



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 26, 1996

Mr. Richard A. Peebles
Richard A. Peebles, P.C.
4001 Garth Road, Suite 107
Baytown, Texas 77521-3115

OR96-2236

Dear Mr. Peebles:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 101970.

Lee College (the "college"), which you represent, received a request for all memoranda that mention the requestor or his office. You have submitted a representative sample of the requested information.¹ You assert that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the information at issue.

We first address your claim under section 552.103. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The college has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The college must meet both prongs of this test for information to be excepted under section 552.103(a).

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

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 (1986) at 4. 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.² Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 (1989) at 5 (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 (1983) at 2. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

You claim that litigation is reasonably anticipated because the requestor has filed a grievance with the Board of Regents. The Board has taken no final action on the grievance, but you state that the requestor has threatened litigation if his request for relief is denied. That an employee who may, at some point, be dissatisfied with the results of the grievance process is too remote and conjectural to conclude at this time that future litigation is reasonably anticipated. Open Records Decision No. 582 (1990) at 3. The litigation exception requires more objective indications that the complainant intends to follow through with the threat of litigation. *See* Open Records Decision 452 (1986). Thus, we conclude that you have failed to meet the requisite showing that litigation is reasonably anticipated and, therefore, you may not withhold the information under section 552.103.

You also cite section 552.102 to support withholding of the requested information. 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). Common-law privacy excepts from disclosure private facts about an individual. *Id.*

²In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); 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 threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

Therefore, 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 (1992) at 1. After a review of the submitted documents, we conclude that they do not contain information that is highly intimate and embarrassing. Thus, you may not withhold these documents under section 552.102.

You also invoke an exception under section 552.111. Section 552.111 excepts from required public disclosure “[a]n interagency or interagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Section 552.111 applies only to internal communications consisting of advice, recommendations, or opinions reflecting the policymaking processes of the governmental body at issue. Open Records Decision No. 615 (1993) at 5. The policymaking functions of an agency do not, however, encompass internal administrative and personnel matters. *Id.* The memoranda at issue concern an internal personnel matter and, therefore, does not come under this exception.

Lastly, you contend that the requested information is excepted from disclosure under section 552.101 because it is “considered to be confidential by law since it is information that relates to the employment relationship” between the college and one of its employees. Section 552.101 excepts from required public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The test for information protected under the common-law privacy doctrine is set out above in our discussion of section 552.102.

The test to be applied in determination of a legitimate public interest was amplified in *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ *ref'd n.r.e.*). Because there is a legitimate public interest in the activities of public employees in the workplace, information about public employees is commonly held not to be excepted from required disclosure under this test.

As we have already concluded, none of the information in the representative sample that you presented to us is highly intimate and embarrassing and of no public interest. Moreover, as section 552.101 is a mandatory exception, we have reviewed the documents to ascertain whether any of the submitted information is confidential either by statute, by judicial decision, or under constitutional privacy. We conclude that there is no confidential information or information protected by constitutional privacy in the submitted documents. Therefore, section 552.101 does not except the requested information from required public disclosure.

Because the requested information may not be withheld from disclosure under any of the exceptions you assert, you must release the requested information.³

We are resolving this matter with an 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 should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/rho

Ref.: ID# 101970

Enclosures: Marked documents

cc: Mr. Jim Hickman
Lee College District
P.O. Box 818
Baytown, Texas 77522-0818
(w/o enclosures)

³We note, however, that some of the requested material may include the home address, phone number, and family information of a current or former city official or employee. It is possible that this information may be confidential under section 552.117 of the Government Code, and therefore, this specific information, depending on the specific circumstances, may not be released. Section 552.117 excepts from required public disclosure the home addresses, telephone numbers, social security numbers, or information revealing whether a public employee has family members of public employees who request that this information be kept confidential under section 552.024. Therefore, section 552.117 requires you to withhold such information of a *current or former employee or official who requested that this information be kept confidential under section 552.024*. See Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold the information of a current or former employee who made the request for confidentiality under section 552.024 after this request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 (1989) at 5. Therefore, if the employee or official has elected to not allow public access to this information in accordance with the procedures of section 552.024 of the Government Code, we believe that the college must withhold this information from required public disclosure pursuant to section 552.117. We have marked a sample of that kind of information that must be withheld if the employee made the election not to allow public access to the information.