



July 15, 1999

Dr. Ann Dixon
Superintendent
Somerset Independent School District
P.O. Box 279
Somerset, Texas 78069

OR99-1969

Dear Dr. Dixon:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 126168.

The Somerset Independent School District (the "district") received an open records request for all documents, including tape recordings, regarding the suspension of a named assistant superintendent. The records at issue pertain to the district's pending investigation into allegations that the assistant superintendent committed sixteen violations of district policy and state law. You contend that the requested information is excepted from required public disclosure pursuant to sections 552.102 and 552.103 of the Government Code.¹

Because section 552.103 is the more inclusive exception, we will discuss it first. To secure the protection of section 552.103, 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 at 4 (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 have not made such a showing in this instance. We, therefore, conclude that you have not met your burden of demonstrating the applicability of this exception. The district may not withhold any of the requested information pursuant to section 552.103.

¹Please note that information is not confidential under the Texas Public Information Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied* 430 U.S. 931 (1977); *see also* Attorney General Opinion JM-672 (1987). Consequently, unless the requested information falls within an exception to disclosure, it must be released, notwithstanding any agreement between the district and a third party specifying otherwise.

Section 552.102(a) of the Government Code protects “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy” 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.). Employee privacy under section 552.102(a) is less broad than common law privacy under section 552.101, however, because of the greater public interest in disclosure of information regarding public employees. Open Records Decision Nos. 269 (1981), 169 (1977).

Virtually all of the information at issue pertains solely to the superintendent’s alleged actions as a public servant, and as such cannot be deemed to be outside the realm of public interest. Accusations against officers of a public body are especially of legitimate public concern if, as here, dishonesty in dealing with the public body is charged. *See* Open Records Decision Nos. 372 (1983), 269 (1981), 230 (1979); *see also* Open Records Decision No. 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees). None of the requested information may be withheld pursuant to common-law privacy.²

We note that the attorney for the superintendent has asserted a constitutional right of privacy on behalf of the superintendent. The constitutional right to privacy consists of two related interests: 1) the individual interest in independence in making certain kinds of important decisions, and 2) the individual interest in independence in avoiding disclosure of personal matters. The first interest applies to the traditional “zones of privacy” described by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), and *Paul v. Davis*, 424 U.S. 693 (1976). These “zones” include matters related to marriage, procreation, contraception, family relationships, and child rearing and education and are clearly inapplicable here.

²We also note that none of the information at issue may be withheld merely because it is incorrect or misleading. These are not factors to be considered in the open records process. *See* Open Records Decision No. 579 (1990); *see also* *Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994) (state of Texas does not recognize tort of false-light invasion of privacy). If, however, portions of the information at issue are in fact inaccurate or untrue, there is no reason that the district may not also release, along with the requested documents, other supplemental information that explains why and to what extent the information is inaccurate or that otherwise clarifies the information contained in the records at issue.

The second interest, in nondisclosure or confidentiality, may be somewhat broader than the first. Unlike the test for common-law privacy, the test for constitutional privacy involves a *balancing* of the individual's privacy interests against the public's need to know information of public concern. Although such a test might appear more protective of privacy interests than the common-law test, the scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." *See* Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985)). As noted above, the records at issue do not concern intimate aspects of individuals' private affairs, but rather directly pertain to the district's investigation of alleged violations of district policy and state law. The district may not withhold any of these records under either constitutional or common-law privacy. Consequently, the district must release the requested records, except as discussed below.

We note that certain portions of the records at issue must be withheld pursuant to other provisions of law. Although the attorney general will not ordinarily raise an exception that might apply but that the governmental body has failed to claim, *see* Open Records Decision No. 325 at 1 (1982) this office will raise other confidentiality provisions because the release of confidential information could impair the rights of third parties and because the improper release of confidential information constitutes a misdemeanor. *See* Government Code § 552.352.

Some of the requested information constitutes "education records" made confidential under the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"). 20 U.S.C. § 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.

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 enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). When a student has attained the age of eighteen years or is attending an institution of postsecondary education, the student holds the rights accorded by Congress to inspect these records. 20 U.S.C. § 1232g(d). "Education records" means those records that contain information directly related to a student and 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).

Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982), 206 (1978). We have marked the requested documents, or portions thereof, that directly relate to students and thus constitute "educational records" under FERPA. The district must withhold the information we have marked from the requestor unless the district receives permission to release the information as specified above.

We also note that some of the records at issue contain information that reveals whether certain district employees have family members. Section 552.117(1) of the Government Code excepts such information from disclosure if the employee has requested that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). If the respective employees made the election prior to the date on which the district received the open records request, the district must withhold the information we have marked pursuant to section 552.117(1). Otherwise, this type of information must be released.³

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,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/RWP/eaf

Ref.: ID# 126168

Encl. Marked documents

³The district must also withhold all information contained in the submitted tape recording that is similar to that which we have marked as being excepted from disclosure under sections 552.026 and 552.117(1). Recognizing the practical limitations of making such redactions from the tape recording, we will assume that the district will make a good faith effort to withhold only those portions of the tape recording that correspond with our markings.

cc: Ms. Anastasia Cisneros-Lunsford
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(w/o enclosures)