



Office of the Attorney General
State of Texas

November 15, 1996

DAN MORALES
ATTORNEY GENERAL

Ms. Ann Diamond
Assistant District Attorney
Tarrant County
Office of the Criminal District Attorney
Justice Center
401 W. Belknap
Fort Worth, Texas 76196-0201

OR96-2125

Dear Ms. Diamond:

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# 101717.

The Tarrant County Human Resources Department (the "department"), which you represent, received a request for information concerning a former employee. The requestor asked "to see former Tarrant County employee Donna Long's appeal of her termination to the Civil Service Commission, and the documents filed in response to it." You assert that the requested information is excepted from disclosure under sections 552.101, 552.102 and 552.103 of the Government Code. We have considered the arguments and exceptions you make and have reviewed the submitted documents.

At the outset, we address your contention that the requested information constitutes records of the judiciary and thus is not subject to the Open Records Act.¹ See Gov't Code § 552.003(1)(B) (excepting judiciary from scope of Open Records Act). You advise us that the Tarrant County Civil Service Commission (the "commission") performs *functions* that are "judicial" which should except it from the Open Records Act. However, in *Holmes v. Morales*, 924 S.W.2d 920 (Tex. 1996), the Texas Supreme Court held that the Texas Constitution "section 1, Article V specifically vests the judicial power . . . in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, . . . , and in such other courts as may be provided by law." As the commission does not fall within the specifically set out entities with judicial

¹The act generally requires the public disclosure of information maintained by a "governmental body." Gov't Code § 552.002. However, the act's definition of "governmental body" does not include the judiciary. Gov't Code § 552.003(1)(B).

power, we must conclude that it is a "governmental body" subject to the provisions of the Texas Open Records Act.

We must next address your assertion that section 552.103 of the Government Code exempts the submitted information from required public disclosure. Section 552.103(a) applies to 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.

To secure the protection of section 552.103(a), the department must demonstrate that the requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding, to which the department is or may be a party. Open Records Decision No. 588 (1991). Section 552.103 requires concrete evidence that the claim that litigation may ensue is more than mere conjecture. Open Records Decision No. 518 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

You assert that "[t]he ongoing [commission] case constitutes actual, not merely threatened, litigation." Although you characterize this process as administrative litigation, we note that a hearing before the commission is not a "contested case" under the Administrative Procedure Act, Gov't Code §§ 2001.001 *et seq.* (1993), and we have not recognized such a hearing as a quasi-judicial proceeding under section 552.103(a). See Open Records Decision No. 588 (1991). However, you have offered evidence to show that the requestor has threatened legal action in the event that she is unsuccessful in her claims to the commission, and that her claims "will likewise be a subject of litigation in another forum." Furthermore, you have provided to our office a letter from an Assistant Criminal District Attorney which attests that "the information sought by the requestor is exempt from disclosure pursuant to § 552.103." Therefore, after review of the submitted records it is evident that litigation is reasonably anticipated and the responsive records relate to that litigation. In this instance you have made the requisite showing that the requested information relates to anticipated litigation for purposes of section 552.103(a). The requested records may therefore be withheld.

However, our review of the submitted records indicates that some of the information at issue has already been seen by the opposing party in the anticipated litigation. Generally, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated

litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. We also note that the department has discretion to release information that is not otherwise confidential by law. Gov't Code § 552.007. Finally, the applicability of section 552.103(a) generally ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You also assert that the submitted records are excepted from disclosure pursuant to sections 552.101 and 552.102 of the Government Code. Therefore, we must consider whether these exceptions except from disclosure any of the information, which you may not withhold pursuant to section 552.103. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section also encompasses common-law privacy. Under common-law privacy, private facts about an individual are excepted from disclosure. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). For information to be protected from public disclosure under the common-law right of privacy, the information must meet the criteria set out in *Industrial Foundation*. Information must be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1. Section 552.102 protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The protection of section 552.102 is the same as that of the common-law right to privacy under section 552.101. *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Consequently, we will consider these two exceptions together for the documents which may not be withheld, and are subject to release, pursuant to section 552.103 of the Government Code.

You assert that the submitted information is excepted from required public disclosure because you believe it would be an "invasion of personal privacy" to disclose such information. However, this office has previously held that a common-law right of privacy does not protect facts about a public employee's misconduct on the job or complaints made about his or her performance. *See* Open Records Decision Nos. 444 (1986) at 4 (legitimate public interest in information relating to public employees), 438 (1986), 230 (1979), 219 (1978). After a review of the submitted records we find that most of the information subject to disclosure is not highly intimate or embarrassing and there exists a legitimate public interest in this information. *See* Open Records Decision No. 165 (1977). However, we have marked some information in the submitted records which are excepted from disclosure, because they are highly intimate and embarrassing and there is no legitimate public interest in their disclosure. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied); *see generally* Open records Decision 455 (1987). Accordingly, most of the remaining information subject to disclosure is not excepted under either sections 552.101 or 552.102 and must be disclosed to the requestor, except for the marked sections, which are protected under the privacy provisions of section 552.101 of the Government Code.

We are resolving this matter with this 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 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Sam Haddad
Assistant Attorney General
Open Records Division

SH/ch

Ref: ID# 101717

Enclosures: Marked documents

cc: Mr. Larry Hartstein
Arlington Morning News
1112 Copeland Road, Suite 400
Arlington, Texas 76011
(w/o enclosures)