



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

March 31, 1994

Mr. Robin Collins  
Rodriguez, Lewis & Collins  
800 Wyoming, Suite A  
El Paso, Texas 79902

OR95-176

Dear Mr. Collins:

On behalf of the Ysleta Independent School District ("the school district"), you ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 26643.

The school district received a request for information concerning one of its former employees, including the employee's personnel file, complaints against the employee, and information about the school district's investigation of those complaints. The school district seeks to withhold portions of the requested information based on sections 552.102(a), 552.102(b) and 552.103 of the Government Code.

Section 552.102(a) of the Government Code excepts from required public disclosure

information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, except that all information in the personnel file of an employee of a governmental body is to be made available to that employee or the employee's designated representative as public information is made available under this chapter.

You raise section 552.102(a) in regard to one document in the employee's file. The test for applying section 552.102(a) is the same test for determining a violation of the common-law tort of invasion of privacy which the Texas Supreme Court established in

*Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). 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. *Industrial Found.*, 540 S.W.2d at 685.

We find that the information on the document at issue is intimate information. Moreover, we do not think that the public has a legitimate interest in this information. We, therefore, conclude that the school district may withhold this document based on section 552.102(a) of the Government Code. See Open Records Decision No. 600 (1992) at 8.

Section 552.102(b) excepts from required public disclosure

a transcript from an institution of higher education maintained in the personnel file of a professional public school employee, except that this section does not exempt from disclosure the degree obtained or the curriculum on a transcript in the personnel file of the employee.

This provision requires the school district to redact all information on the employee's transcript, except the employee's name, the degree obtained, and the courses taken. See Open Records Decision No. 526 (1989) at 2-3 (construing predecessor provision).

Section 552.103(a) excepts from required public disclosure information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

You seek to apply section 552.103(a) in three ways. First, you urge that this provision excepts from required public disclosure various drafts of a Memorandum of Understanding between the school district and the former employee, since "they relate to settlement negotiations." However, the information you enclosed indicates that the employee resigned and that the Memorandum of Understanding was executed. The applicability of section 552.103 ends once the settlement has been reached. See Open

Records Decision No. 245 (1980) at 2. We, therefore, conclude that the school district may not withhold the drafts of the Memorandum of Understanding based on section 552.103(a) of the Government Code.<sup>1</sup>

However, certain portions of these drafts contain information that is protected from disclosure by the common-law right to privacy. The school district must withhold these portions based on section 552.101 of the Government Code. We have marked the drafts accordingly.

Second, you contend that section 552.103(a) also applies to various other documents, including evidentiary information gathered during the school district's investigation of certain allegations of employee misconduct. You say that section 552.103(a) excepts this information from required public disclosure because it "relate[s] to threatened litigation involving the district's employment of [the former employee]."

For section 552.103(a) to apply, litigation must be pending or reasonably anticipated and the information must relate to that litigation. *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 (1990). You inform us of the pendency of a complaint before the Equal Employment Opportunity Commission ("EEOC"). The pendency of a complaint before the EEOC indicates a substantial likelihood of potential litigation. Open Records Decision No. 386 (1983) at 2. We also find that the information at issue relates to the anticipated litigation. We therefore, conclude that the school district may withhold the requested information based on section 552.103(a) of the Government Code.

However, no section 552.103(a) interest exists in information which the opposing party has had access to. See Open Records Decision No. 349, 320 (1982). Thus, you may not withhold the "Charge of Discrimination," which the opposing party filed with the EEOC or any other information which the opposing party has obtained. However, based on common-law privacy, you must withhold information on the "Charge of Discrimination" or elsewhere that identifies the charging party. (A discussion of the application of common-law right to privacy to the requested information follows on page four of this letter.) In addition, once the EEOC complaint has been resolved, the applicability of section 552.103(a) ends. See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982) at 3.

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<sup>1</sup>We observe that the Memorandum of Understanding states that "the circumstances of the resignation are not [to] be disclosed except as may be required by civil or judicial process." The Open Records Act, in providing that all information of a government body is public unless expressly excepted from disclosure, prevents governmental bodies from making enforceable promises to keep information confidential, unless they are authorized to do so by law. See Attorney General Opinion JM-37 (1983); Open Records Decision No. 585 (1991).

Because the applicability of section 552.103(a) ends once the EEOC case is closed, we will consider the other way the school district seeks to apply section 552.103(a) to the requested information. The school district also seeks to withhold the requested information under section 552.103(a) because it anticipates other litigation. The school district anticipates other litigation because it has received a letter from an attorney who is representing another school district employee in regard to her employment. In that letter, the attorney states that he has advised his client that she has valid claims against the former employee and requests the school district "to take prompt investigatory and remedial action" or he "will advise [his client] to pursue a formal grievance and/or other further action."

The attorney does not state that he intends to sue the school district. Moreover, the information you enclosed makes it apparent that the school district conducted an investigation and took remedial action in regard to the conduct of the former employee about which the employee is complaining. Thus, we find no objective indication that the employee (the potential opposing party) intends to sue the school district. *See* Open Records Decision No. 555 (1990) (finding litigation was reasonably anticipated where potential opposing party filed a complaint with the civil rights division and hired an attorney who stated that he intended to file suit). Therefore, we cannot conclude that in this instance litigation is reasonably anticipated. Because we conclude that the attorney's letter does not establish that litigation with this employee is reasonably anticipated, once the EEOC claim is resolved, the school district may not withhold the requested information based on section 552.103(a) of the Government Code.

However, when the EEOC claim is closed and section 552.103(a) no longer applies, you must release the information with redactions of certain portions of the information which are protected from required public disclosure under the common-law right to privacy. Information about mental abuse in the workplace is highly embarrassing, private information. *See Industrial Found.*, 540 S.W.2d at 683; *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied). Moreover, we do not think the public has a legitimate interest in knowing the identity of these individuals. *See Ellen*, 840 S.W.2d at 525. Thus, any information that identifies the victims of workplace mental abuse must be withheld under section 552.101 of the Government Code and the common-law right to privacy.

Finally, we note that the requested information contains the home address of the former employee. This address may be excepted from required public disclosure, if the former employee has complied with the provisions of section 552.024 of the Government Code. *See* Gov't Code § 552.117.

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 may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Kay Guajardo". The signature is fluid and cursive, written over a light background.

Kay Guajardo  
Assistant Attorney General  
Open Government Section

KHG/LRD/rho

Ref.: ID# 26643

Enclosures: Marked documents

cc: Ms. Katherine L. Duff  
Brim, Arnett & Judge, P.C.  
114 W. 7th Street, Suite 100  
Austin, Texas 78701  
(w/o enclosures)