



February 23, 1999

Mr. Cary L. Bovey
Brown, McCarroll, Sheets
& Crossfield
309 E. Main Street
Round Rock, Texas 78664-8877

OR99-0526

Dear Mr. Bovey:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 122232.

The City of Round Rock (the "city"), which you represent, received a request for a specific tape recording of a conversation between Chief Raymond Kuhlmann and one of his subordinates that Captain Rick Thomas turned over to the city manager. The requestor also seeks the written report describing an altercation which occurred on November 4, 1998. You initially claim that the requested tape is not public information subject to disclosure under the Open Records Act. In the alternative, you claim that the tape and the responsive two pages you have submitted to this office are excepted from disclosure by sections 552.101, 552.102, and 552.117 of the Government Code.

You contend that the requested tape recording need not be released because it is not "public information" subject to the Open Records Act. Section 552.002 of the Government Code defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." We have observed that certain factors are relevant, although not exhaustive, in deciding whether a document is essentially a governmental or personal document: who prepared the document; the nature of its contents; its purpose or use; who possessed it; who had access to it; whether the governmental body required its preparation; and whether its existence was necessary to or in furtherance of official business. Open Records Decision No. 635 at 4-5 (1995).

You explain to this office that the “tape recording at issue in this request was made by the telephone recording system at the Round Rock Police Department, which, with a few exceptions, records all phone calls made to or from the Police Department. The original tapes of the recorded phone calls are maintained for a period of time, and then destroyed pursuant to a regular schedule.” You state that the recording was not made under any law or ordinance nor does it involve the transaction of official business. The recorded conversation consists of a personal conversation between two city employees. It appears, however, that the information was created and maintained with city resources while the employees were at work. Because we find the requested tape recording is public information, we will consider your claimed exception to disclosure.

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. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). 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 common-law privacy and excepts from disclosure private facts about an individual. *Id.* 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 at 1 (1992).

We have examined the submitted information. Again, the requested audio tape recording consists of a personal conversation between two city employees. The recording does not mention or refer in any way to city business or city personnel matters. It does not appear to reflect any employee’s job performance, abilities, or behavior. We do not find nor does any party suggest any legitimate public interest in the release of this conversation. The requested tape recording may be withheld under common-law privacy. The two written memoranda, however, recount two employees’ encounters with another city employee and reflect personnel interactions and the city’s working environment. The information also reflects employees’ on-the-job behavior and activities in the course of their employment. We do not believe that these documents are protected from disclosure by a right of privacy. Open Records Decision Nos. 470 (1987) (public employee’s job performance does not generally constitute his private affairs).

Notwithstanding the above, there is some information within the two documents that must be withheld. You indicate that all of the subject city employees have elected, prior to this

request for information, that the city withhold their home addresses, telephone numbers, social security numbers, or information revealing whether they have family members under section 552.024 of the Government Code. You also explain that some of the employees are peace officers. Section 552.117(1) 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. *See* Open Records Decision Nos. 622 (1994), 455 (1987). Furthermore, section 552.117(2) requires that the same information be withheld if it relates to a peace officer as defined by article 2.12 of the Code of Criminal Procedure. Thus, you must withhold the information outlined in section 552.117 concerning the city employees at issue in this information. We have marked the information that must be withheld. The remaining information on the submitted written documents 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.

Sincerely,



Don Ballard
Assistant Attorney General
Open Records Division

JDB\nc

Ref: ID# 122232

Enclosures: Marked documents and audio tape recording

cc: Mr. Christian Davenport
Austin American Statesman
203 East Main Street
Round Rock, Texas 78664
(w/o enclosures)