



October 3, 2002

Mr. Joe R. Tanguma
Attorney for Del Mar College District
Gary, Thomasson, Hall & Marks
P.O. Box 2888
Corpus Christi, Texas 78403-2888

OR2002-5593

Dear Mr. Tanguma:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 170224.

The Del Mar College District (the "college"), which you represent, received a request for information relating to a named individual's e-mail communications and other computer activity. You indicate that the college has released some of the requested information. The college claims that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.136, and 552.137 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.¹

Initially, we must consider whether some of the submitted information is subject to the Public Information Act (the "Act"), chapter 552 of the Government Code. Section 552.021 provides for public access to "public information." Section 552.002 defines "public information" as consisting of

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the college to withhold any information that is substantially different from the submitted information. See Gov't Code § 552.301(e)(1)(D): Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002(a). This office has stated that certain factors are relevant, although not exhaustive, in deciding whether a document is essentially governmental or personal information: who prepared the document; the nature of its contents; its purpose or use; who possessed it; who had access to it; whether the governmental body required its preparation; and whether its existence was necessary to or in furtherance of official business. *See* Open Records Decision No. 635 (1995). The college notes that the submitted e-mail communications contain personal information. Having reviewed the information, we find that some of the submitted e-mails are not "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the college. Gov't Code § 552.002(a). Thus, those e-mails, which we have marked, do not constitute public information, and therefore the Act does not require the college to release them to the requestor.

Next, we address the college's claims with respect to the rest of the requested information. As section 552.103 of the Government Code is the college's most inclusive claim, we address this exception first. Section 552.103 provides in part:

(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.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to that litigation. *See 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.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

You state that both the requestor and the person to whom the requested information pertains are employees of the college. You inform us that the person to whom the information pertains has initiated an internal grievance procedure against the requestor and is represented by legal counsel. You state that the grievance is still pending and may lead to litigation against the college and/or the requestor. Having considered your representations, we find that you have not demonstrated that litigation was pending or reasonably anticipated when the college received this request for information. Therefore, the college may not withhold the rest of the requested information under section 552.103.

The college also believes that this information may be excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You inform us that an official college policy gives its employees a reasonable expectation of privacy with respect to personal files and data that are held on college computers, such that other employees will not be allowed access to such information unless expressly authorized to do so by appropriate college authorities. You state that the requestor has not been authorized to have access to the personal files and data of the employee to whom the requested information pertains. We note, however, that a governmental body may not make information confidential under section 552.101 of the Government Code by rule or agreement, unless the governmental body has specific authority to do so. *See* Open Records Decision Nos. 514 at 1-2 (1988), 484 at 2 (1987), 479 at 1-2 (1987), 444 at 6 (1986). You do not inform us that the college has such authority. Furthermore, information is not confidential under chapter 552 of the Government Code simply because the source of the information anticipated or requested confidentiality for the information. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Thus, the college may not withhold the

remaining requested information from public disclosure on the basis of its policy with regard to such information.

The college also informs us that the remaining requested information appears to be of a personal nature and to contain sensitive and private information. Therefore, we will consider whether any of this information is excepted from disclosure under section 552.101 in conjunction with a right to privacy. Section 552.101 encompasses constitutional and common-law rights to privacy. Constitutional privacy protects two kinds of interests. See Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987); see also *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). The first is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. See Open Records Decision No. 455 at 3-7 (1987); see also *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981). The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. See Open Records Decision No. 455 at 6-7 (1987); see also *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985), *reh'g denied*, 770 F.2d 1081 (1985), *cert. denied*, 474 U.S. 1062 (1986). This aspect of constitutional privacy involves a balancing of the individual's privacy interest against the public's interest in the information. See Open Records Decision No. 455 at 7 (1987). Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie v. City of Hedwig Village*, 765 F.2d at 492). We find that none of the remaining requested information is protected by constitutional privacy under section 552.101.

Common-law privacy under section 552.101 protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. See *Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy encompasses the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. See 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has since concluded that other types of information also are private under section 552.101. See Open Records Decision Nos. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to a drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress). We conclude that none of the remaining information is protected by common-law privacy under section 552.101.

In summary, some of the requested information does not constitute public information under section 552.002 of the Government Code. Chapter 552 of the Government Code does not require the college to release that information to the requestor. The remaining requested information is not excepted from disclosure and must be released. As we are able to make these determinations, we need not consider your other arguments.

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).

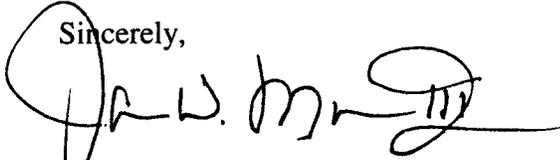
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,

A handwritten signature in black ink, appearing to read "J.W. Morris, III". The signature is written in a cursive style with a large initial "J" and a long horizontal flourish at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 170224

Enc: Marked documents

c: Ms. Sarah Mohundro
2407 Oakbrook
Portland, Texas 78374
(w/o enclosures)