



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 9, 1998

Ms. Lisa O. Aguilar
Assistant City Attorney
City of Corpus Christi
Legal Department
P.O. Box 9277
Corpus Christi, Texas 78469-9277

OR98-0641

Dear Ms. Aguilar:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 113158.

The City of Corpus Christi (the "city") received a request for the civil service records of three named employees. You claim that portions of one of the former employee's records are excepted from disclosure by sections 552.101 and 552.102 of the Government Code. Because you do not seek to withhold any of the other requested information, we presume that this information has been released.

The Open Records Act imposes a duty on governmental bodies seeking an open records decision pursuant to section 552.301 to submit that request to the attorney general within ten business days after the governmental body's receipt of the request for information. The time limitation found in section 552.301 is an express legislative recognition of the importance of having public information produced in a timely fashion. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ). When a request for an open records decision is not made within the time period prescribed by section 552.301, the requested information is presumed to be public. *See* Gov't Code § 552.302. This presumption of openness can only be overcome by a compelling demonstration that the information should not be made public. *See, e.g.*, Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests).

The city received the requestor's first request for information on October 24, 1997. You explain that you sought to clarify the request on November 7, 1997. It appears that you received the requestor's response December 1, 1997. You did not seek a decision from this office, however, until December 16, 1997. Consequently, you have not met your statutory

burden. Gov't Code 552.301. The requested information is therefore presumed public.¹ You have argued, however, that some of the requested information is protected by a right of privacy. Such protection would overcome the presumption of openness. Thus, we will consider these arguments.

You argue that three types of information are protected from disclosure by sections 552.101 and 552.102 because of a right of privacy. 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." This section encompasses information protected by constitutional or common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 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*

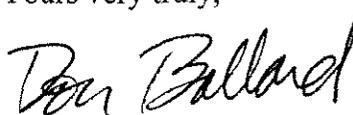
¹The informer's privilege is a discretionary exception and may be waived by a governmental body. Open Records Decision No. 549 (1990). Furthermore, the informer's privilege is not applicable to complaints against police officers where the officer is informed of the complainant's identity. Open Records Decision No. 208 (1978); *see also* Open Records Decision No. 202 (1978) (once the identity of an informer is disclosed to those who would have cause to resent the communication, the privilege is no longer applicable).

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)).

We have reviewed the submitted documents and have marked the information that must be withheld under constitutional or common-law privacy. We believe that you must withhold the victim's identity in the marked documents. Open Records Decision No. 393 (1983). We do not believe that the remaining types of information you seek to withhold are protected by a right of privacy. Open Records Decision Nos. 484 (1987) (public interest in knowing how police departments resolve complaints against police officer ordinarily outweighs the officer's privacy interest), 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 329 (1982) (reasons for an employee's resignation are not ordinarily excepted by constitutional or common law privacy). Thus, with the exception of the marked information, the submitted records must be released.

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# 113158

Enclosures: Submitted documents

cc: Ms. Michelle R. DeLaBarre
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(w/o enclosures)