



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

April 10, 1997

Mr. Therold I. Farmer  
Walsh, Anderson, Underwood, Schulze  
& Aldridge, P.C.  
6300 La Calma, Suite 200  
Austin, Texas 78768

OR97-0765

Dear Mr. Farmer:

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# 104883.

The Kemp Independent School District (the "district"), which you represent, received a request for information consisting of 32 pages of letters from parents or other citizens to the school board. You assert that the requested information is excepted from disclosure pursuant to sections 552.101, 552.102 and 552.103 of the Government Code. We have considered your arguments and have reviewed the information submitted.

Section 552.101 excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision and incorporates the doctrine of common-law privacy. For information to be protected from public disclosure under the common-law right of privacy, the information must meet the criteria set out in *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). 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. You also raise section 552.102, which protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The protection of section 552.102 is the same as that of the common-law right to privacy under section 552.101. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.).

You assert that the complaints against the employees are of no legitimate interest to the public, that release of the letters would constitute an unwarranted invasion of privacy, and that

to release them would place the district at risk of stigmatizing its employees or subjecting them to “false light” defamation. We note, however, that in *Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994), the Texas Supreme Court held that Texas does not recognize the existence of a cause of action for false light privacy. *See also* Open Records Decision No. 484 (1987) (privacy does not protect unsubstantiated complaints against police officer). Further, this office has found that the manner in which a public employee performs his job cannot be said to be of minimal interest to the public, which is the second part of the privacy test. Open Records Decision No. 405 (1983), 400 (1983). This office has also found that information regarding complaints filed by citizens and their resolution by a police department is of legitimate concern to the public and therefore not properly excepted by the predecessor to section 552.102. Open Records Decision No. 418 (1984). We therefore conclude that the requested information may not be withheld from disclosure by a right of privacy.<sup>1</sup>

Section 552.101 also protects information made confidential by judicial decision. In this regard, you assert that the requested information is excepted from disclosure under the informer’s privilege. The informer’s privilege protects the identity of persons who report violations of the law to officials having the duty of enforcing particular laws. *See Roviario v. United States*, 353 U.S. 53, 59 (1957). The informer’s privilege does not, however, apply to information that does not describe alleged illegal conduct. Open Records Decision No. 515 (1988) at 5. For example, the informer’s privilege aspect of section 552.101 does not protect memoranda and written statements complaining of a fellow employee’s work performance when those statements do not reveal the suspected violation of specific laws to the officials charged with enforcing those laws. *See* Open Records Decision Nos. 579 (1990) at 8, 515 (1988) at 3. Because the complaints at issue do not reveal the violation of laws, we conclude that the district may not withhold the requested information under the informer’s privilege of section 552.101.

Section 552.101 also encompasses information protected by other statutes. You assert that under the Open Meetings Act, the same complaints which are the subject of this request, if made orally, would not have been made public since a governing body may hold closed meetings to hear complaints about employees. *See* Gov’t Code § 551.074(a)(2). Thus, you argue that release of the written complaints under the Open Records Act would circumvent the intent of the Open Meetings

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<sup>1</sup>We also note that, in support of your 552.102 argument, you cite to *Wells v. Hico ISD*, 736 F.2d 243, 256 (5th Cir. 1984) for the proposition that a school district must not violate an individual’s liberty interest by releasing either information or mere allegations that would stigmatize an employee to the point of burgeoning him or her with a “badge of infamy.” According to the *Hico* court, however, “[to] establish a liberty interest, an employee must demonstrate that his governmental employer *has brought false charges against him* that ‘might seriously damage his standing and associations in his community,’ or that impose a ‘stigma or other disability’ that forecloses ‘freedom to take advantage of other employment opportunities.’” (Emphasis added) (citations omitted). The court further stated, “[n]or is reputation alone a constitutionally protected interest, even though state law may create an action for defamation. Rather, the stigma must be imposed by the state in connection with its denial of a right or status previously recognized by state law, such as the nonrenewal at issue here, though loss of a property interest (such as tenured employment) is not required.” (Citations omitted). Thus, in order for the liberty interests of the individuals who are the subject of the complaints in this case to be violated, the district would have to make false charges against them which result in a denial of a right or status. Because it does not appear we have that situation here, we conclude the release of the information in response to an Open Records Act request in this case will not violate the liberty interests of district employees.

Act. This office has ruled, however, that the mere fact information was discussed in an executive session does not make it confidential under the Open Records Act. Open Records Decision Nos. 605 (1992); 485 (1987). We therefore conclude that the requested information may not be withheld under section 552.101 in conjunction with section 551.074.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the governing body is or may be a party, or to which an officer or employee of the governing body, as a consequence of the person's office or employment, may be a party. The district 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 district must meet both prongs of this test for information to be excepted under section 552.103(a).

You have informed us that litigation is pending between an employee of the district and the requestor, and that the litigation arises out of remarks made by the requestor against the employee at a school board meeting in relation to parent-teacher relations. The employee is one of those mentioned in the information being requested. We note, however, that section 552.103 doesn't apply absent a showing of a direct relationship between the information sought and the pending or contemplated litigation. Open Records Decisions No. 429 (1985), 222 (1979) (construing predecessor statute). Upon review of the submitted documents, we are unable to determine whether they are directly related to the pending litigation. We therefore conclude that the district has not met its burden under section 552.103(a), and thus the requested information may not be withheld under this section.

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 upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/ch

Ref.: ID# 104883

Enclosures: Marked documents

cc: Ms. Alicia K. Smith  
P.O. Box 646  
Kemp, Texas 75143  
(w/o enclosures)