



Office of the Attorney General
State of Texas

August 24, 1992

DAN MORALES
ATTORNEY GENERAL

Ms. Bettye S. Springer
Haynes and Boone, L.L.P.
1300 Burnett Plaza
Fort Worth, Texas 76102-4706

OR92-512

Dear Ms. Springer:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 16867.

The City of Coppell (the "city") received an open records request for a settlement agreement (the "agreement") between the city and a former city employee. You contend the agreement comes under the protection of sections 3(a)(2) and 3(a)(3) of the Open Records Act. You also note that the agreement contains provisions making the terms of the agreement confidential.

We initially note that a governmental body cannot, through a contract, overrule or repeal provisions of the Open Records Act.¹ Attorney General Opinion JM-672 (1987). *See also Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Although you assert that release of the agreement "except by court order" would subject the city to potential litigation, you have not demonstrated that any court order makes the settlement agreement confidential so as to bring it within the protection of section 3(a)(7). Consequently, unless it falls within one of the exceptions that you have raised, the city must release the agreement, notwithstanding any contract between the city and the former city employee specifying otherwise.

¹Article I, section 16, of the Texas Constitution forbids only laws that operate retroactively on contracts; consequently, any contract with confidentiality provisions, such as that at issue here, that was executed after the enactment of the Open Records Act is without effect. *See, e.g., Open Records Decision No. 55A (1975)*. The settlement agreement is not made confidential by its own terms.

We further note that section 6 of the Open Records Act provides in pertinent part:

Without limiting the meaning of other sections of this Act, the following categories of information are specifically made public information:

....

(3) information in any account, voucher, or *contract* dealing with the receipt or expenditure of public or other funds by governmental bodies, not otherwise made confidential by law. [Emphasis added.]

Section 6 reflects the legislative intent that information regarding the receipt or expenditure of public funds should ordinarily be available to the public. Although section 6 of the act does not override the exceptions listed in section 3(a), it does at a minimum heighten the burden of proof that information is excepted from required public disclosure. Open Records Decision No. 518 (1989) at 7. With this in mind, we now look to your contentions regarding the applicability of sections 3(a)(2) and 3(a)(3).

Section 3(a)(2) is designed to protect public employees' personal privacy. The scope of section 3(a)(2) protection, however, is very narrow. See Attorney General Opinion JM-36 (1983); Open Records Decision No. 336 (1982). The test for section 3(a)(2) protection is the same as that for information protected by common-law privacy under section 3(a)(1): to be protected from required disclosure the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.) [Emphasis added]. The information at issue pertains solely to the settlement of the former employee's age discrimination claims she filed against the city, and as such cannot be deemed to be outside the realm of public interest. Section 3(a)(2) was not intended to protect the type of information at issue here.

You next contend that the agreement is protected by section 3(a)(3) because the release of the agreement "would subject the City to potential litigation . . . for

breach of the Agreement." To secure the protection of section 3(a)(3), a governmental body must demonstrate that requested information "relates" to pending or reasonably anticipated litigation. Open Records Decision No. 551 (1990).

The mere chance of litigation will not trigger the 3(a)(3) exception. Open Records Decision Nos. 331, 328 (1982). You have not demonstrated that the likelihood that the former employee will bring suit against the city is more than mere conjecture. Further, once information has been obtained by all parties to the litigation, no section 3(a)(3) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). Consequently, even if this office were to determine that litigation in this regard was reasonably anticipated, section 3(a)(3) would be inapplicable to the agreement because both parties have access to this information.

You also argue that the agreement "relates" to other, pending litigation to which the city is a party:

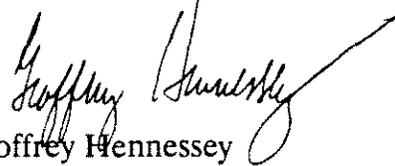
More particularly, the City is currently being sued by two former employees and one current employee of the Coppell Fire Department. . . . During the deposition of a City official in the [pending] case, the plaintiffs' attorney made repeated references to [the former employee's] employment with the City and the circumstances of her termination. As a result, the circumstances and terms of the Agreement may be placed in issue in the [pending] case.

Your argument does not meet your heightened burden under the act. You have not explained, nor is it apparent to this office, how the terms of the agreement relate to the factual or legal issues in litigation involving other former city employees. Accordingly, the city must release the agreement in its entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with

a published open records decision. If you have questions about this ruling, please refer to OR92-512.

Yours very truly,



Geoffrey Hennessey
Assistant Attorney General
Opinion Committee

GH/RWP/lmm

Ref.: ID# 16867

cc: Mr. Walter G. Pettijohn
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