



March 16, 2000

Ms. Jennifer L. Lehmann
Escamilla & Poneck, Inc.
1200 South Texas Building
603 Navarro Street
San Antonio, Texas 78205-1826

OR2000-1066

Dear Ms. Lehmann:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 133452.

The Harlandale Independent School District (the "district"), which you represent, received a request for "memoranda and any other documentation" in the requestor's "school file" which "could be used as documentation against [the requestor]," including memoranda in the possession of the Superintendent during a January 7, 2000 conference with the requestor, and "any notes to file or personal calendar notations" pertaining to the requestor. You have provided for our review information that is responsive to the request, marked as exhibits "B-1," "B-2," and "B-3." You assert the requested information is excepted from public disclosure under sections 552.026, 552.101, 552.103, 552.107, 552.111, 552.114, and 552.130 of the Government Code. We have reviewed the submitted information and considered the exceptions you assert.

We note at the outset that the exhibits submitted for our review include documents that appear to have been created subsequent to the district's receipt of the public information request at issue. It is implicit in several provisions of the Public Information Act (the "Act") that the Act applies only to information already in existence. *See* Gov't Code §§ 552.002, .021, .227, .351. Thus, the Act does not require a governmental body to prepare new information in response to a request. Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975). Nor does the Act require a governmental body to supply information on a periodic basis as such information is prepared in the future. Attorney General Opinion JM-48 at 2 (1983); Open Records Decision Nos. 476 at 1 (1987), 465 at 1 (1987). The documents submitted for our review that did not exist at the time of the request at issue are therefore not responsive to the present request. Thus, you are not required to release these documents to the requestor.¹

¹You advise this office that the district received the request on January 11, 2000. The documents at issue contain dates subsequent to that date or are indicated to have been created subsequent to the request. We

You assert some of the information is excepted from disclosure under the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, and sections 552.026 and 552.114 of the Government Code. In Open Records Decision No. 634 (1995), this office concluded: (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by section 552.026 without the necessity of requesting a decision from this office, 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. We note that certain information was redacted from all three exhibits prior to the submission of the information for our review. Because the specific information that was redacted appears to consist of information which identifies or tends to identify a student, we assume these prior redactions were made in accordance with Open Records Decision No. 634.² We note exhibits "B-1" and "B-2" appear to contain statements taken from students. You aver that the information that is excepted from disclosure under FERPA "includes both the student's names and their statements." We do not agree that the entirety of a statement taken from a student is *necessarily* made confidential by FERPA.³ Rather, 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). Aside from the information you have redacted, we have marked for redaction certain additional information that we believe is made confidential by FERPA. We determine you must not release this marked information.⁴

Information is excepted from disclosure by section 552.101 "if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This

have marked these documents with a red flag. In the event any of these documents existed at the time of the request and are therefore responsive, we have also marked for redaction the information on these documents that must not be released, as discussed below.

²We are thus unable to determine whether the already redacted information is excepted from disclosure as information protected by FERPA. In the future, if you wish for this office to issue a decision based on FERPA, you should submit the information without redactions in order for this office to properly make a determination. *See also* Gov't Code § 552.301(e)(2)(a) (a governmental body must label the specific information submitted to this office for review to indicate which exceptions apply to which parts of the copy).

³The entirety of any particular student statement contained in the exhibits may nevertheless be confidential under other law. See the discussion below of Chapter 261 of the Family Code.

⁴If you have further questions as to the applicability of FERPA to information that is the subject of a request under the Act, you may consult with the United States Department of Education's Family Policy Compliance Office. *See* Open Records Decision No. 634 at 4 n.6, 8 (1995).

exception includes information protected by other statutes. Section 261.201 of the Family Code governs release of information related to reports of child abuse or neglect. In pertinent part it reads:

- (a) 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 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, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

As to exhibits "B-1" and "B-2," you indicate that the information in these exhibits pertains to investigations in which "the Child Protective Services Department" is or was involved. We thus assume that the allegations are the subject of investigations conducted by the Department of Protective and Regulatory Services (the "department"). *See* Fam. Code § 261.406(a) (the department shall perform an investigation of a report of alleged or suspected abuse or neglect of a child in a private or public school under the jurisdiction of the Texas Education Agency). You also indicate, however, that the district has conducted its own investigations of the allegations contained in exhibits "B-1" and "B-2." You have not informed this office, nor are we able to ascertain from our review of the documents, what specific information in exhibits "B-1" and "B-2," if any, also constitutes information that the district provided the department for purposes of its investigations. To the extent that the information in these exhibits is also contained in the files of the investigations conducted under chapter 261 of the Family Code, we believe such information is made confidential by section 261.201 of the Family Code.⁵ We thus conclude such information must not be released to the requestor. As to any information in the exhibits that the district has *not* provided the department for purposes of its investigations, such information is not made confidential by section 261.201 of the Family Code and is subject to release, except as otherwise noted herein.

⁵You have not cited any specific rule that the department has adopted to permit release of such information to the requestor, nor are we aware of any such rule. Hence, we conclude such information must not be released. *See, e.g.,* Open Records Decision No. 440 at 2 (1986).

As to all three exhibits, you assert that section 552.103 of the Government Code, the "litigation exception," protects the information from disclosure. This provision excepts from disclosure information:

[R]elating to litigation of a civil or criminal nature 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.

[Information is excepted from disclosure] only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103. Section 552.103 was intended to prevent the use of the Public Information Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-1048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990). Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103. Open Records Decision No. 588 at 7 (1991). To show that the litigation exception is applicable, the district must demonstrate that (1) litigation was pending or reasonably anticipated at the time of the request and (2) the information at issue is related to that litigation. *See* Gov't Code § 552.103(a), (c); *See also 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). You do not indicate that litigation is pending. To demonstrate that litigation is reasonably anticipated, the district must furnish evidence that, at the time of the request, litigation was realistically contemplated and was more than mere conjecture. Gov't Code § 552.103(c); Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). In your correspondence dated January 31, 2000, you state that the district

is conducting an additional investigation into whether or not termination is warranted for [the requestor]. Should the [district] propose termination, the recommendation will be made by the [district] Superintendent. The [School] Board will then in turn render a final decision of the matter. Under the Texas Education Code, [the requestor] then has a right to request a hearing prior to the Board's final decision. If a hearing is requested, it is the policy of the [district] to conduct the hearing consistent with the provisions of the Texas Education Code, Subchapter F (hearings before hearing examiner).

(citations omitted). Assuming *arguendo* that the above-referenced hearing constitutes a contested case under the Administrative Procedure Act, we nevertheless determine that, as of the date of the request, the possibility that the requestor would request such a hearing was mere conjecture. As of the date of the request, it is apparent that the district had not yet made any recommendation regarding the employment status of the requestor. We thus conclude you have not demonstrated the applicability of the litigation exception to any of the submitted information.

As to all of the exhibits, you also argue that the attorney work product privilege in conjunction with section 552.101 would protect the information from disclosure. We note that the attorney work product privilege is properly asserted under sections 552.103 or 552.111 where litigation is pending or reasonably anticipated, and only under section 552.111 where litigation has concluded. See Open Records Decision No. 647 at 3 (1996). 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 or release 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. Open Records Decision No. 647 at 4 (1996). We find that you have not established the applicability of both parts of the first prong of the work product test. Moreover, as to the second prong of the work product test, we have no indication that any of the information at issue was created by or under the direction of an attorney. Also, the information consists primarily of recitations of fact. This office has stated that the work product privilege does not extend to "facts an attorney may acquire." See Open Records Decision No. 647 at 4 (1996) (citing *Owens-Corning Fiberglass v. Caldwell*, 818 S.W.2d 749, 750 n. 2 (Tex. 1991); see also *Leede Oil & Gas, Inc. v. McCorkle*, 789 S.W.2d 686 (Tex. App.--Houston [1st Dist.] 1990, no writ)(the attorney work product privilege does not protect memoranda prepared by an attorney that contain only a "neutral recital" of facts). We conclude none of the information may be withheld as attorney work product.

In your initial correspondence to this office dated January 25, 2000, you also asserted section 552.107, the agency memoranda aspect of section 552.111, and section 552.130. However, you have made no arguments with respect to these exceptions, nor have you marked any of the submitted information with respect to these exceptions. Among other information, section 552.301 of the Government Code requires a governmental body to submit to this office written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld. See Gov't Code § 552.301(e)(1)(A). A governmental body

must also label the submitted information to indicate which claimed exceptions apply to which parts of the information. *See* Gov't Code § 552.301(e)(2). Sections 552.107 and 552.111 are discretionary exceptions, in that they are intended to protect the interests of the governmental body. Because these exceptions have not been properly asserted, we conclude you have waived the section 552.107 and 552.111 assertions. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)); 522 at 4 (1989) (discretionary exceptions in general). Section 552.130 of the Government Code protects the privacy interests of third parties, and is thereby considered a mandatory exception. Thus, we have reviewed the submitted information with respect to this asserted exception. Section 552.130 excepts from disclosure certain information related to motor vehicle records. *See* Gov't Code § 552.130. We find no information in the submitted exhibits that is excepted from disclosure by this provision.

In summary, you must withhold the information we have marked. The information that was previously redacted from the documents must also be withheld to the extent reasonable and necessary to avoid identifying a particular student. You also must withhold any information that the district provided the department for its investigations. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

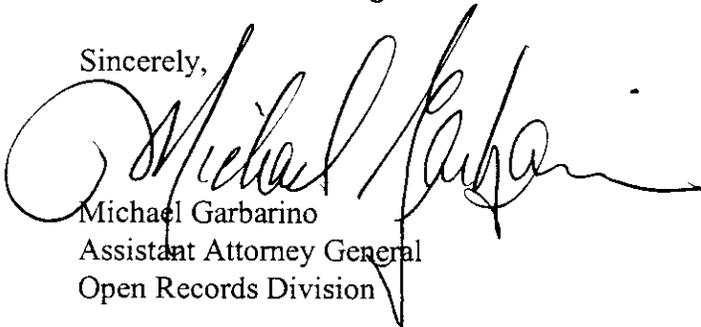
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report

that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Garbarino". The signature is written in a cursive style with a large initial "M".

Michael Garbarino
Assistant Attorney General
Open Records Division

Ref: ID# 133452

Encl. Submitted documents

cc: Mr. Carlos A. Gonzalez
1512 Leal Street
San Antonio, Texas 78207
(w/o enclosures)