



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 10, 1998

Mr. James Deatherage
Attorney for Irving Independent School District
Power & Deatherage
1311 West Irving Boulevard
Irving, Texas 75061-7220

OR98-2654

Dear Mr. Deatherage:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 119575.

You indicate that the superintendent of the Irving Independent School District received on July 13, 1998, a letter from the requestor. In that letter, dated July 12, 1998, the requestor asked for several things, including a meeting to discuss concerns. The requestor specifically asked for the following:

Prior to the meeting, we are requesting a copy of all documents regarding this matter which were written by you to Mr. Puryear and his staff or from Mr. Puryear and his staff to you or the District, as it pertains to this matter. Please consider this request as though it were individually submitted under the authority of the Texas Open Records Act.

The superintendent responded to this request for records under the Open Records Act by letter dated July 14, 1998. The superintendent's letter states that the requested records are excepted from disclosure under section 552.103 and 552.111, and also states: "If necessary, I shall request an Open Record's decision from the Texas Attorney General's office on this matter."

You indicate that after a telephone conference with the requestor and receipt of another letter from the requestor, the superintendent believed that the requestor no longer wanted the records. The requestor subsequently filed a complaint with this office asserting that the superintendent failed to either provide the requested records or to timely seek a

decision from this office concerning the applicability of the stated exceptions to disclosure. Section 552.301 provides that if a governmental body believes that requested information is protected from disclosure under an exception in the Open Records Act, that governmental body has a duty to seek a decision from the attorney general within ten business days after the governmental body's receipt of the request for information. When a request for an open records decision is not made within the time period prescribed by section 552.301, the requested information is presumed to be public. See Gov't Code § 552.302.

You represent the Irving Independent School District and the superintendent. You assert that sections 552.102 and 552.103 protect the requested records from disclosure. Section 552.103(a) may be waived by failure to timely raise this exception. Open Records Decision No. 473 (1987) (governmental body's failure to request decision within ten days waived sections 552.103(a) and 552.111, but not sections 552.101 and 552.102, which protect privacy interests of third parties). However, for purposes of this ruling, we will assume that the time period for responding to the public information request was tolled for the time in which the superintendent believed the requestor did not want the records.

To show that section 552.103(a) is applicable, a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to the litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex.App.-Austin 1997, no pet.); *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 at 4 (1990). The governmental entity must meet both prongs of this test for information to be excepted under section 552.103(a). Litigation has been found to be reasonably anticipated when an individual has hired an attorney who demands damages and threatens to sue the governmental entity. Open Records Decision No. 551 at 2 (1990). However, when a requestor on several occasions publicly states a threat to sue, this alone does not show that litigation is reasonably anticipated. In this situation the prospect of litigation is too speculative for section 552.103(a) to be applicable. Open Records Decision No. 518 at 5 (1989) (governmental body must show that litigation involving a specific matter is realistically contemplated). Thus, section 552.103(a) will not protect these records from disclosure.

We next consider your section 552.102 argument to protect these records from disclosure. Section 552.102(a) protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of privacy." Section 552.102(a) is implicated when an employee's common-law privacy interest is at stake. *Hubert v. Harte-Hanks Texas Newspapers Inc.*, 652 S.W.2d 546 (Tex. App.-Austin 1983, writ ref'd n.r.e.). The test for whether information is protected on the basis of the employee's common-law privacy interest is if the information is (1) highly intimate or embarrassing to a reasonable person and (2) of no legitimate public concern. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 930 (1977); *Hubert v. Harte-Hanks Texas Newspapers Inc.*, 652 S.W.2d 546 (Tex. App.-Austin 1983, writ ref'd n.r.e.).

You assert that if the requested records are disclosed, "the rights of Puryear and/or Riley to have the matter heard and considered in a closed meeting is destroyed without their consent and to their detriment." However, this does not meet the common-law privacy test encompassed by section 552.102. The records at issue relate to issues of legitimate public interest and pertain to the job performance of public employees. Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job performance of public employees); 423 at 2 (1984) (scope of public employee privacy is narrow). The records at issue must be disclosed.

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,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/ch

Ref: ID# 119575

Enclosures: Submitted documents

cc: Ms. Christine Deel
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Irving, Texas 75060
(w/o enclosures)