



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

November 27, 1996

Ms. Amy L. Whitt  
Assistant City Attorney  
City of Lubbock  
P.O. Box 2000  
Lubbock, Texas 79457

OR96-2268

Dear Ms. Whitt:

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# 37940.

The City of Lubbock (the "city") received a request for information pertaining to a background investigation conducted by the Lubbock Police Department (the "department") on an applicant for employment with the department. The requestor is the applicant. You state the city has complied with the request to the extent there are no confidentiality issues involved with the documents. You contend the remaining information (submitted as Exhibits B through H) is excepted from disclosure under sections 552.101, 552.108 or 552.111 of the Government Code.

We will initially address your arguments under section 552.111. You assert documents involving opinions and recommendations as to the hiring of the applicant played a role in the decision not to hire the applicant, and that 552.111 allows a governing body to withhold advice, opinions and recommendations, including those from employment references, which play a role in its decision-making process. Section 552.111 excepts from disclosure "only those internal agency communications consisting of advice, recommendations, opinions and other material reflecting the deliberative or policymaking processes of the governmental body at issue." Open Records Decision No. 615 (1993) at 5. This exception is intended to protect advice and opinions given on policy matters and to encourage frank and open discussions within an agency in connection with the agency's decision-making processes. *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 412 (Tex. App.--Austin 1992, no writ) (citing *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.)). An agency's policymaking functions do not encompass routine internal administrative and personnel matters. Open Records Decision No. 615 (1993) at 5. Disclosure of such matters does not inhibit free discussion among agency personnel as to policy issues. *See id.* Because the documents in Exhibits B and C which you argue are excepted under 552.111 involve opinions and recommendations pertaining to a routine personnel matter, and not the department's policymaking function, we conclude these documents may not be withheld under 552.111.

You contend financial information contained in Exhibit B pertaining to the requestor's wife is excepted from disclosure under 552.101 in that its release would "disclose embarrassing private facts." Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 (1987) at 4. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

In Open Records Decision No. 481 (1987), the Attorney General addressed the question whether the Open Records Act allowed the Dallas/Fort Worth International Airport Board to deny a request submitted by an unsuccessful applicant for employment for access to information concerning his application. The information contained financial data pertaining to the applicant and his wife, indicating how long a particular bank had maintained credit history information on these individuals, the highest credit extended to them, their payment habits, the total loan balances, and whether and in what manner the loans were secured. In addressing the privacy interest in this information, the Attorney General stated

. . . we do not believe that information revealing a person's credit history, loan balances, payment habits, and collateral is so innocuous as to implicate no privacy interest, nor do we think that reasonable people would not object to the mandatory disclosure of this data. We conclude, therefore, that there is a privacy interest at stake here, albeit one of lesser magnitude than the interest involved in the cases cited above. We need not attempt to determine the extent of this privacy interest, because unlike the foregoing cases, there is in this instance absolutely no public interest in the disclosure of this information. That there is a privacy interest in this data but no public interest in its disclosure means that the data is constitutionally protected, notwithstanding that the privacy interest is less than that involved in Plante and Duplantier.<sup>1</sup> In view of this, the applicant is not entitled to examine Exhibit "C" to the extent that it contains personal financial information concerning his wife.

Open Records Decision No. 481 (1987) at 3-4. We similarly conclude that information in Exhibit E pertaining to the bank balances and credit limits of the applicant's wife, as well as the current balance and payment history relating to department stores and utilities, are protected by a constitutional right of privacy, are of no legitimate interest to the public, and are therefore

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<sup>1</sup> DuPlantier v. United States, 606 F.2d 654 (5th Cir. 1979); Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978).

excepted from disclosure under 552.101.<sup>2</sup>

You also contend certain witness statements contained in Exhibit F concerning a criminal incident involving the applicant are protected by the informer's privilege. The informer's privilege, incorporated into the Open Records Act by section 552.101, is actually a governmental entity's privilege to withhold from disclosure the identity of those persons who report violations of law. The privilege recognizes the duty of citizens to report violations of law and, by preserving their anonymity, encourages them to perform that duty. *Roviaro v. United States*, 353 U.S. 53, 59 (1957). The informer's privilege protects the identity of a person who reports a violation or possible violation of law to officials charged with the duty of enforcing the particular law. Open Records Decision Nos. 462 (1987), 434 (1986).

In the present case, the individuals whose statements are contained in Exhibit F were not acting as informants because they were not reporting criminal activity to the Lubbock Police Department for purposes of prosecution. We therefore conclude the individuals are not "informants" for purposes of the informer's privilege, and thus their statements may not be withheld under section 552.101.<sup>3</sup>

Finally, you assert criminal history record information (CHRI) obtained through a computer data base involving individuals unrelated to the requestor is excepted under 552.101 and 552.108. The documents submitted to this office marked "Exhibit H" consist of CHRI obtained from the National Crime Information Center - Interstate Identification Index (NCIC-III) and the Texas Crime Information Center (TCIC). The dissemination of CHRI obtained from the NCIC network is limited by federal law. See 28 C.F.R. § 20.1; Open Records Decision No. 565 (1990) at 10-12. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 (1990) at 10-12. Sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release the CHRI except to another criminal justice agency for a criminal justice purpose, Gov't Code § 411.089(b)(1). Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. Furthermore, any CHRI obtained from the Texas Department of Public Safety or any other criminal justice agency must be withheld as provided

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<sup>2</sup>We note the items listed 1-10 on the last two pages of Exhibit E are not identified on their face in any way with either the requestor or his wife. The information on these pages is excepted from disclosure only to the extent it relates to the requestor's wife. If it pertains to the requestor, it is not excepted from disclosure under 552.101. See Open Records Decision No. 481 (1987) at 4. ("In our opinion, privacy theories are not implicated when an individual asks a governmental body to provide him with information concerning himself").

<sup>3</sup>It appears the city obtained some of the requested information in Exhibit F from a law enforcement agency, the Clovis, N.M. Police Department. You have not argued that section 552.108 excepts this information from disclosure, and sections 552.301 and 552.302 prevent you from now raising section 552.108. See Open Records Decision No. 397 (1983) (the names and statements of witnesses may be withheld under 552.108 if it is determined necessary in order 1) to protect witnesses from intimidation or harassment; or 2) to harm the prospects of future cooperation). However, because the Clovis P.D. presumably did not receive a copy or notice of this request, that agency did not have the opportunity to submit its own arguments for excepting this material from disclosure. Under these circumstances, the law enforcement agency may now be able to raise section 552.108 as a compelling reason for non-disclosure of this information. See Open Records Decision No. 586 (1991).

by Government Code chapter 411, subchapter F. The city, therefore, must withhold any CHRI obtained from the TCIC and NCIC pursuant to section 552.101 of the Government Code.<sup>4</sup>

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# 37940

Enclosures: Submitted documents

cc: Mr. Raymond Romero  
3424 Frankford Ave., Apt. 2A  
Lubbock, Texas 79407  
(w/o enclosures)

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<sup>4</sup>As we resolve your CHRI argument under 552.101, we need not address the argument raised under 552.108.