



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 17, 1993

Mr. Gustavo L. Acevedo, Jr.
Schulman, Walheim, Beck & Heidelberg, Inc.
Attorneys at Law
745 East Mulberry, Suite 700
San Antonio, Texas 78212

OR93-246

Dear Mr. Acevedo:

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# 19299.

The Donna Independent School District received an open records request for the settlement agreement in *Ignacio Guerra, Jr., v. Alfredo Lugo, et al.*, Civil Action No. M-92-213 in the United States District Court for the Southern District of Texas. You contend you may withhold this agreement from the public pursuant to sections 3(a)(1), 3(a)(2) and 3(a)(3) of the Open Records Act.

To secure the protection of section 3(a)(3), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990). In this instance you have made the requisite showing that the requested information relates to pending litigation for purposes of section 3(a)(3).

However, the opposing party in this litigation executed the settlement agreement on February 19, 1993. If the opposing parties in litigation have seen or had access to requested information, there is no justification for withholding it pursuant to section 3(a)(3). Open Records Decision Nos. 349, 320 (1982). This is so regardless of whether the judge in the case has approved the agreement. *See* Open Records Decision No. 245 (1980).

You contend you must withhold the agreement pursuant to sections 3(a)(1) and 3(a)(2) of the Open Records Act because the privacy rights of Dr. Guerra are implicated by the public release of the agreement. Section 3(a)(1) excepts information deemed confidential by judicial decision. This exception applies to information if its disclosure would result in a violation of the common-law tort of invasion of privacy through the disclosure of private facts. *Industrial Found. of the South v. Texas Indus. Accident Bd.*,

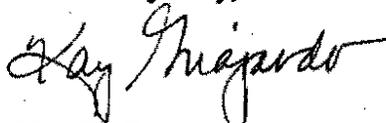
540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U. S. 931 (1977). In order to be within the common-law tort, the information must (1) contain highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person, and (2) be of no legitimate concern to the public. *Id.*

Section 3(a)(2) excepts "information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Personnel file information is confidential under section 3(a)(2) only if its release would cause an invasion of privacy under the test for common-law privacy articulated in *Industrial Foundation. Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546, (Tex. App.--Austin 1983, writ ref'd n.r.e.); Open Records Decision No. 600 (1992) at 8. Thus, we consider your claims under sections 3(a)(1) and 3(a)(2) together.

The settlement agreement does not contain highly intimate or embarrassing facts about Dr. Guerra's private affairs so that its release would be highly objectionable to a reasonable person. Thus, the agreement does not meet the first branch of the *Industrial Foundation* test for common-law privacy. We need not consider the second branch of the test. Thus, sections 3(a)(1) and 3(a)(2) do not apply to the settlement agreement; the settlement agreement is public information.¹

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 contact our office.

Yours very truly,



Kay H. Guajardo
Assistant Attorney General
Opinion Committee

KHG/lmm

Ref: ID# 19299
ID# 19326

Enclosures: Submitted documents

¹The settlement agreement contains a provision in which all parties agree not to release a copy of the agreement to any third party unless required by state or federal law. Under the Open Records Act, a governmental body cannot withhold information by entering into a contract provision that prohibits disclosure. See Open Records Decision No. 514 (1988) at 1.

cc: Ms. Nolene Hodges
Reporter
Valley Morning Star
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(w/o enclosures)