



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

July 25, 1994

Ms. Myra C. Schexnayder  
Assistant School Attorney  
Houston Independent School District  
3830 Richmond Avenue  
Houston, Texas 77027-5838

OR94-394

Dear Ms. Schexnayder:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 26270.

The Houston Independent School District ("HISD") has received a request for five categories of documents relating to an incident between a teacher and a student. It has released information relating to the first three categories, but believes that some of the documents requested in the fourth and fifth categories are excepted from required public disclosure under sections 552.101, 552.102, 552.111 and 552.114 of the act. We address these exceptions in the order you raise them.

Section 552.114 excepts from required public disclosure student records of educational institutions funded by state revenue. In addition, section 552.026 of the act incorporates the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, into the act. FERPA prohibits an educational institution that receives federal revenue from releasing "education records" without written consent. 20 U.S.C. § 1232g(b)(1). "Education records" are defined as records that contain information directly related to a student and that are maintained by an educational institution. *Id.* § 1232g(a)(4)(A). Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision No. 332 (1982); 206 (1978). This office generally applies the same analysis under section 552.114. Open Records Decision No. 539 (1990).

A number of the records you have submitted for our review contain the names of students and their parents. This information is confidential under FERPA and section 552.114 and must be redacted, along with any other information that would identify particular students. The remainder of the documents, however, are not confidential and must be released. We have marked the names of students and parents for your convenience. We further note that you have submitted two handwritten documents that appear to be notes written by classroom observers. Although most of the notes relate solely to teaching techniques, some contain student names or other information that would reveal the identities of particular students. Given that our copies of these documents are illegible, we have not redacted student names and other identifying information from these records. HISD must do so before releasing these records.

Next, you assert that some of the records are excepted from required public disclosure under section 552.111. Section 552.111 excepts "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In a recent opinion that reexamined the section 552.111 exception as a result of *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), this office concluded that section 552.111 excepts from public disclosure only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body at issue. Open Records Decision No. 615 (1993) at 5. The policymaking functions of an agency, however, do not encompass routine internal administrative and personnel matters. *Id.* Furthermore, section 552.111 does not except purely factual information from disclosure. *Id.* We have reviewed the information submitted by HISD. The information you have marked as protected by section 552.111 is generally factual. Moreover, it deals with routine administrative and personnel matters, and does not reflect the policymaking processes of HISD. Therefore, we conclude that this information may not be excepted from required public disclosure under section 552.111.

HISD argues that because these documents were prepared prior to Open Records Decision No. 615 and the *Gilbreath* decision, those rulings are not controlling. You cite no authority for this proposition. It is well-settled that a party requesting records under the act has no vested right in the availability of records and that a newly adopted exception to the Open Records Act applies to records as of its effective date, even if there is a pending request for the records. See *Houston Indep. Sch. Dist. v. Houston Chronicle*

*Publishing Co.*, 798 S.W.2d 580 (Tex. App.--Houston [1st Dist.] 1990, writ denied).<sup>1</sup> We believe it is equally true that a governmental body has no vested right in the unavailability of records under the act and that a judicial opinion reinterpreting an exception applies to records generated prior to its issuance.

Finally, you contend that certain medical information about the teacher at issue is confidential under section 552.101, which excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." For information to be protected from public disclosure under the common-law right of privacy as incorporated into the act by section 552.101, the information must meet the criteria set out by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court stated that

information . . . is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing former V.T.C.S. article 6252-17a, section 3(a)(1)). The court considered the following kinds of information to be highly intimate or embarrassing: information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. Two documents in the teacher's file reveal highly intimate and embarrassing medical information about her. We do not believe that there is a legitimate public interest in this information. We therefore conclude that this information, which we have marked for your convenience, must be withheld.

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<sup>1</sup>In *Houston Independent School District v. Houston Chronicle Publishing Co.*, 798 S.W.2d 580 (Tex. App.--Houston [1st Dist.] 1990, writ denied), the court applied a newly enacted exception to the Open Records Act to the records sought in the mandamus action before it. The trial court held that the Houston Chronicle Publishing Company was entitled to have access to college transcripts of school district administrators, but the appellate court reversed, concluding that the school district could withhold the transcripts pursuant to an exception adopted after the district court issued its order. *Houston Indep. Sch. Dist.*, 798 S.W.2d at 583-84; *see* Gov't Code § 552.102. The appellate court concluded that the Houston Chronicle Publishing Company had not yet obtained a vested right in the transcripts, and, consequently, that they were excepted from disclosure under the new amendment. 798 S.W.2d at 589-90. In Open Records Decision No. 600 (1992), this office followed the rationale of the *Houston Independent School District* case and concluded that an amendment to former section 3(a)(17) of the Open Records Act, now section 552.117 of the Government Code, applied to records that had already been requested under the act.

With the exceptions noted above, the request information must be released in its entirety. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in cursive script that reads "Mary R. Crouter".

Mary R. Crouter  
Assistant Attorney General  
Open Government Section

MRC/LRD/rho

Ref: ID# 26270

Enclosures: Marked documents

cc: Ms. Susan A. Allinger  
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(w/o enclosures)