



April 26, 2000

Mr. S. Stephen Hilmy
Gary, Thomasson, Hall & Marks
210 South Carancahua, Suite 500
Corpus Christi, Texas 78403-2888

OR2000-1616

Dear Mr. Hilmy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 135696.

The Gregory-Portland Independent School District (the "district"), which you represent, received a request for copies of the investigation and reasons surrounding the suspension of a named district employee. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You assert that the submitted information is excepted from disclosure under section 552.101 in conjunction with common law privacy and section 552.102. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the act. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Therefore, we will dispose of both claims by simply addressing whether section 552.101 applies to the requested information.

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information protected by the common law right of privacy. *Id.* Common law privacy excepts from disclosure private facts about an individual. *Id.* 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 at 1 (1992).

Although you assert that the disclosure of the submitted information relating to possible irregularities in the handling of district activity funds is highly intimate and embarrassing, we note that there is a legitimate public interest in how a public employee conducts himself while on-duty and how he performs his job functions. *See* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job performance of public employees), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 423 at 2 (1984) (scope of public employee privacy is narrow), 329 (1982) (reasons for an employee's resignation are not ordinarily excepted by constitutional or common law privacy). Further, information which pertains solely to an employee's actions while acting as a public servant and the conditions for continued employment cannot be deemed to be outside the realm of public interest. *See* Open Records Decision No: 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees). Therefore, we conclude that the submitted documents are not excepted from disclosure under common law privacy as encompassed by section 552.101, or under section 552.102.

You also assert that section 552.101 excepts the documents submitted as Exhibits II-V because the information may be protected by the husband-wife privilege and, therefore, confidential by law. Section 552.101 also encompasses information protected by statute. Rule 504 of the Rules of Evidence protects private communications between husband and wife. However, the Rules of Evidence only govern civil and criminal proceedings. Tex. R. Evid. 101(b). Thus, the husband-wife evidentiary privilege does not amount to a confidentiality statute which excepts the information from disclosure under section 552.101 of the Government Code. Accordingly, you may not withhold the submitted information under section 552.101.

You also assert that the information is excepted by section 552.103 of the Government Code. Section 552.103(a) provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature 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.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex.*

Law Sch. v. Texas Legal Found., 958 S.W.2d 479 (Tex. App.–Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.–Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). Further, litigation must be pending or reasonably anticipated on the date the requestor applies to the public information officer for access. Gov't Code § 552.103(c).

To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990), *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 at 2 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

Although you assert that it is the district’s understanding that the suspended employee has engaged legal counsel, you have not provided us with any information indicating that the employee has taken any objective steps toward filing suit. Therefore, you have not demonstrated that litigation is reasonably anticipated and, therefore, you may not withhold the requested information under section 552.103.

You also claim that section 552.131 excepts portions of the information from disclosure. Section 552.131 of the Government Code, as enacted by House Bill 211, provides in pertinent part:

- (a) “Informer” means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.
- (b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

Because the Legislature limited the protection of section 552.131 to persons who report possible violations of "law," we do not believe that the mere report of a violation of a school district policy or procedure is sufficient to invoke the protection of section 552.131. Thus, this exception does not apply to an individual who merely alleges the commission of behavior that does not constitute a violation of criminal, civil or regulatory law. *Cf.* Open Records Decision No. 515 (1989). Nor would this exception protect the identity of an individual who merely provides information to the school district during an investigation, but whose statement does not contain an allegation of a violation of law. Consequently, as part of its burden of demonstrating the applicability of section 552.131, a school district must clearly identify to this office the precise law or regulation alleged to have been violated in the individual's statement. *See* Gov't Code § 552.301(e)(1).

You explain that the submitted information contains statements furnished to the district by employees relating to the possible violation of policy or law. Further, you assert that no final determination has been made as to whether the informers planned, initiated, or participated in the possible violation. Because you have not set forth the precise law or regulation alleged to have been violated in these statements and you have not confirmed that the "informers" did not participate in the possible violation, we conclude that you have not established the applicability of section 552.131 to the submitted information. Because we have found none of the exceptions applicable, the district must release the submitted information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the

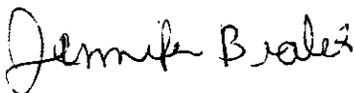
governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jennifer Bialek
Assistant Attorney General
Open Records Division

JHB/nc

Ref: ID# 135696

Encl. Submitted documents

cc: Mr. James Doughty
4750 S. Padre Island Drive
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(w/o enclosures)