



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

April 11, 1997

Ms. Annette Jones  
Assistant City Attorney  
City of Waco  
P.O. Box 2570  
Waco, Texas 76702-2570

OR97-0784

Dear Ms. Jones:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 105172.

The City of Waco (the "city") received a request for the following information:

All memos, notes, letters, and any departmental written guidelines/charts on the reorganization of the Special Operations Section in the last half year of 1996 and the first month of 1997 to date, to include memorandums from Asst. Chief Stroman to Chief Miller dated 12-20-96.

All correspondence involving the letter of dissatisfaction on Commander Jesse Flores and supplemental written documents involving his move from the Special Operations Section to include memorandums from Asst. Chief Stroman to Chief Miller on moving/transferring other commanders to the Special Operations Section.

You claim that the requested information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code, the informer's privilege, section 143.089 of the Local Government Code, and that some of the documents are personal notes of the employees. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111

exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. Section 552.111 also excepts from required public disclosure a preliminary draft of a letter or document related to policymaking matters, since drafts represent the advice, opinion, and recommendation of the drafter as to the form and content of the final document, so long as the underlying factual data upon which the document was based is released in a final document. Open Records Decision No. 559 (1990).

While most of the documents in Exhibit "C" pertain to the city's policy functions, some of the information contained in these documents is purely factual. Some of the information in Exhibit "D" relates to the city's policy functions; however, most of the information in Exhibits "D" and "E" relates to routine administrative and personnel matters; section 552.111 does not except it from required public disclosure. We have marked those portions of the documents in Exhibits "C," "D," and "E" that may be withheld from required public disclosure under section 552.111. The remaining information in those three exhibits may not be withheld under section 552.111.

You claim that the information in Exhibits "E" and "G" are personal notes of Assistant Chief Stroman and, as such, are excepted from disclosure under the "personal notes exception." We disagree. In an analogous situation, we have concluded that where a city secretary is under a duty to record minutes of a meeting of a governmental body, the notes are distinguishable from the type of personal notes held to be outside the provisions of chapter 552. Open Records Decision No. 225 (1979); *cf.* Open Records Decision Nos. 145 (1976) (concluding that handwritten notes in personal calendar not within Open Records Act), 116 (1975) (Open Records Act does not reach personal notes in public employee's sole possession made solely for his own use). The notes appear to have been taken by the assistant chief as part of his job responsibilities for the city. Therefore, they are not "personal notes," but are notes pertaining to the assistant chief's job, and the city may not withhold them as "personal notes."

You also claim that the information submitted as Exhibits "F" and "G" is protected by privacy. Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." 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 Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The court stated that

information . . . is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing statutory predecessor to Gov't Code § 552.101). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Section 552.101 also excepts information that is confidential under constitutional privacy. 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)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse or the detailed description of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have reviewed the documents submitted as Exhibits "F" and "G" and have marked the information that must be withheld under constitutional or common-law privacy.

You also claim that the informer's privilege protects the information in Exhibits "F" and "G." Texas courts have recognized the informer's privilege. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 (1988) at 3, 208

(1978) at 1-2. The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 (1981) at 2 (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. See Open Records Decision Nos. 582 (1990) at 2, 515 (1988) at 4-5. We do not believe that the informer's privilege applies here, as the complaints appear to be of an administrative nature rather than of criminal conduct. Therefore, the city may not withhold any of the information in Exhibits "F" and "G" under the informer's privilege.

Finally, you claim that the information in Exhibits "F" and "G" is protected by section 143.089 of the Local Government Code. Section 143.089 of the Local Government Code works in conjunction with section 552.101 of the Government Code, which encompasses information protected by other statutes. Section 143.089(g) provides:

A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

In *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946 (Tex. App.--Austin 1993, writ denied), the court addressed a request for information contained in a police officer's personnel file maintained by the city police department for its use and addressed the applicability of section 143.089(g) to that file. The records included in the personnel file related to complaints against the police officer for which no disciplinary action was taken. The court determined that section 143.089(g) made these records confidential. *City of San Antonio*, 851 S.W.2d at 949. You have not claimed that the information in Exhibits "F" and "G" is maintained in a personnel file maintained for the police department's use. Rather, these documents appear to come from the senior officer's files. However, if these documents are part of the department files maintained by the police department under section 143.089(g), the city must withhold this information. Otherwise, section 143.089 does not provide a "right of privacy" for this information and it may not be withheld except as otherwise indicated in this ruling.

We note that some of the information in Exhibit "D" is excepted from disclosure under section 552.117 of the Government Code. Section 552.117 excepts from public disclosure information relating to the home address, home telephone number, and social security number of a current or former government employee or official, as well as information revealing whether that employee or official has family members. Section 552.117

requires you to withhold this information for peace officers. We have marked the information in Exhibit "D" that must be withheld under section 552.117.

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

Yours very truly,



Stacy E. Sallee  
Assistant Attorney General  
Open Records Division

SES/glg

Ref.: ID# 105172

Enclosures: Marked documents

cc: Ms. Jan Price  
(w/o enclosures)

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