



February 19, 1999

Mr. Edward W. Dunbar
Dunbar, Crowley & Hegeman, L.L.P.
4726 Transmountain Drive
El Paso, Texas 79924

OR99-0510

Dear Mr. Dunbar:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Open Records Act. . Your request was assigned ID# 122560.

The El Paso Community College District received a request for “copies of all normal operation audit reports and of all audit memos prepared by the college’s internal auditor, Matthew Babbick, since July 1996.” You submit information responsive to the request but seek to withhold it under sections 552.101 and 552.103 of the Government Code.

Section 552.101 protects “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” including information coming within the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85.

Section 552.101 also encompasses constitutional privacy protections. The constitutional right to privacy consists of two related interests: 1) the individual interest in independence in making certain kinds of important decisions, and 2) the individual interest in independence in avoiding disclosure of personal matters. The first interest applies to the traditional “zones of privacy” described by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), and *Paul v. Davis*, 424 U.S. 693 (1976). These “zones” include matters related to marriage, procreation, contraception, family relationships, and child rearing.

The second interest, in nondisclosure or confidentiality, may be somewhat broader than the first. Unlike the test for common-law privacy, the test for constitutional privacy involves a *balancing* of the individual's privacy interests against the public's need to know information of public concern. Although such a test might appear more protective of privacy interests than the common-law test, the scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." See Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985)).

You argue that the "conclusions made by the auditor" in the responsive reports and memoranda "implicate privacy interests." We have examined the submitted information and conclude that none of it is protected by privacy, either constitutional or common-law. See Open Records Decision No. 620 at 4 (1993) (companies do not have privacy interests).

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.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991). The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986) and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

You contend that "[t]here could well be litigation if these matters are made public." In our opinion you have not demonstrated that litigation to which the requested information relates is either pending or reasonably anticipated. Therefore, the submitted information may not be withheld under section 552.103(a). The submitted information must be released in its entirety.

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.

Sincerely,



William Walker
Assistant Attorney General
Open Records Division

WMW/ch

Ref:: ID# 122560

Enclosures: Submitted documents

cc: Mr. David Crowley
El Paso Times
P.O. Box 20
El Paso, Texas 79999
(w/o enclosures)