



February 12, 1999

Mr. Cary L. Bovey  
Brown, McCarrol, Sheets,  
& Crossfield, L.L.P.  
309 East Main Street  
Round Rock, Texas 78664-5246

OR99-0439

Dear Mr. Bovey:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code (the "act"). Your request was assigned ID # 122036.

The City of Round Rock (the "city"), which you represent, received a request for copies of the "personnel files of the following City of Round Rock employees: 1) Raymond Kuhlmann, Chief of Police, Round Rock Police Department; and 2) Nancy Snow, Round Rock Police Department employee." You state that "the City will of course provide copies of the information not addressed in this request for an open records decision." You submitted to this office the requested information, appropriately marked as to the information you seek to withhold. You contend that the information that you seek to withhold is protected from disclosure pursuant to sections 552.101, 552.102, 552.108, 552.111, 552.117, and 552.130 of the Government Code.

You assert that some information is excepted from disclosure under sections 552.101 and 552.102. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." 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 for information claimed to be protected under the doctrine of common-law privacy in *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Section 552.101 encompasses information protected by other statutes, by common-law privacy, and by constitutional privacy. It excepts from disclosure private facts about an individual. *Id.* Information may be withheld on the basis of common-law privacy 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 at 1 (1992).

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 at 9-10 (1992), 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 information that you must release.

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 at 8-9 (1992).

One of the submitted documents is a medical record prepared by a physician. It is confidential by law under section 5.08(b) of article 4495b, V.T.C.S. Section 5.08(b) of the Medical Practice Act (the "MPA"), article 4495b, V.T.C.S., provides as follows:

...

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician

are confidential and privileged and may not be disclosed except as provided in this section.

We have marked the document that is a medical record. This document may be released only in accordance with the MPA. Open Records Decision No. 598 (1991). See V.T.C.S. art. 4495b, §§ 5.08(c), (j).

The informer's privilege, incorporated into the Open Records Act by section 552.101, has long been recognized by Texas courts. See *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). It protects from disclosure the identity 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 at 3 (1988), 208 at 1-2 (1978). The informer's privilege serves to protect the flow of information to a governmental body; it does not serve to protect a third person. Open Records Decision No. 549 at 5 (1990). Since the informer's privilege exists to protect the governmental body's interest, this privilege, unlike other section 552.101 claims, may be waived by the governmental body. *Id.* at 6 (1990). You have waived the informer's privilege by failing to explain how and why it applies to the requested information. See, e.g., Open Records Decision Nos. 542 (1990) (concluding that burden is place on the governmental body when it requests ruling pursuant to statutory predecessor to section 552.301(b)), 532 (1989), 363 (1983), 197 (1978). Conclusory assertions that a particular exception applies to requested information will not suffice.

You also raise section 552.111 to protect some of the submitted information from disclosure. 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 at 5-6 (1993). Because the information at issue relates solely to personnel matters, section 552.111 does not except the information from required public disclosure, and you must release it.

You also contend that section 552.108 of the act exempts from disclosure the records of an investigation of an employee. Section 552.108 of the Government Code, as amended by the Seventy-fifth Legislature, excepts from required public disclosure:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if:

...

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; or

...

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if:

...

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

...

(c) This section does not except from [public disclosure] information that is basic information about an arrested person, an arrest, or a crime.

Gov't Code § 552.108.

No incident report or referral to the district attorney is among the submitted documents. The internal investigation appears to have been an administrative, as opposed to a criminal investigation. You state that no criminal prosecution resulted from the investigation. Where no criminal prosecution results from an investigation of a police department employee for alleged misconduct, section 552.108 is inapplicable. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex. Civ. App.--El Paso 1992, writ denied) (construing the predecessor to section 552.108); Open Records Decision No. 350 (1982). Furthermore, you have not explained how the provisions of section 552.108 other than subsection 552.108(a) and (b)(2) apply to the submitted documents. Therefore, section 552.108 does not except the information from disclosure.

You rely on section 552.117 to except from disclosure the addresses, telephone numbers, social security numbers and other information identifying whether there are family members of Chief Kuhlmann and Ms. Snow. We agree that this information is protected by section 552.117. We have marked additional information that must be withheld under 552.117. Gov't. Code § 552.117(2). We have also marked information that may be excepted by 552.117(1) if the employee has elected under section 552.024 to close to public access information about the person's home address, home telephone number, or social security number, and whether the person has family members. Gov't Code § 552.024

Finally, you rely on section 552.130 to protect information related to a driver's license. Section 552.130 provides in relevant part as follows:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]

...

(b) Information described by Subsection (a) may be released only if, and in the manner, authorized by Chapter 730, Transportation Code.

Gov't Code § 552.130. You have correctly identified information protected by section 552.130 of the Government Code.

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.

Sincerely,



Emilie F. Stewart  
Assistant Attorney General  
Open Records Division

EFS\nc

Ref: ID# 122036

Enclosures: Marked documents

cc: Mr. Shane Graber  
Round Rock Leader  
105 South Blair  
Round Rock, Texas 78664  
(w/o enclosures)