



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 3, 1998

Ms. Elena M. Gallegos  
Attorney at Law  
P.O. Box 2156  
Austin, Texas 78768

OR98-2928

Dear Ms. Gallegos:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 120177.

The Connally Independent School District (the "district"), which you represent, received a request for information regarding the requestor's child. You inform us that you have released all of the child's education records to the requestor. You contend that the remaining requested information is excepted from disclosure pursuant to sections 552.101 and 552.107 of the Government Code and as attorney work product.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 261.201(a) of the Family Code provides:

The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect [of a child] made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Exhibit B, the report of suspected abuse which you submitted to the Department of Protective and Regulatory Services (the "department"), resulted from an investigation of alleged abuse of a child. Accordingly, the information submitted as Exhibit B is made confidential by section 261.201 of the Family Code and must be withheld from disclosure under section 552.101 of the Government Code. *See* Open Records Decision No. 440 (1986) (applying former Fam. Code § 34.08).<sup>1</sup> To the extent that the documents submitted as Exhibits C and D were used by the department in its chapter 261 investigation, Exhibits C and D are confidential under section 261.201 as files, reports, records, communications, and working papers used or developed in an investigation under chapter 261.

However, in the event that Exhibits C and D were not used by the department in its chapter 261 investigation, we will address the applicability of sections 552.102 and 552.107 of the Government Code to the information in Exhibits C and D. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* We conclude that you may withhold the information in Exhibits C and D that we have marked from public disclosure under section 552.107. You also assert that section 552.107 excepts Exhibit F from public disclosure. We conclude that Exhibit F is not information excepted from public disclosure under section 552.107.

Next, we will consider whether the remaining information in Exhibits C and D is information excepted by privacy under section 552.102. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the act.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." For information to be

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<sup>1</sup>We note, however, that if the Texas Department of Regulatory Services has created a file on this alleged abuse, the child's parent(s) may have the statutory right to review that file. *See* Fam. Code § 261.201(f).

protected from public disclosure under the common-law right of privacy, the information must meet the criteria set out in *Industrial Found. v. Texas Industrial Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The 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 at 4 (1976) (construing statutory predecessor to Gov't Code § 552.101). We conclude that the remaining information in Exhibits C and D is not excepted by common-law privacy under sections 552.101 and 552.102.

Furthermore, you assert that Exhibit F, a consultant's report, is attorney work product that is excepted from public disclosure. We will also consider whether the remaining information in Exhibit D constitutes attorney work product. A governmental body may withhold attorney work product from disclosure if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the documents at issue were created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *Id.* at 4. The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions and legal theories.

We have reviewed your arguments and the documents and conclude that the documents in Exhibit F were created in anticipation of litigation. However, you have not shown how the information reflects the attorney's mental processes, conclusions and legal theories. Thus, you may not withhold Exhibit F as attorney work product. As for the remaining information in Exhibit D, you have not shown that the information was created in anticipation of litigation. Hence, you may not withhold the remaining information in Exhibit D as attorney work product.

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 regarding any other records. If you have any questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Yen-Ha Le". The signature is written in a cursive, slightly slanted style.

Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/nc

Ref: ID# 120177

Enclosure: Marked documents