



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 19, 1993

Ms. Glenda Robinson Nell
Associate General Counsel
Texas Tech University Health Sciences Center
Office of Vice President and General Counsel
P.O. Box 4641
Lubbock, Texas 79409-2021

OR93-045

Dear Ms. Nell:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 18347.

Texas Tech University received a request for the following information about a former member of its faculty:

1. a letter of invitation to join the faculty;
2. a letter accepting the invitation to join the faculty;
3. an employment contract and data sheet with a cover letter from Mrs. Freida Pierce to the faculty member;
4. a memorandum from Robert Anderson to John Darling and Marilyn Phelan concerning a meeting at which the faculty member was relieved of all his responsibilities as a Texas Tech faculty member;
5. a faculty notice that the faculty member was relieved of his responsibility pending investigation of certain charges against him;
6. a letter from the faculty member that he will not seek renewal of his contract;
7. a letter from the Dean of the College of Education accepting the faculty member's resignation.

You seek to withhold all of the requested items under section 3(a)(2) of the Open Records Act, based on the privacy rights of the faculty member. You also raise section 3(a)(11) as an exception to the required public disclosure of item number 5.

Section 3(a)(2) of the Open Records Act excepts from required public disclosure "information in personnel files, the disclosure of which would constitute a clearly

unwarranted invasion of personal privacy." The test for application of this exception is the same test for violation of the common-law tort of invasion of privacy through the disclosure of private facts. *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin, 1983, writ ref'd n.r.e.). Under the test for the common-law right to privacy enunciated by the Texas Supreme Court, information is protected from disclosure only when it (1) contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person, and when (2) the information is of no legitimate concern to the public. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

In applying this test, prior decisions of this office have concluded that information about a public employee's job qualifications, job performance and reasons for termination, is not information about his "private affairs." *See* Open Records Decision Nos. 470 (1987); 455 (1987); 278 (1981). Moreover, prior decisions have determined that there is a legitimate public interest in such job-related information. *See, e.g.* Open Records Decision No. 470 at 5. In this case, except for a very small portion of private information in item number 4, *see id.* at 4., the requested information is information about the faculty member's employment at Texas Tech University. Such information is not information about the faculty member's private affairs, but rather information that is of a legitimate concern to the public. *See id.* It is therefore our decision that the requested information is not protected under the common-law right to privacy. Thus, with the exception of two portions of item 4, which we have marked as private information, you may not withhold the requested information based on section 3(a)(2).

You claim that section 3(a)(11) protects from required disclosure item number 5, the faculty notice that the faculty member was relieved of his responsibilities pending the investigation of the charges. Section 3(a)(11) excepts

inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency.

The test for applying section 3(a)(11) established in prior decisions of this office is whether the requested information is interagency or intra-agency information consisting of advice, opinion or recommendation used in an agency's deliberations concerning policy matters. Open Records Decision No. 574 (1990). The exception does not apply to facts and written observations of facts and events which are severable from advice, opinion, and recommendation. *Id.*

Under this test section 3(a)(11) does not apply to item number 5. The notice contains no advice, opinion, or recommendation; it simply informs the other faculty members of the fact that one faculty member had been relieved of his responsibilities.

However, recently the Third Court of Appeals of the Third District of Texas at Austin has rejected this office's long-standing application of section 3(a)(11). *See Texas*

Department of Public Safety v. Gilbreath, No. 3-92-024-CV (Tex. App.--Austin, November 15, 1992, n.w.h.). That court found that section 3(a)(11) "exempts those documents, and only those documents, normally privileged in the civil discovery context." *See id* at 7. The court has denied a motion for rehearing in the case.

In light of the *Gilbreath* decision, we are currently reviewing the status of the section 3(a)(11) exception. In the meantime, we ask that you once again review your initial decision to seek closure of item number five. From the face of the document, it is not apparent that it would be privileged in the civil discovery context. We remind you that it is within the discretion of governmental bodies to release information that may be covered by section 3(a)(11). If, as a result of your review, you still desire to seek closure of this item, please resubmit your request with your arguments for withholding the information pursuant to section 3(a)(11). You must submit these materials within 15 days of the date of this letter. This office will then review your request in accordance with the *Gilbreath* decision. If you do not timely resubmit the request, we will presume that you have released item number 5. As for the other items of the requested information, you must release them immediately.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR93-045.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Opinion Committee

KHG/lmm

Ref.: ID# 18347

Enclosure: Submitted documents

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