



September 16, 1999

Ms. Ellen M. Salyers
Assistant District Attorney
Comal County Criminal District Attorney's Office
150 N. Seguin, Suite 307
New Braunfels, Texas 78130-5161

OR99-2583

Dear Ms. Salyers:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 127474.

The Comal County Criminal District Attorney's Office (the "county") received a request for, among other things, information contained on 28 computer diskettes. Except for the computer diskette information, you have released the requested information to the requestor. You claim that the computer diskette information is excepted from disclosure under sections 552.102, 552.107, and 552.117 of the Government Code. We have considered your claims and reviewed the submitted representative sample of documents.¹

As a threshold issue, you argue that the information in Exhibits 8, 9, and 9A is not information subject to the Public Information Act (the "act") under the reasoning set forth in Open Records Decision No. 581 (1990). In Open Records Decision No. 581, this office determined that certain computer-related information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. We have reviewed the information and conclude that only the information in Exhibit 9A is information that is not subject to the act as opined in Open Records Decision No. 581. As you claim no exceptions for the information in Exhibits 8 and 9, it must be released.

¹In 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.

The 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). The county received the written request for information on June 2, 1999. However, your letter requesting a decision from this office was postmarked June 28, 1999, more than ten business days after your receipt of the written request for information.

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). Section 552.107(1) does not constitute a compelling reason to overcome the presumption of openness. Open Records Decision No. 630 (1994). Except for the information discussed below, you must release the information to the requestor.

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 v. Texas Industrial Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977), 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 common-law privacy. 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*. 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 at 4 (1976) (construing statutory predecessor to Gov't Code § 552.101). In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information such as that 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; *see also* Open Records Decision Nos. 470 (1987) (concluding that fact that a person broke out in hives as a result of severe emotional distress is excepted by common-law privacy), 455 (1987) (concluding that kinds of prescription drugs a person is taking are protected by common-law privacy), 343 (1982) (concluding that information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/ seizures, or emotional/mental distress is protected by common-law privacy). However, the public has a genuine interest in information concerning a public employee's job performance and the reasons for dismissal, demotion or promotion. Open Records Decision No. 444 at 5-6 (1986); *see also* Open Records Decision No. 208 (1978) (disciplinary action against public employee available to public).

In addition, in *United States Department of Justice v. Reporters Committee For Freedom of the Press*, 489 U.S. 749 (1989), the U.S. Supreme Court concluded that where an individual's criminal history record information ("CHRI") is compiled or summarized by a governmental entity, the information takes on a character that implicates individual's right of privacy in a manner that the same individual records in an uncompiled state do not. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). After reviewing the submitted information, we have marked the information in Exhibits 6, 6A, and 7 that you must withhold under common-law privacy.

Section 552.130 excepts information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state. You must withhold the drivers' license numbers under section 552.130.

The submitted information includes information that may be excepted from public disclosure 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 when the public employee requests that this information be kept confidential under section 552.024. Therefore, section 552.117 requires you to withhold this information 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 at 5 (1989). We note that section 552.117 applies only to a current or former employee of the county. Thus, if the applicants are not current or former employees, then section 552.117 does not apply to the applicants' information. Open Records Decision No. 455 (1987).

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.

Sincerely,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/nc

Ref.: ID# 127474

Encl.: Marked documents

cc: Mr. Tom Corlette
319 Desoto
Universal City, Texas 78148
(w/o enclosures)