



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 31, 1995

Ms. Robin Collins
Rodriguez, Lewis & Collins
1220 Montana Avenue
El Paso, Texas 79902

OR95-741

Dear Ms. Collins:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 31577.

The Ysleta Independent School District (the "school district"), which you represent, has received two requests for information relating to two suspended school teachers, Gilbert De La Rosa and Dan Zapata, Jr. In addition to "[t]he YISD policies and/or regulations under which Mr. De La Rosa is being suspended," the first requestor seeks:

1. The complaint(s) which led to the suspension and investigation;
2. The principal's recommendation regarding his investigation;
3. Any statements regarding the alleged misconduct;
4. Any other documents contained in Mr. De La Rosa's personnel file pursuant to this investigation.

The second requestor seeks "all employment material concerning Mr. Dan Zapata, Jr., to include all items relevant to his suspension from his teaching duties at Ysleta High School on 2 February 1995." You advise us that the school district has made some of the requested information available to the requestors. You seek, however, to withhold the remaining information from required public disclosure and claim that sections 552.026, 552.103, 552.107, and 552.114 of the Government Code except it from required public disclosure.

Section 552.026 of the Government Code incorporates the requirements of the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, into the Open Records Act. Open Records Decision No. 431 (1985) at 2-3. FERPA provides as follows:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of their parents to any individual, agency, or organization

20 U.S.C. § 1232g(b)(1). "Education records" are records that

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

Id. § 1232g(a)(4)(A).¹ 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. 206 (1978) at 2. Releasing a student's handwritten comments, even if unsigned, is prohibited under FERPA because it would make the student's identity easily traceable. Open Records Decision No. 224 (1979).

We have examined the information submitted to us for review. It includes the handwritten statements, in Spanish, of particular students and typewritten copies of the same statements, in both English and Spanish. The handwritten statements may be released only as FERPA permits. In addition, we have marked the typewritten copies to indicate the information that the school district may release only in accordance with FERPA.

You also claim that section 552.103(a) excepts the submitted information from required public disclosure. For information to be excepted from public disclosure by section 552.103(a), litigation must be pending or reasonably anticipated and the information must relate to that litigation. Open Records Decision No. 551 (1990) at 5. A surmise that litigation will occur is not enough; there must be some concrete evidence pointing to litigation. Attorney General Opinion JM-266 (1984) at 4; Open Records Decision No. 518 (1989) at 5.

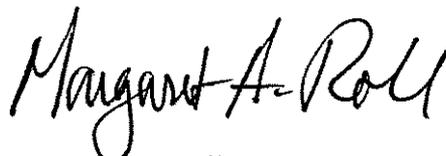
¹The phrase "student record" in section 552.114 has generally been construed to be the equivalent of "education records" in FERPA. Thus, our resolution of the availability of this information under FERPA in this instance also resolves the applicability of section 552.114 to the requested information. See generally Attorney General Opinion H-447 (1974); Open Records Decision Nos. 524 (1989), 477 (1987).

You do not explain why section 552.103(a) applies in this instance. We remind you that you are responsible for submitting in writing the reasons you believe the requested information is excepted from disclosure. Under the Open Records Act, all information held by governmental bodies is open to the public unless it is within a specific exception to disclosure. The custodian of records has the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974) at 3. If a governmental body does not claim an exception or fails to show how it applies to the records, it will ordinarily waive the exception unless the information is deemed confidential by law. Open Records Decision No. 542 (1990) at 2. You have provided us with no information indicating why section 552.103(a) applies in this instance. We conclude, therefore, that the school district may not withhold the any of the submitted information under section 552.103(a) of the Government Code.

Finally, you assert that section 552.107 excepts the submitted information from required public disclosure. Section 552.107 excepts information from disclosure if "it is information that . . . an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas." Section 552.107(1) protects information that reveals client confidences to an attorney, including facts and requests for legal advice, or that reveals the attorney's legal advice. Open Records Decision No. 574 (1990). We have examined the information submitted to us for review and conclude that no portion of it falls within the attorney-client privilege. Accordingly, the school district may not withhold the submitted information under section 552.107(1) of the Government Code. Except as marked, the submitted information must be released in its entirety.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Margaret A. Roll
Assistant Attorney General
Open Government Section

MAR/GCK/rho

Ref.: ID# 31577

Enclosures: Submitted documents

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