The Attorney General of Texas

December 4, 1979

MARK WHITE
torney General

preme Court Building
) Box 12548
ustin, TX 78711
512/475-2501

1 Commerce, Suite 200
Dallas, TX 75202
214/742-8944

4824 Alberta Ave., Suite 160
Paso, TX 79905
915/533-3484

3 Main, Suite 610
on, TX 77002
8-0701

3 Broadway, Suite 312
bbock, TX 79401
806 747-5238

13 N. Tenth, Suite F
McAllen, TX 78501
2/682-4547

200 Main Plaza, Suite 400
an Antonio, TX 78205
2/225-4191

An Equal Opportunity/
rmative Action Employer

Mr. Gerald W. Ward
Superintendent of Schools
Fort Worth Independent School District
3210 West Lancaster
Fort Worth, Texas 76107

Open Records Decision No. ORD-230

Re: Whether investigative file and report of charges against employees is public information.

Dear Mr. Ward:

You request our decision under section 7 of article 6252-17a, V.T.C.S., the Texas Open Records Act, on whether an investigation into allegations of misuse of school district employees and materials is excepted from required public disclosure.

A series of articles published by the Fort Worth Star-Telegram made charges of the misapplication of school district services and materials by certain administrative employees to their personal use. As a result of these charges the School District Board directed its lawyers by formal resolution to make "a factual, impartial and thorough investigation of all such charges and allegations and report to this Board their findings of such facts . . . ." The attorneys for the district conducted an extensive investigation in which all maintenance department employees were contacted, 79 witnesses were interviewed and their statements recorded, from these 73 affidavits were prepared and signed, and 3 sworn statements were prepared. The attorneys prepared and submitted a report of their investigation to the board. This report consists of a general statement describing the method by which the investigation was conducted. Attached to this general statement are separate reports on the investigation into specific charges and allegations of misapplication of materials and services made against four administrators. These separate reports set out the allegation of misconduct, followed by excerpts from the statements of witnesses who are identified only by number. This is followed by a summary statement of the facts bearing on the question. The affidavits of the administrators whose conduct was at issue are attached to these separate reports. Some affidavits of other witnesses are also included.

The board received and considered the report at a meeting closed to the public under section 2(g) of article 6252-17, V.T.C.S., and at a subsequent open meeting made a statement of its conclusions based on the report. The board concluded that:

> The Board of Education finds there is no evidence to support the charges and allegations made by a Star-Telegram reporter regarding the serious misuse of Fort Worth Independent School District materials and employees for personal benefit. We feel that the thorough investigation conducted by our attorneys showed some minor errors in judgment but no serious abuses of school policy or criminal activity came to light.

The board went on to adopt as its policy a directive by the Superintendent prohibiting the doing of work in the school maintenance shops for individuals and forbidding the sale of school property from the warehouse or maintenance shops.

The Executive Editor of the Fort Worth Star-Telegram made a written request for access to (1) the report by the attorneys; (2) the tapes of the statements taken; (3) the transcripts made of the tapes; (4) all affidavits; (5) all sworn statements; (6) the invoices and cancelled checks, referred to in the board's public statement relating to labor and materials used in building a cottage for one administrator; and (7) cancelled checks showing payment for labor and materials for building a monkey cage for another. The brief submitted for the Star-Telegram specifies that the names of the persons who made statements are not sought in the request.

The brief of the requestor summarizes the issue posed as follows:

> This request involves a situation in which serious charges were made against persons holding high-level positions of responsibility in a governmental body. The governing board of the governmental body exonerated the employees of wrongdoing, allegedly on the basis of the records at issue here. The Star-Telegram respectfully submits that the public is entitled to know the contents of these reports in order that it may decide for itself whether or not the conclusions of the school board were correct. . . .

The school district declines to disclose the report of the investigation and the tapes, transcripts, affidavits and statements, and contends that a number of exceptions are applicable which permit all of the investigative materials to be withheld from public disclosure.

The district contends that the investigative report prepared by the attorneys is excepted from required public disclosure under section 3(a)(11) as an intra-agency memorandum. The report was directed to be, and is, wholly factual and does not contain the type of opinion, advice, or recommendation on policy matters which this exception was designed to protect. This exception does not apply to purely factual matter. Attorney General Opinion H-436 (1974). See, e.g., Open Records Decision Nos. 225, 222 (1979). This report is not excepted under section 3(a)(11).

The district contends that the investigative report is excepted from required public disclosure as information deemed confidential by law, specifically as information within

the constitutional right of privacy as described by the court in Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668 (Tex. 1976). This case makes it clear that the constitutional right of privacy is a very limited right, extending only to fundamental "zones of privacy," which have thus far only included activities relating to marriage, procreation, contraception, family relationships, and child rearing and education. Id. at 679. There is no authority to support the contention that factual information concerning alleged misuse of school district materials and services is protected by a constitutional right of privacy. Neither do we believe that the information in the report is within the common law tort right of privacy which was held in the Industrial Foundation case to permit some information to be withheld under section 3(a)(1). In Open Records Decision No. 219 (1978), this office held that a report of a special audit concerning purchasing practices and procedures could not be withheld under section 3(a)(1) on the basis of a privacy interest in avoiding embarrassment which might arise by implication from the way in which government business is conducted.

The district also contends that the report of the investigation is excepted under sections 3(a)(1) and 3(a)(7) by the attorney-client privilege. In Open Records Decision No. 210 (1978), a school superintendent sought access to correspondence between a school district and its attorney concerning an investigation and report concerning alleged misconduct by the superintendent. The information there was held to be within the attorney-client privilege and excepted from disclosure to the superintendent under section 3(a)(1). While the information involved there was facially similar to that involved here, the report in that case went well beyond a purely factual report, and consisted in large part of legal advice and recommendations based upon the investigation made. Open Records Decision No. 200 (1978) also recognized the attorney-client privilege in correspondence between a school board and its attorney in which legal advice was sought and given. Here, while the investigation was conducted by attorneys and reflects their skills, the report is a purely factual investigation, and does not contain legal advice or opinion. This office held in Open Records Decision No. 80 (1975) that section 3(a)(7) did not apply to a factual investigation by an agency. See Kent Corporation v. N.L.R.B., 530 F.2d 612 (5th Cir. 1976), cert. den., 429 U.S. 920 (fact that document written by attorney does not exempt it as attorney work product under federal Freedom of Information Act); Associated Dry Goods Corp. v. N.L.R.B., 455 F. Supp. 802 (S.D. N.Y. 1978) (notes of interview not excepted merely because taken by attorney). It is our decision that the report is not excepted under section 3(a)(1) or 3(a)(7) because of an attorney-client privilege.

The district contends that the investigative report is excepted under 3(a)(2) which excepts:

> (2) information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. . . .

In determining what privacy interests of an employee were intended to be protected under this exception, this office has construed and applied it in light of, and in harmony with, that related provision in the Open Meetings Act, V.T.C.S. art. 6252-17, § 2(g), which permits the public to be excluded from meetings in

> . . . cases involving the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee or to hear complaints or charges against such officer or employee . . . .

Open Records Decision Nos. 208 (1978) (details of investigation of complaint of police misconduct are not public); 191 (1978) (employee grievance and statements alleging sexual harrassment not public); 181 (1977) (statements of police officers charged with misconduct are not public); 178 (1977) (charges in audit against identifiable employee are not public); 163 (1977) (complaints and charges by Mexia State School employees against other employees not public); 159 (1977) (investigation of rumors of illegal or improper conduct by candidate for chief of police not public); 115 (1975) (investigation of allegations against employee not public); 106 (1975) (investigation of complaint against peace officers not public, but final disposition is); 103 (1975) (identity of employee evaluated in closed meeting not public); 81 (1975) (parts of school board committee report reflecting complaints and charges against employees not public); 68 (1975) (letter of resignation not public); 60 (1974) (portion of minutes reflecting discussion of personnel matters not public).

While we generally agree with these decisions that a governmental body may ordinarily investigate and resolve personnel matters internally, and that an employee has a legitimate privacy interest in not having the details of evaluations of his performance of duties made public, we must not lose sight of the purpose of the Open Records Act, nor should we ignore the limited scope of this exception. Section 1 of the Act declares that the public is entitled to "full and complete information regarding the affairs of government and official acts of those who represent them as public officials and employees."

The phrase "information in personnel files" has been given an expansive definition for purposes of implementing an employee's right of access to information concerning his own employment relationship. See Open Records Decision Nos. 191 (1978); 172 (1977); 133 (1976); 115 (1975); 55, 31 (1974). However, the phrase does not necessarily have the same expansive scope for purposes of shielding information from public inspection. In this case, we believe that it would stretch the exception for "information in personnel files" beyond its permissible scope to extend it to all information gathered in an investigation of an entire department stemming from public charges of serious misuse of public materials and services for personal use.

This exception by its express language requires a determination that disclosure of the information involved would be a "clearly unwarranted invasion of personal privacy." In this case, the charges and allegations of misconduct against four high administrators were publicly made, and any embarrassment stemming from such charges being made has already occurred. The board of the district has made an extensive investigation of the charges, at a cost of $17,636.40, and based on this investigation has determined that "there is no evidence to support the charges . . . regarding the serious misuse of . . . materials and employees for personal benefit." However, the board declines to present any factual basis for this conclusion. We cannot agree that disclosure of the report of the factual

investigation, which does not identify the witnesses, but only those individuals whose conduct was at issue, would be a "clearly unwarranted invasion of personal privacy." On the contrary, we believe the public interest in the facts of this case warrants whatever minimal invasion of privacy that might be involved in disclosing the information on which the board determined there was no serious misuse of public property or services.

In regard to the tapes, transcripts, affidavits, and sworn statements, we believe there is a significant interest protected under the Open Records Act which precludes their disclosure. It is that of encouraging persons to report possible misconduct without their identity being disclosed. This interest is protected by recognizing the informer's privilege, which this office has previously recognized and applied as making information confidential under section 3(a)(1). See Open Records Decision Nos. 183 (1978); 172 (1977).

We believe the proper balance can be achieved in this instance by holding that the factual investigative report presented to the board is public, including the affidavits of the four administrators whose conduct was at issue, and including the copies of the checks held by the School District as to payment for supplies and labor for the monkey cage, but that the tapes, transcripts, affidavits, and sworn statements of persons other than those on whom the investigation focused are excepted from required public disclosure under section 3(a)(1) on the basis of the informer's privilege.

Very truly yours,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

TED L. HARTLEY
Executive Assistant Attorney General

Prepared by William G Reid
Assistant Attorney General

APPROVED:
OPINION COMMITTEE

C. Robert Heath, Chairman
David B. Brooks
Susan Garrison
Rick Gilpin
William G Reid
Bruce Youngblood