



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 14, 1997

Mr. Richard L. Webb
Attorney
The University of Texas System
Office of General Counsel
201 West Seventh Street
Austin, Texas 78701-2981

OR97-1101

Dear Mr. Webb:

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# 32780.

The University of Texas at Dallas, a component of The University of Texas System (the "university") received a request for:

1. The complete contents of [the requestor's] personnel file, minus all routine items related to fringe benefits.
2. The complete contents of the personnel file of [a named university employee].
3. The complete contents of any file, however labeled, created to contain material related to the sexual harassment charge lodged against [the requestor] by [a named university employee].
4. The complete contents of any file(s), including all attachments, appendices, or enclosures related to the EEOC complaint filed by [a named university employee].
5. The complete contents of the file(s) related to the Workman's Compensation claim filed by [a named university employee].

The requestor is an employee of the university. You advise that you are releasing the information in item one of the request. However, you claim that the remainder of the

requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.111, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first address your claim that section 552.103 excepts from disclosure the information in items 3 and 4 of the request. Section 552.103(a) excepts from 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.

The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body 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.

The documents show that a complaint of discrimination was filed against the university with the Texas Commission on Human Rights (the "TCHR"). This office has ruled that a pending complaint before the Equal Employment Opportunity Commission (the "EEOC") indicates a substantial likelihood of litigation relating to the complaint. Open Records Decision Nos. 386 (1983) at 2, 336 (1982) at 1. The TCHR operates as a federal deferral agency under section 706(c) of title VII, 42 U.S.C. § 2000e-5. The EEOC defers jurisdiction over complaints alleging employment discrimination to the TCHR. *Id.* By demonstrating that a TCHR complaint is pending against the city, you have shown that the university reasonably anticipates litigation relating to the complaint. You have also shown that the requested documents relate to the anticipated litigation. Accordingly, section 552.103(a) excepts the items 3 and 4 of the requested documents from required public disclosure.¹

¹We note that if the opposing party in the anticipated litigation has seen or had access to any of the documents at issue, there would be no justification for withholding those documents from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). However, the documents at issue contain information that is confidential by law. Therefore, we urge the university to exercise caution in releasing the documents once section 552.103(a) no longer protects the documents from disclosure. See Gov't Code § 552.352. See also *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied).

We next address your claim that sections 552.101 and 552.102 protects some of the requested documents from disclosure. Section 552.101 excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision and incorporates the doctrine of common-law privacy. 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 of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may 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. You also raise section 552.102, which 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.

Because there is a legitimate public interest in the activities of public employees in the workplace, information about public employees is commonly held not to be excepted from required public disclosure under common-law privacy. 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). For example, this office has concluded in the past that common-law privacy does not protect information about the educational training of an applicant or employee; names and addresses of former employers; dates of employment, kind of work, salary, and reasons for leaving; names, occupations, addresses and telephone numbers of character references; and information about job performance. Open Records Decision No. 455 (1987) at 9. Most of the requested information in item 2 relates to the job performance of a public employee, and therefore must be disclosed to the requestor, with certain exceptions noted below.

Section 552.101 also encompasses information protected by other statutes. Section 402.083(a) of the Labor Code provides, "Information in or derived from a claim file regarding an employee is confidential and may not be disclosed by the commission except as provided by this subtitle." In Open Records Decision No. 533 (1989), this office concluded that the predecessor to this statute applied only to information held by the Texas Worker's Compensation Commission (the "commission") or transmitted by the commission. *See* Labor Code § 402.086. It appears here that the information requested in item 5 was obtained from the employee and not from the commission. Thus, it is not confidential under section 402.083 of the Labor Code. *See* Open Records Decision No. 533 (1989). If, however, any of the information submitted to this office for review was obtained from the commission, then you must withhold only that information under section 402.086(a) in conjunction with section 552.101 of the Government Code.

In addition, Sections 552.024 and 552.117 of the Government Code provide that a current or former public employee or official can opt to keep private his or her home

address, home telephone number, social security number, and information that reveals that the individual has family members if, as of the time of the request for the information, the individual had elected to keep this information private. Open Records Decision Nos. 530 (1989) at 5, 482 (1987) at 4, 455 (1987). You have shown that the named employee, whose records are at issue, elected to withhold disclosure of the employee's home address and telephone number. Therefore, you must withhold this information from disclosure wherever it appears in the submitted material. Also, if this individual's social security number was obtained or maintained by a governmental body pursuant to any provision of law, enacted on or after October 1, 1990, it is confidential pursuant to section 405(c)(2)(C)(viii) of title 42 of the United States Code.

We are resolving this matter with an informal letter ruling rather than with a published open records decision.² This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Vickie Prehoditch
Assistant Attorney General
Open Records Division

VDP/alg

Ref.: ID# 32780

Enclosures: Submitted documents

cc: Mr. David E. Dunn
Natural Sciences & Mathematics
University of Texas at Dallas, FN 32
P.O. Box 830688
Richardson, Texas 75083-0688
(w/o enclosures)

²Because we are able to make a determination regarding the requested information in items 3 and 4 under section 552.103, we do not address your claims regarding the applicability of sections 552.107 and 552.111 to that information.