



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 8, 1995

Mr. William L. Rentfro
Rentfro & Rentfro, P.C.
Attorneys at Law
Texas Commerce Bank Building
2300 Boca Chica Boulevard, Suite 201
Brownsville, Texas 78521

OR95-377

Dear Mr. Rentfro:

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# 32270.

The Brownsville Independent School District (the "district") received an open records request for "any information pertaining to the termination of [a district employee's] employment as a coach with the [district], including but not limited to: the personnel file for [the employee]; records relating to his workman's compensation and sick leave; [and] any other documentation relating to his resignation from his coaching position." You state that you have released to the requestor all of the information requested except for some information which you contend is confidential under sections 402.083 and 402.087 of the Labor Code, and thus, must be withheld under section 552.101 of the Government Code. Additionally, you contend that the information not yet released is excepted from disclosure by sections 552.102 and 552.103(a) of the Government Code. Finally, you state that included in the documents requested are the home address and telephone number of a district employee. You contend that this information is excepted from public disclosure by section 552.117 of the Government Code. You have submitted copies of the records you contend may be withheld from public disclosure for our review.

Initially you contend that the records submitted for our review are deemed confidential by sections 402.083 and 402.087 of the Labor Code, and thus, must be withheld from the public pursuant to section 552.101 of the Government Code.¹ Section 402.083(a) of the Labor Code provides:

Information in or derived from a [worker's compensation] claim file regarding an employee is confidential and may not be disclosed by the [Texas Workers' Compensation] [C]ommission except as provided by this subtitle. [Emphasis added.]

Open Records Decision No. 533 (1989) (copy enclosed) discussed the applicability of the statutory predecessor to section 402.083 of the Labor Code, section 9a of former article 8307, V.T.C.S., to information held by a governmental body that was not the Texas Workers' Compensation Commission. This office held as follows:

Under the provisions of article 8307, section 9a, the report of first injury or illness in a worker's compensation claim -- indeed, all the information in a worker's compensation file held by the Industrial Accident Board -- is deemed confidential and may not be released by the Industrial Accident Board or by anyone else who has lawfully acquired the information, except as provided in article 8307, section 9a. The statute contemplates acquisition of the information from the board and prohibits further dissemination by an agency, person or entity that has acquired the information from the board. Here, the city did not acquire the information from the board, but rather furnished the information to the board. Therefore, the city is not, in this instance, within the coverage of the confidentiality rule. . . .

. . . . Therefore, information in a worker's compensation claim file held by the Industrial Accident Board is deemed confidential by law, but information in a worker's compensation claim file held by a public employer, who is covered by the Open Records Act, falls outside the scope of section 9a if it comprises information not obtained from the board, and is not therefore protected per se by statute from public disclosure.

Open Records Decision No. 533 (1989) at 5-6.

¹Section 552.101 protects from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

Section 402.087 sets forth a procedure by which a prospective employer may obtain workers' compensation information about an applicant for employment from the commission. We note that the records you seek to except from disclosure are not records maintained by the commission, but are records maintained by the district. Sections 402.083 and 402.087 apply only to information maintained by the commission. Accordingly, the requested information which the district contends may be withheld under sections 402.083 and 402.087 is not confidential under section 402.083 of the Labor Code. Thus, the documents at issue are not excepted from disclosure by section 552.101 of the Government Code.

You also contend that release of the information you seek to withhold would constitute a "clearly unwarranted invasion of personal privacy, and so is excepted from disclosure under" section 552.102 of the Government Code. Section 552.102(a) excepts from required public disclosure

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.

The test for applying section 552.102(a) is the same test for determining a violation of the common-law tort of invasion of privacy as set forth in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.); Open Records Decision No. 444 (1986). To be within the common-law tort, the information must (1) 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 (2) be of no legitimate concern to the public. *Industrial Found.*, 540 S.W.2d at 685. Information previously held by this office not to be protected by common-law privacy interests includes, for example, applicants' and employees' educational training; names and addresses of former employers; dates of employment; kind of work; salary; and reasons for leaving; names, occupations, addresses and phone numbers of character references; job performance or ability; birth dates; height; weight; marital status; and social security numbers. See Open Records Decision No. 455 (1987); see also Open Records Decision Nos. 470 (1987), 467 (1987), 444 (1986), 421 (1984), 405 (1983). Information which this office has previously held to be information that is protected by common-law privacy interests include criminal history, detailed medical information, emotional or mental distress, results of psychological and IQ tests, personal financial information, and allegations of sexual harassment, under some circumstances. See *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied); Open Records Decision Nos. 600 (1992), 565 (1990), 545 (1990), 422 (1984).

We have examined the information submitted to us for review. None of the information you seek to withhold is of a highly intimate or embarrassing nature that would constitute a public disclosure of private facts as described in *Industrial Foundation*. See Open Records Decision No. 533 (1989).

You also claim that the information you seek to withhold is protected from disclosure by section 552.103(a). Section 552.103(a) excepts from required public 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.

For information to be excepted from public disclosure by section 552.103(a), litigation must be pending or reasonably anticipated and the information must relate to that litigation. *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 (1990) at 5. A surmise that litigation will occur is not enough; there must be some concrete evidence pointing to litigation. Attorney General Opinion JM-266 (1984) at 4; Open Records Decision Nos. 518 (1989) at 5, 328 (1982). To secure protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). You do not explain why section 552.103(a) applies in this instance. Therefore, the information you seek to withhold is not protected from public disclosure by section 552.103(a).

Finally, you contend that the home address and telephone number of the district employee is excepted from disclosure by section 552.117 of the Government Code. Section 552.117 provides that information is excepted from required public disclosure

if it is information relating to:

(1) the home address or home telephone number of:

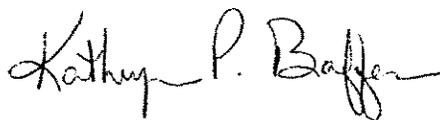
(A) a current or former official or employee of a governmental body, except as otherwise provided by Section 552.024.

Section 552.024 of the Government Code sets out a procedure by which a governmental employee may, by a signed writing, elect to have his or her home address and telephone number withheld from public disclosure. Section 552.117 does not automatically protect public employees' home addresses and telephone numbers unless the employee at issue is a peace officer. Gov't Code § 552.117(1)(B); Open Records Decision Nos. 530 (1989), 488 (1988). To obtain protection under section 552.117, non-peace officer employees and officials and former employees and officials must exercise their privilege timely under section 552.024. The exercise of the option to close public access to home addresses and telephone numbers does not apply to an open records request made before the option was exercised. Open Records Decision No. 530 (1989). Therefore, in this case, if the district employee has elected not to disclose his home address and home telephone number in accordance with section 552.024 of the Government Code, the district must withhold these items of information. Otherwise, they are public.

Having addressed all of the district's claimed exceptions, we conclude that whether the district employee properly exercised his option under section 552.024 regarding his home address and home telephone number determines whether the district must withhold or disclose that information. The remainder of the information in the records submitted for our review is public and must be disclosed.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kathryn P. Baffes
Assistant Attorney General
Open Government Section

KPB/KHG/rho

Ref.: ID# 32270

Enclosures: Open Records Decision No. 533 (1989)
Submitted documents

cc: Mr. Maro Robbins
Reporter
The Brownsville Herald
P.O. Box 351
Brownsville, Texas 78520
(w/o enclosures)