



February 24, 1999

Ms. Mia M. Martin
Thompson & Knight
1700 Pacific Avenue, Suite 3300
Dallas, Texas 75201-4693

OR99-0534

Dear Ms. Martin:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 122506.

The Richardson Independent School District (the “district”) received a request for information related to complaints involving “Spring Valley Elementary School and/or Nancy Callaway since 1990” as well as that individual’s personnel file. You seek to withhold portions of the requested information under sections 552.101, 552.102, and 552.103, and 552.117 of the Government Code. You submitted representative samples of the information at issue.¹

Section 552.101 protects “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” including information coming within the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85.

¹In reaching our conclusion, we assume that the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision No. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.102(a) protects

information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, except that all information in the personnel file of an employee of a governmental body is to be made available to that employee or the employee's designated representative as public information is made available under this chapter.

Section 552.102(a) is designed to protect public employees' personal privacy. The scope of section 552.102(a) protection, however, is very narrow. *See* Open Records Decision No. 336 (1982). *See also* Attorney General Opinion JM-36 (1983). The test for section 552.102(a) protection is the same as that for information protected by common-law privacy under section 552.101: the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.).

The submitted information relates to complaints against the individual named in the request, who is the principal of the referenced elementary school. We believe there is a legitimate public interest in most of this material. *See* Open Records Decision No. 269 (1981); 169 (1977). We have marked a portion of the information that we believe is protected under common-law privacy. Otherwise, the submitted information is not protected from disclosure under the privacy principles incorporated in sections 552.101 and 552.102.

Section 552.103(a) of the Government Code, known as the litigation exception, excepts from required public disclosure information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 at 1 (1991). The mere

chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986), and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

You advise:

The District has reasonable grounds to believe that the matter may result in litigation. The matter under investigation is still in the administrative complaint process, but the employee involved has already retained an attorney to represent him.

In our opinion, you have not shown that the submitted materials meet the tests set out above. Consequently you may not withhold this information pursuant to section 552.103(a).

We note that you say that the district has withheld portions of the requested information under section 552.117. Sections 552.024 and 552.117 provide that a public employee or official can opt to keep private his or her home address, home telephone number, social security number, or information that reveals that the individual has family members. We agree that you must withhold information subject to section 552.117 if, as of the time of the request for the information, the employee had elected, under section 552.024, to keep the information private. Open Records Decision Nos. 530 at 5 (1989), 482 at 4 (1987), 455 (1987).

You also indicate that the district has withheld information under section 552.101 in conjunction with section 21.355 of the Education Code. Section 552.101 requires withholding, *inter alia*, information made confidential by statute. Section 21.355 of the Education Code makes confidential a "document evaluating the performance of a teacher or administrator." In our opinion, none of the submitted information is subject to section 21.355. However, we agree that you must withhold, under section 21.355, information responsive to the request which constitutes "document[s] evaluating the performance of a teacher or administrator." *See* Open Records Decision No. 643 (1996).

Finally, you indicate that you have also withheld information protected by the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. Sec. 1232g.

Section 552.026 of the Government Code provides as follows:

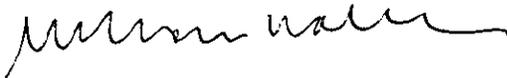
This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

See also, section 552.114(a) (requiring withholding “information in a student record at an educational institution funded wholly or partly by state revenue”).

The Family Educational Rights and Privacy Act of 1974 (“FERPA”) provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student’s education records to anyone but certain numerated federal, state, and local officials and institutions, unless otherwise authorized by the student’s parent. *See* 20 U.S.C. § 1232g(b)(1). This office has determined that an educational agency or institution may withhold information subject to FERPA without having to request an attorney general’s decision. Open Records Decision No. 634 (1995).

Except as noted above, you must release information responsive to the request. 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 questions about this ruling, please contact our office.

Sincerely,



William Walker
Assistant Attorney General
Open Records Division

WMW/ch

Ref.: ID# 122506

Enclosures: Submitted documents

cc: Mr. Chuck Voith
13210 Roaring Springs
Dallas, Texas 75240
(w/o enclosures)