



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 13, 1995

Mr. Don Bradley
Staff Attorney
Office of General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR95-594

Dear Mr. Bradley:

You have asked this office to determine if information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. The Texas Department of Health (the "department") received a request for information concerning a particular employee. Your request for a decision was assigned ID# 32510.

We note initially that various questions were submitted to the department in the form of interrogatories, which would have required the department to compile new information. You state that the department "has not attempted to produce answers to the non-document related questions" in the inquiry. The Open Records Act is not a substitute for the discovery process under the Texas Rules of Civil Procedure. See Attorney General Opinion JM-1048 (1989) at 3 ("the fundamental purposes of the Open Records Act and of civil discovery provisions differ"); Open Records Decision No. 551 (1990) at 3-4 (discussion of relation of Open Records Act to discovery process). The department does not have to compile new information or to answer questions to respond to a request. See Gov't Code § 552.002 (defining a "public record"); *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio, 1978, writ dismissed w.o.j.) (official could not be compelled to produce documents not in his possession); Open Records Decision Nos. 452 (1986) at 2-3, 342 (1982) at 2 (Open Records Act applies only to documents already in existence).

Both requests are for information concerning a named employee. You have submitted to this office documents responsive to those requests. You assert that the information at issue is excepted from disclosure under section 552.103(a) of the Government Code, and state:

[One] request came from the attorney of another TDH employee who was given a letter of intent to terminate on February 17, 1995. This letter provides opportunity for a rebuttal through March 24, 1995 of the allegations made against the requestor. If the allegations are not sufficiently rebutted, there is a likelihood of termination of this employee. Such an action would most certainly result in an administrative hearing. . . . The requestor has received this letter of intent to terminate from his supervisor, whose employment records are sought by the requestor. The supervisor's employment records requested are completely unrelated to the allegations and action being considered.

To show the applicability of section 552.103, a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related 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) at 4. In Open Records Decision No. 452 (1986) at 4, this office stated:

Litigation cannot be regarded as "reasonably anticipated" unless there is more than a "mere chance" of it -- unless, in other words, we have concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. [Citations omitted.]

The time period for the employee's response to the allegations had apparently already passed by the time this office received your request for a decision. Although any time an employee is terminated there may be a chance of litigation, you have provided no information showing that the employee has actually taken steps toward litigation. *See* Open Records Decision No. 331 (1982). In addition, you indicate that the records at issue are not related to the termination action. Under these circumstances, the department has not shown the applicability of section 552.103(a) to the documents at issue.

We note that both requestors seek information from the named employee's personnel file. One of the requestors contends that under section 552.102 of the Government Code she is entitled to all personnel information except for that which, if released, would constitute a "clearly unwarranted invasion of personal privacy." The test to determine whether information is private and excepted from disclosure under 552.102 is whether the information is (1) highly intimate or embarrassing to a reasonable person and (2) of no legitimate public concern. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 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.). Generally, information concerning the job performance of a public employee is of legitimate public concern. Open Records Decision Nos. 470 (1987) at 4 (public has legitimate interest in job performance of public employees), 423 (1984) at 2 (scope of public employee privacy is narrow).

This office has recognized that there is a privacy interest in personal financial information. Open Records Decision No. 373 (1983). In Open Records Decision No. 545 (1990), we stated that information regarding an employee's participation in the state's deferred compensation plan, including the amounts contributed and cumulative account balances with specific vendors, is private confidential information. In Open Records Decision No. 600 (1992) (copy enclosed), this office drew a distinction between benefit plans that are funded in whole or part by the state and financial decisions made by the employee about his own salary. Details of transactions funded in whole or in part by the state are generally of legitimate public interest, because these are financial transactions that involve public funds. See Open Records Decision No. 545 (1990). Therefore, it is public information that an employee is participating in insurance programs paid for in whole or in part by the state. See Open Records Decision No. 600 (1992) at 9 (information about "essential features" of employee participation in group insurance programs is not excepted from disclosure).

However, there is no legitimate public interest in public employees' private financial decisions. Thus, information showing whether the employee is allocating part of his salary to various types of "flex" plans, which allow an employee to allocate his pretax compensation to certain benefit plans, is private financial information. Open Records Decision No. 600 (1992) at 11-12. Information showing whether the employee opts to have his paycheck deposited directly to a bank is also private. *Id.* Information about deferred investment programs and designation of beneficiaries of those programs, must be withheld. See Open Records Decision No. 545 (1990). Information concerning an employee's allocation of part of his salary to any voluntary investment program is private and may not be disclosed. Open Records Decision No. 600 (1992) at 11-12. Information about insurance coverage paid for entirely by the employee is excepted from disclosure, as is information about designated beneficiaries of those plans. Open Records Decision No. 600 (1992) at 9-10.

The documents submitted to this office also contain the employee's home address and home telephone number. Sections 552.024 and 552.117 of the Government Code protect from public access the current and former home addresses and home telephone numbers of public employees who have chosen to keep this information private. Open Records Decision No. 622 (1994) at 5. Section 552.024 provides that employees who do not want home addresses and telephone numbers to be publicly accessible must take that option within 14 days after starting or ending employment with the state. After 14 days, an employee wanting to open or close access must so request in writing. If an election is not made, the information is subject to public access. See Open Records Decision Nos. 530 (1989) at 5, 482 (1987) at 4, 455 (1987). You have submitted to this office a selection form indicating that the employee had opted to have this information maintained as confidential prior to the dates of the open records requests. Thus, you may not release the named employee's home address and home telephone number.

Other information in the personnel file is protected from disclosure under section 552.101 of the Government Code, which exempts from disclosure information made confidential by other law. This includes all Form W-4s, the Employee's Withholding

Allowance Certificate, which are confidential as tax return information under title 26, section 6103(a) of the United State Code. Open Records Decision No. 600 (1992) at 8-9. Also, social security numbers that were obtained or maintained by a governmental body pursuant to any provision of law, enacted on or after October 1, 1990, are confidential pursuant to section 405(c)(2)(C)(viii) of title 42 of the United State Code.¹ We note that section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information.

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,



Ruth H. Soucy
Assistant Attorney General
Open Government Section

RHS/KHG/rho

Ref.: ID# 32510

Enclosures: Open Records Decision No. 600 (1992)
Submitted documents

cc: Ms. Iris J. Jones
Wright & Greenhill
221 West 6th Street
Austin, Texas 78701-3495
(w/o enclosures)

¹It is not apparent to us, nor do we have any way of knowing, whether this employee's social security number was obtained or maintained by the department pursuant to any provision of law enacted on or after October 1, 1990. Therefore, we have no basis to determine whether the social security number at issue is confidential under title 42 of the United States Code, section 405(c)(2)(C)(viii), and therefore excepted from public disclosure under section 552.101 of the Open Records Act.

We note also that the Seventy-fourth Legislature has significantly amended the Open Records Act effective September 1, 1995. See Act of May 19, 1995, H.B. 1718, 74th Leg., R.S. (to be codified at Gov't Code ch. 552) (copies available from House Document Distribution). We do not address in this ruling whether these recent amendments to the Open Records Act will affect requests for this type of information that are made on or after September 1, 1995.

Mr. Akwasi Evans
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