 and Exhibit B from the subsequent request that you may withhold pursuant to section 3(a)(11). The district must release all remaining information.

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 OR92-39.

Yours very truly,



Susan Garrison
Assistant Attorney General
Opinion Committee

SG/RWP/lcd

Ref.: ID# 12369
ID# 12533
ID# 11389
ID# 11172
OR90-552

Mr. Cobby A. Caputo - Page 5 (OR92-39)

Enclosures: Marked documents
Tape recordings

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