



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 19, 1998

Mr. Mike Atkins
Attorney at Law
4001 East 42nd
Suite 200
Odessa, Texas 79762

OR98-2764

Dear Mr. Atkins:

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# 119812.

The Ector County Independent School District (the "district"), which you represent, received a request for information concerning an individual whom the requestor is representing. Gov't Code §§ 552.229, .307. You assert that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted documents.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You have submitted two documents from the individual's references which you claim are confidential teacher evaluations. Section 21.355 of the Education Code provides, "Any document evaluating the performance of a teacher or administrator is confidential." This office has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, this office also concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* Based on the reasoning set out in Open Records Decision No. 643 (1996), we conclude that the submitted evaluations are confidential under section 21.355 of the Education Code.

Next, you assert that the interview sheet and notes are excepted from disclosure by sections 552.101 and 552.102. Sections 552.101 and 552.102 except from disclosure information protected by constitutional or common-law privacy and excepts from disclosure private facts about an individual. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). After reviewing the submitted materials, we do not believe that the interview sheet and notes are protected by a common-law or constitutional right to privacy. Additionally, section 552.023 provides an individual with a limited special right of access to information about that individual and prevents a governmental body from asserting an individual's own privacy as a reason for withholding records from that individual. *See Open Records Decision No. 481* (1987) (determining that common-law privacy does not provide basis for withholding information from its subject). Thus, you may not withhold the information based on privacy.

You also claim that the interview sheet and notes are excepted from disclosure under section 552.111. Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In *Open Records Decision No. 615* (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, generally do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *Open Records Decision No. 615* at 5-6 (1993). In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. After reviewing the submitted information, we find that the documents relate solely to personnel matters and may not be withheld under this exception.

Finally, we will consider your section 552.103 claim. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The district has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); *Open Records Decision No. 551* at 4 (1990). The district must meet both prongs of this test for information to be excepted under section 552.103(a).

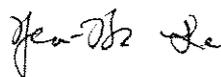
To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Open Records Decision No. 452* at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for

example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.¹ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Nor does the fact that an individual hires an attorney who makes a request for information establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983). Litigation is not reasonably anticipated when an individual who was rejected for employment hires an attorney to investigate the circumstances of the rejection. *Id.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You contend that litigation is reasonably anticipated because the individual who is the subject of the information, was not hired for employment. The individual has contacted the Texas State Teachers Association which is gathering the information in order to investigate the case. We have considered your arguments and conclude that you have failed to make the requisite showing that litigation is reasonably anticipated and, therefore, you may not withhold the interview sheet and notes under section 552.103.

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/nc

Ref.: ID# 119812

¹In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

Enclosures: Submitted documents

cc: Mr. Jeffrey Hardaway
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(w/o enclosures)