Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 3, 1997

Mr. Miles K. Risley
Senior Assistant City Attorney
P.O. Box 1758
Victoria, Texas 77902-1758

OR97-1275

Dear Mr. Risley:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 106534.

The City of Victoria (the "city") received a request for all time sheets, personnel records, disciplinary records, promotion records, pay raise records, and evaluations from 1981 to the present of all municipal court employees. You state that you have released most of the requested information. You claim, however, that some of the information is excepted from required public disclosure by sections 552.101, 552.102, 552.111, and 552.117 of the Government Code. We have considered the exceptions you claim and have reviewed the sample documents that you have submitted.[1]

You first assert that much of the requested personnel file information you seek to withhold is excepted from disclosure by sections 552.101 and 552.102. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the act. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses both common-law privacy and constitutional privacy. Common-law privacy excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*,

[1]In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988); 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1.

The constitutional right to privacy protects two interests. Open Records Decision No. 600 (1992) at 4 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). The first is the interest in independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court. Open Records Decision No. 600 (1992) at 4. The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.*

The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. *See* Open Records Decision No. 455 (1987) at 5-7 (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). 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, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)).

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), and 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), and information concerning the intimate relations between individuals and their family members. *See* Open Records Decision No. 470 (1987).

After examining the documents you seek to withhold, we find that some of them may be withheld as personal financial information and others may not. Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). Thus, a public employee's allocation of his salary to a voluntary investment program offered by their employer is a personal investment decision, and information about it is excepted from disclosure by a common-law right of privacy. Open Records Decision Nos. 600 (1992) (TexFlex benefits), 545 (1992) (deferred compensation plan). However, where a transaction is funded in part by the state, it involves the employee in a transaction with the state and is not protected by privacy. Open Records Decision No. 600 (1992). Some of the information

at issue appears to involve a financial transaction between an individual and the governmental body, *e.g.*, the employees involvement with the Texas Municipal Retirement System and the city's health plan. *See* Open Records Decision No. 600 (1992) at 9-10, 480 (1987). We do not believe that this information is protected by a right of privacy. The city, therefore, may not withhold this information under section 552.101 or 552.102. We have marked the remaining personal financial information that appears to relate only to an individual and must be withheld under section 552.101.

Section 552.101 also excepts from disclosure information protected by other statutes. Form W-4, the Employee's Withholding Allowance Certificate, is confidential as tax return information under title 26, section 6103(a) of the United States Code and must not be released. Open Records Decision No. 600 (1992) at 8-9.

Further, social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the submitted records are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Open Records Act on the basis of that federal provision. We caution, however, that section 552.353 of the Open Records Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the city pursuant to any provision of law, enacted on or after October 1, 1990.

You also assert that some of the information must be withheld under section 552.117. Section 552.117 of the Government Code excepts from required public disclosure the home addresses, telephone numbers, social security numbers, or information revealing whether a public employee has family members of public employees who request that this information be kept confidential under section 552.024. Therefore, section 552.117 requires you to withhold the home telephone number or social security number of a current or former employee or official who requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold the information of a current or former employee who made the request for confidentiality under section 552.024 after this request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 (1989) at 5.

Finally, you argue that some of the requested evaluations and internal memoranda may be withheld under section 552.111. 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 policy making processes of the governmental body. An agency's policy making 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. Most of the information that you have submitted relates to routine personnel matters, and is not excepted under 552.111. Only one portion of the documents relates to the city's policy making functions. We have marked that portion which may be withheld from required public disclosure under section 552.111. The remaining information in the evaluations must be released. *Cf.* Open Records Decision Nos. 473 (1987) at 3 (even highly subjective evaluations of public employees may not ordinarily be withheld under Gov't Code § 552.102), 470 (1987) at 4 (public employee's job performance does not generally constitute his private affairs).

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,

Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref: ID# 106534

Enclosures: Submitted documents

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(w/o enclosures)