



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 18, 1996

E. Lynn Rodriguez
General Counsel
Texas Higher Education Coordinating Board
P.O. Box 12788
Austin, Texas 78711

OR96-2421

Dear Ms. Rodriguez:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 37260.

The Texas Higher Education Coordinating Board received several requests for information. You indicate that most of the information has been provided. However, you assert that some of the information at issue is protected from disclosure by sections 552.101 and 552.103(a) of the Government Code.

One of the documents at issue is correspondence from a grievance committee to the requestor. You state that you are "concerned about the common-law privacy interests of agency employees mentioned in the 1993 report." The requestor asked for a list of the individuals who were interviewed by a grievance committee. You state that these individuals were told their names would be confidential. The requestor also asked for "a list of all personnel who have achieved a monetary achievement bonus by name of employee, division, classification title, and amount for years 1985 - present," including the ethnicity, sex, age, national origin, disability, or political affiliation data of employees." You question whether information about bonuses is protected from disclosure under common-law privacy.

The test to determine whether information is private and excepted from disclosure under common-law privacy provisions, which are encompassed in section 552.101 and section 552.102 of the Government Code, is whether the information is (1) highly intimate or embarrassing to a reasonable person and (2) of no legitimate public concern. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 930 (1977); *Hubert v. Harte-Hanks Texas Newspapers Inc.*, 652 S.W.2d 546 (Tex. App.-Austin 1983, writ ref'd n.r.e.). The 1993 grievance committee information relates

to the job performance and work behavior of public servants. There is a legitimate public interest in a public employee's conduct while at work and how he or she performs job functions. 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). Thus, the requested 1993 grievance committee correspondence must be disclosed.

The names of individuals who were interviewed by the grievance committee does not constitute information protected under common-law privacy. It does not appear that this information is intimate or embarrassing to a reasonable person, but even if it were, there is a legitimate public interest in this information.

This office has recognized that there is a privacy interest in personal financial information. Open Records Decision No. 373 (1983). However, there is a legitimate public interest in financial transactions that involve public funds. See Open Records Decision No. 545 (1990). As information about transactions funded in whole or in part by the state is of legitimate public interest, Open Records Decision Nos. 600 (1992), information showing that an employee received an achievement award is not protected by privacy. See also Open Records Decision No. 455 (1987) at 9 (there is legitimate public interest in employee salaries).

The requestor has also asked for information concerning employees' disabilities and political affiliations. In Open Records Decision No. 641 (1996), this office determined that medical information obtained pursuant to the Americans with Disabilities Act of 1990 (the "ADA") 42 U.S.C. § 12101 *et seq.*, is confidential under section 552.101 of the Government Code in conjunction with 42 U.S.C. § 12112. See also 29 C.F.R. § 1630.14(b)(1) (providing that medical information "shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record").

Section 12112(d)(3)(B) of title 42 of the United States Code provides that information regarding medical condition or medical history may be disclosed as follows:

- (i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
- (ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
- (iii) government officials investigating compliance with this Act shall be provided relevant information on request.

These restrictions are applicable to information about medical conditions obtained from employees. 29 C.F.R. § 1630.14(c)(1)(i)-(iii). Thus, information about disabilities obtained pursuant to the ADA is confidential under section 552.101.

We note that the ADA is not applicable to all of the information concerning employees' disabilities. The ADA is not applicable to information obtained prior to the effective date of 42 U.S.C. § 122112. *See* Pub. L. No. 101-336, Title I, § 108, 104 Stat. 337 (1990) (providing that this provision is effective 24 months after enactment of July 26, 1990 Act). As to documents obtained prior to this date, the information concerning disabilities is protected from disclosure pursuant to common-law privacy, as is the information about employees' political affiliations. Both types of information fit the *Industrial Foundation* test set out by the Texas Supreme Court. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 930 (1977).

As to the remaining documents at issue, you assert that they are excepted from disclosure pursuant to section 552.103(a). To show that section 552.103(a) is applicable, a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to the 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; *see also* Open Records Decision No. 518 (1989) at 5 (governmental body must show that litigation involving a specific matter is realistically contemplated). However, in this situation the prospect of litigation is too speculative for section 552.103(a) to be applicable. Open Records Decision No. 518 (1989) at 5 (governmental body must show that litigation involving a specific matter is realistically contemplated).¹

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 should 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

*Open Records Division
Office of the Attorney General*

Ref: ID#37260

Enclosures: Submitted documents

cc: Ms. Patricia Lieb

¹We note that some of the information in these remaining documents may implicate the requestor's own common-law privacy interests. While this information should be disclosed to the requestor, it may not be made public. *See* Gov't Code § 552.023.