THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

September 7, 1989

Mr. Stephen L. Sheets
City Attorney
The City of Round Rock
221 East Main Street
Round Rock, Texas 78664

Dear Mr. Sheets:

This office previously issued an open records decision, OR89-277, that held that a majority of the contents of a notebook maintained by Mr. James R. Nuse, Director of Public Works for the city of Round Rock, were subject to the Texas Open Records Act, article 6252-17a, V.T.C.S., and that you had waived the right to withhold those portions of the notebook that were subject to the act because you had failed to submit a copy of the entire notebook to this office within a specified ten-day time period. OR89-277 did not, however, recognize that your initial request for a decision from this office was made in a timely manner, that at the time of that request you submitted only representative samples of the notebook because you considered, whether accurately or not, the contents of the notebook to be "voluminous," and that you made timely arguments as to why the notebook could be withheld pursuant to sections 3(a)(1) and 3(a)(11) of the Open Records Act. Consequently, this office will reconsider, at your request, its prior decision, but only with regard to the applicability of these two exceptions to required public disclosure; this ruling is OR89-277A.[1]

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1. We note that subsequent to your initial request, you raised additional exceptions to required public disclosure with regard to the notebook. Because you did not raise these exceptions in a timely manner, the act does not authorize this office to consider your additional arguments. See art. 6252-17a, § 7(a); Open Records Decision No. 515 (1988).

Section 3(a)(1) of the act protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision," including the common-law right to privacy. Industrial Foundation of the South v. Texas Industrial Accident Board, 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. None of the information contained in the notebook meets these tests; you may not, therefore, withhold any portion of the notebook pursuant to section 3(a)(1).

Section 3(a)(11) of the act excepts inter-agency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's deliberative process. Open Records Decision No. 464 (1987). The purpose of this section is "to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes." Austin v. City of San Antonio, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.).

Although the notebook may to some extent reflect Mr. Nuse's opinions, a mechanical application of an "opinion test" alone does not effect the public policy underlying the Open Records Act. Cf. Open Records Decision No. 464 (1987); see also Open Records Decision No. 439 (1986). It is not enough that the notebook contain "opinions." To be excepted from required disclosure, the document must be a direct part of the deliberative process in sensitive policy matters, the "give-and-take" that takes place during the decision-making process. Open Records Decision No. 464; see Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975). A less restrictive interpretation of the term "deliberative process" would "virtually foreclose all public knowledge regarding the implementation of personnel polices in any given agency." See Vaughn v. Rosen, 523 F.2d at 1145.

You have not demonstrated that any portion of the notebook played a part in the "give-and-take" of the decision-making process. This office believes that section 3(a)(11) is inapplicable here because the notebook, by your own description, is for Mr. Nuse's "own personal use." Because you failed to show that sections 3(a)(11) or 3(a)(1)

apply to the notebook, you must release this information in its entirety except for those portions of the notebook previously held not to be subject to the Open Records Act.

Yours very truly,

Jennifer S. Riggs
Chief, Open Government Section
of the Opinion Committee

JSR/RWP/bc

cc: Mr. William Albee
2706 Overview
Round Rock, Texas 78681

Ref.: (See OR89-277)