



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 5, 1997

Ms. Amy Flinn Metcalf  
Bickerstaff, Heath, Smiley,  
Pollan, Kever & McDaniel, L.L.P.  
1700 Frost Bank Plaza  
816 Congress Avenue  
Austin, Texas 78701-2443

OR97-2645

Dear Ms. Metcalf:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 110883.

The Austin Independent School District (the "district"), which you represent, received a request for thirteen categories of information concerning an incident that occurred at the Alternative Learning Center on December 12, 1995. Some of the requested information was the subject of two earlier requests which this office ruled upon in Open Records Letter No. 96-2293 (1996). You inform us that

"[b]ecause portions of [the requestor's] current request do not differ from previous requests he has made regarding the underlying incident, we believe some of the requested documents which have previously been excepted from disclosure continue to be privileged without the necessity of requesting an additional attorney general opinion. Tex. Gov't Code § 552.301. To that end, the witness statements requested are withheld pursuant to Tex Gov't Code § 552.108. In addition, certain documents requested are withheld in their entirety as student records under Family Education and Privacy Act of 1974 ("FERPA"). The District may withhold documents pursuant to FERPA without first requesting an opinion from the Attorney General. Op. Tex. Atty. Gen. ORD-634 (1995).

You seek a decision from this office only as to the information that has not previously been requested. We have reviewed your assertions and the information you now seek to withhold in Exhibit 3, the Discipline Plan, which is responsive to the present request.

Because you state that you are only seeking an opinion on those documents which have not previously been requested, we will not rule on the first three categories of the request as they were the subject of the earlier two requests. As for request items 4-10, 12,

and 13, you state that no responsive records exist. The Texas Open Records Act applies only to information in existence at the time a governmental body receives a request for the information. Open Records Decision Nos. 452 (1986), 342 (1982). The Act does not require a governmental body to create or prepare new information. Open Records Decision Nos. 572 (1990), 342 (1982).

You submit the Discipline Plan as responsive to request item 11. You have not raised an exception to disclosure for this document; thus, the document is presumed to be public information. See Gov't Code §§ 552.301(b), 552.303(e). Information that is presumed public must be released unless a governmental body demonstrates a compelling interest to withhold the information to overcome this presumption. See *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). As you have not shown such a compelling interest, this information is presumed to be public and should be released.

Lastly, you state that you are not asking for a decision on the requested witness statements because you are relying on Open Records Letter No. 96-2293 (1996). Open Records Letter No. 96-2293 (1996) was decided under *Holmes v. Morales*, 924 S.W.2d 920 (Tex. 1996), and former section 552.108, which is no longer in effect. We note that, effective September 1, 1997, the Seventy-fifth Legislature amended section 552.108 of the Government Code to except from required public disclosure

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state [and]

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) the internal record or notation:

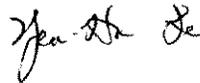
(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(c) This section does not except from [public disclosure] information that is basic information about an arrested person, an arrest, or a crime.

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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/rho

Ref.: ID# 110883

Enclosures: Submitted documents

cc: Mr. Eugene Watson  
100 Norwood Loop  
Dripping Springs, Texas 78620  
(w/o enclosures)