OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

June 10, 1999

Mr. J. Brett Harrison
Henslee, Fowler, Hepworth & Schwartz
1114 NationsBank Building
110 N. College Avenue
Tyler, Texas 75702

OR99-1621

Dear Mr. Harrison:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 124773.

The Chapel Hill Independent School District (the "district"), which you represent, received a request for information relating to the conduct of Eileen Whitaker, a former employee of the district. The request was made as part of an investigation conducted by the State Board of Educator Certification. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.114, and 552.026 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial. This section encompasses the common-law right to privacy. Section 552.102 protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The protection of section 552.102 is the same as that of the common-law right to privacy under section 552.101. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). A governmental body may withhold information as protected by the common-law right to privacy 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. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The name, position, experience, tenure, salary, and educational level or public employees is expressly made public and must be released. Open Records Decision No. 342 (1982). The circumstances of a public employee's resignation are generally available to the public. Open

Records Decision No 444 at 4 (1986). Further, the common-law right of privacy does not protect facts about a public employee's misconduct on the job or complaints made about his or her performance. *See* Open Records Decision Nos. 438 (1986), 230 (1979), 219 (1978). The submitted documents do not contain facts protected under common-law privacy or that may be withheld under section 552.101 or 552.102 of the Government Code.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. To secure the protection of section 552.103(a), a governmental body has the burden of providing relevant facts and documents to show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). 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; the mere chance of litigation will not establish the litigation exception. Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* 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 where a potential party threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981). In this case, you rely solely on your assertion that a potentially aggrieved individual has retained an attorney. You do not indicate for what purpose the attorney was retained or any actions taken by the attorney. We conclude that you have not demonstrated that litigation is reasonably anticipated in this matter. Therefore, no information may be withheld under section 552.103 of the Government Code.

The submitted documents contain information that may be excepted from public disclosure by section 552.117 of the Government Code. This section excepts from required public disclosure the home addresses, home telephone numbers, social security numbers, or personal family members information of public employees who request that this information be kept confidential under section 552.024. Therefore, section 552.117 requires you to withhold this information if a current or former employee or official requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold this information of a current or former employee who made the request for confidentiality under section 552.024 after this request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 at 5 (1989). We have marked the subject information to indicate that which may be subject to section 552.117.

We note that you have redacted information which apparently identifies particular students.[1] Such information is subject to sections 552.114 and 552.026 of the Government Code and 20 U.S.C. 1232(g), the Family Educational Rights and Privacy Act ("FERPA"). FERPA specifies the conditions of release of "education records" and prohibits release except as so provided. "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.

20 U.S.C. § 1232g(a)(4)(A). *See also* Open Records Decision Nos. 462 (1987), 447 (1986)

An educational agency or institution subject to FERPA may disclose personally identifiable information from education records, without first obtaining the parent's prior written consent, when the agency or institution seeks advice from the Attorney General whether a particular disclosure would violate FERPA. *See* 20 U.S.C. §§ 1232(g)(b)(C), (b)(3) and (b)(5). However, in Open Records Decision No. 634 (1995), this office held: (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA without the necessity of requesting an attorney general decision, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. Thus, where an institution is unsure of the application of FERPA to specific information, it may disclose that information to this office for review. As you have requested our opinion in this case, we find that the redacted information may only be released in accordance with the provisions of FERPA.

We note that information may generally be transferred between governmental agencies which are subject to the Public Information Act and have a related administrative aim without destroying the confidential nature of the information. Attorney General Opinion JM-590 (1986); Open Records Decision Nos. 655 (1997), 567 (1990), 561 (1990), 516 (1989). These decisions are grounded in the well settled policy of the state that state agencies should cooperate with each other in the interest of the efficient and economical administration of their statutory duties. *See* Open Records Decision No. 516 (1989). These decisions also recognize that a release to a state agency is not a release to the public for

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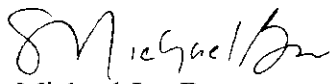
[1] You also argue that persons familiar with the subject events can "readily ascertain the identity of the minor student" from the records as a whole. From our review of the redacted documents we conclude that releasing this information to the public will not identify a particular student. The fact that some persons may have previous knowledge of the identities of the individuals involved is not relevant to our analysis.

purposes of Government Code section 552.007, which prohibits the selective disclosure of information, or Government Code section 552.352, which provides criminal penalties for the release of information considered to be confidential. *See id.* This transfer doctrine does not apply where the conditions of release of the information is specified by a statute such as FERPA. Thus, with the exception of the information subject to FERPA, you may transfer the requested information to the State Board for Educator Certification without waiving the district's ability to raise its discretionary exceptions in the future or implicating breaches of confidentiality.

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,



Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/ch

Ref: ID# 124773

Encl. Submitted documents

cc: Mr. Doug Phillips
State Board for Educator Certification
1001 Trinity
Austin, Texas 78701-2603
(w/o enclosures)