



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 28, 1994

Ms. Martha Allan
Supervising Attorney
Texas Department of Protective and
Regulatory Services
P.O. Box 149030
Austin, Texas 78714-9030

OR94-704

Dear Ms. Allan:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 24682.

The Texas Department of Protective and Regulatory Services (the "department") has received a request for documents relating to an offer of employment or application for employment made to or by a certain person. The department asserts that the information is excepted from required public disclosure by sections 552.102 and 552.103 of the act.

Section 552.103 of the act excepts from required public disclosure information relating to litigation "to which the state or a political subdivision . . . is or may be a party." Section 552.103 requires concrete evidence that litigation is realistically contemplated; it must be more than mere conjecture. Open Records Decision Nos. 518 (1989) at 5; 328 (1982).

You state that "[t]he agency has received information from the requestor which indicates that an employee furnishing information regarding the requestor may be the subject of litigation from the requestor in the near future." The documents you have submitted indicate that the requestor threatened to file suit regarding the withdrawal of her offer of employment in a telephone conversation with a department employee, that she has retained an attorney to represent her in connection with this matter, that her attorney has discussed this matter with a department employee, and that the requestor told another employee that she intends to consult with an employment lawyer. That a person has threatened to sue a governmental body and has retained an attorney without more,

however, does not demonstrate that litigation may be reasonably anticipated. See Open Records Decision Nos. 452 (1986); 331 (1982) (fact that person states on more than one occasion an intent to sue does not demonstrate that litigation may be reasonably anticipated); see also Open Records Decision No. 361 (1983) (fact that a request for information is made by an attorney on behalf of a rejected applicant is not sufficient to demonstrate that litigation may be reasonably anticipated). We conclude that the department has not demonstrated that litigation regarding this matter to which the department may be a party is reasonably anticipated. Accordingly, the department may not except the requested information from required public disclosure under section 552.103.

Section 552.102 excepts:

(a) . . . information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, except that all information in the personnel file of an employee of a governmental body is to be made available to that employee or the employee's designated representative as public information is made available under this chapter.

Section 552.102(a) protects personnel file information only if its release would cause an invasion of privacy under the test articulated for common-law privacy under section 552.101. In order for information to be protected from public disclosure under the common-law right of privacy as incorporated by section 552.101, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). The court stated that

information . . . is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing former section 3(a)(1) of article 6252-17a, V.T.C.S.); *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.) (court ruled that test to be applied in decision under former section 3(a)(2), V.T.C.S. art. 6252-17a, was the same as that delineated in *Industrial Foundation* for former section 3(a)(1), V.T.C.S. art. 6252-17a).

The requested records relate to the requestor's successful application for a position with the department and the subsequent withdrawal of the offer of employment. We have reviewed the information you submitted to this office. Much of the information relates to applicants rather than employees of the department. Because section 552.102 is

inapplicable to applicants, *see* Open Records Decision No. 455 (1987) at 8, we apply the common-law privacy test pursuant to section 552.101, which you did not raise. Given that this office has concluded that there is a legitimate public interest in the qualifications of applicants for public employment, *see id.*, we believe that the requested information is of legitimate public interest. Accordingly, it is not excepted from required public disclosure under section 552.101 and must be released.¹

If you have questions about this ruling, please contact our office.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Open Government Section

MRC/MAR/rho

Ref.: ID# 24682

Enclosures: Submitted documents

cc: Mr. Reuben L. Hancock
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(w/o enclosures)

¹We note that the applications you have submitted reflect the applicants' social security numbers. A social security number or "related record" is excepted from required public disclosure under section 552.101 of the act in conjunction with the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(vii), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994); *see also* 42 U.S.C. § 405 (c)(2)(C)(v) (governing release of social security number collected in connection with the administration of any general public assistance, driver's license or motor vehicle registration law). Based on the information you have provided, we are unable to determine whether the social security numbers listed on the applications are confidential under this federal statute. We note, however, that section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information. Therefore, prior to releasing any social security number information, the department should ensure that the information is not confidential under federal law.