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Open Records Decision No. 455

Re: Construction of sections 3(a)(17) and 3A of the Open Records Act, article 6252-17a, V.T.C.S., and related questions

Gentlemen:

The Sixty-ninth Legislature amended section 3(a)(17) of the Open Records Act, article 6252-17a, V.T.C.S., and added section 3A to the act. Acts 1985, 69th Leg., ch. 750, at 2575. In pertinent part, section 3(a)(17) of article 6252-17a now excepts from required public disclosure

> the home addresses and home telephone numbers of each official and employee of a governmental body except as otherwise provided by Section 3A of this Act. . . . (Emphasis added).

Section 3A of article 6252-17a provides:

> (a) An employee hired by a governmental body, and each official of the governmental body, shall choose whether or not to allow public access to the information in the custody of the governmental body relating to the official's or employee's home address and home telephone number. Each official and employee shall state that person's choice to the main personnel officer of the governmental body in a signed writing not later than the 14th day after the date on which the employee begins the employment with the governmental body, or the official is elected or appointed. If the

> official's or employee's choice is to not allow public access to the information, the information is protected as provided by Section 3 of this Act. If an employee or official fails to report within the period established by this section, the information is subject to public access.
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> (b) If, during the course of the employment or the term of the office the employee or official wishes to close or open public access to the information, that individual may request in writing that the main personnel officer of the governmental body close or open access, as the case may be, to the information. (Emphasis added).

Each of you has inquired about these provisions. Dr. Bernstein asks whether home addresses and telephone numbers of former governmental employees are open to the public if, while still employed, the individuals elected not to disclose this information. Mr. Darnell asks whether the Adult Probation Office of Lubbock County must release the address of a probationer. Mr. Schulman asks whether these provisions protect applicants for governmental employment.

Section 3(a)(17) applies to "each official and employee of a governmental body." The scope of section 3A is equally clear: it applies to "employee[s] hired by a governmental body, and each official of the governmental body." Applicants for employment and private citizens such as probationers clearly are not within this language, and we are not at liberty to expand it to include them. See Goldman v. Torres, 341 S.W.2d 154 (Tex. 1960) (courts cannot alter plain meaning of statutory language). Sections 3A and 3(a)(17), therefore, do not embrace the home addresses and telephone numbers of applicants for governmental employment or of private citizens.

The addresses and telephone numbers of former governmental employees, however, are a different matter. In our opinion, if a governmental employee avails himself of the protection of sections 3A and 3(a)(17) while employed, that protection does not cease when his employment relationship ends. At least two reasons support this conclusion. First, the legislative history of these sections shows that their primary purpose is to protect governmental employees from being harassed while at home. Bill Analysis to House Bill No. 1976, prepared for House Committee on State Affairs, filed in Bill File to H. B. No. 1976, Legislative Reference Library. Since former employees may reasonably expect to be harassed for actions taken while they were employed, particularly where they were employed in visible positions or in sensitive areas such as law enforcement, it hardly seems likely that the legislature intended for the protection afforded by these sections to exist only during the employment relationship. To the extent that these sections were intended to promote governmental

rather than private interests, moreover, the same result obtains. One purpose of these sections may have been to enable governmental bodies to assure employees and prospective employees that their home addresses and telephone numbers need not be divulged. A governmental body which cannot guarantee that this information will be kept confidential after the employment relationship ends is in little better position than one which cannot guarantee any protection at all. To conclude that sections 3A and 3(a)(17) do not protect former employees, therefore, is largely to vitiate whatever governmental interests may underlie these sections.

We therefore conclude that if, while still employed, a governmental employee elects to protect his home address and telephone number from disclosure, the governmental body may not disclose this information after the employment relationship ends. As noted, we also conclude that applicants for employment and private citizens are not protected by sections 3A and 3(a)(17).

Our discussion of the status of the addresses and telephone numbers of former officers or employees, applicants for employment, and private citizens, however, cannot end here. If this information is made "confidential by law, either Constitutional, statutory, or by judicial decision" within section 3(a)(1) of the Open Records Act, it may not be disclosed. See Open Records Decision No. 325 (1982) (attorney general will raise section 3(a)(1) on behalf of governmental bodies). Since no "law" explicitly making this information confidential has been cited to us, the issue is whether the information raises privacy issues.

Prior decisions of this office have resolved individual privacy claims by applying a two-fold test. Open Records Decision No. 328 (1982) discussed this test:

> In Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668 (Tex. 1976), the Texas Supreme Court recognized two kinds of section 3(a)(1) privacy. 'Constitutional' privacy protects information within one of the 'zones of privacy' described by the United States Supreme Court in Roe v. Wade, 410 U.S. 113 (1973) and Paul v. Davis, 424 U.S. 693 (1976). These 'zones of privacy' protect matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. 'Common law' privacy, on the other hand, protects information which contains:
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> > highly intimate or embarrassing facts about a person's private affairs, such that its publication would be highly objectionable to a person of ordinary sensibilities.

> 540 S.W.2d at 683. In addition, the information must 'not [be] of legitimate concern to the public.' Id. at 685.

The United States Supreme Court and the Fifth Circuit Court of Appeals, however, have recognized a second type of constitutional privacy. Fadjo v. Coon, 633 F.2d 1172, 1175 (5th Cir. 1981) discusses the two aspects of constitutional privacy:

> Recent decisions of the Supreme Court and of this circuit indicate that the right to privacy consists of two interrelated strands: 'One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.' Whalen v. Roe, 429 U.S. 589, 599-600 . . . (1977). Both strands may be understood as aspects of the protection which the privacy right affords to individual autonomy and identity. [Citation omitted]. The first strand, however, described by this circuit as 'the right to confidentiality,' Plante v. Gonzalez, 575 F.2d 1119, 1132 (5th Cir. 1978), cert. denied, 439 U.S. 1129 . . . (1979), is broader in some respects.
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> The privacy right has been held to protect decisionmaking when the decision in question relates to matters such as 'marriage, procreation, contraception, family relationships, and child rearing and education.' [citations omitted]. Matters falling outside the scope of the decisionmaking branch of the privacy right may yet implicate the individual's interest in nondisclosure or confidentiality. See, e.g., DuPlantier v. United States, 606 F.2d 654, 669-71 (5th Cir. 1979), rehearing denied, 608 F.2d 1373, and Plante v. Gonzalez, 575 F.2d 1119, 1132 (5th Cir. 1978) (finding that financial disclosure laws raised issues within the scope of the confidentiality branch of the privacy right although they did not impinge on protected decisionmaking). See also Nixon v. Administrator of General Services, 433 U.S. 425 . . . (1977) (discussing the privacy interest in avoiding disclosure of personal matters including personal finances to archivists screening presidential papers).

Ramie v. City of Hedwig Village, Texas, 765 F.2d 490, 492 (5th Cir. 1985), elaborated on the disclosural privacy theme:

> The liberty interest in privacy encompasses two notions: the freedom from being required to

> disclose personal matters to the government and the freedom to make certain kinds of decisions without governmental interference. [citation omitted]. The disclosure strand of the privacy interest in turn includes the right to be free from the government disclosing private facts about its citizens and from the government inquiring into matters in which it does not have a legitimate and proper concern.

It is clear, therefore, that people have an interest in "avoiding disclosure of personal matters." Whalen v. Roe, 429 U.S. at 599. What is not clear is how far the concept of "personal matters" can be stretched. When circumstances may be such that even the disclosure of personal matters should be permitted must also be explored.

The Ramie court shed some light on the first issue when it said that "the Constitution is violated only by invasions of privacy involving the most intimate aspects of human affairs." Ramie, 765 F.2d at 492. The compelled disclosure of personal financial information fits in this category. See, e.g., DuPlantier v. United States, supra; Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978). The Whalen case suggested that the public disclosure of the kinds of prescription drugs that a person is taking implicates disclosural privacy. And recent cases involving mandatory urine testing recognize a privacy interest in the maintenance by public entities of records revealing whether or not the person tested had ingested illicit drugs. See, e.g., Shoemaker v. Handel, 619 F. Supp. 1089 (D.N.J. 1985), aff'd, 795 F.2d 1136 (3rd Cir. 1986).

Fifth Circuit precedents also stress that no disclosural privacy violation occurs when a legitimate public interest in information exists. In Plante v. Gonzalez, supra, for example, the court considered whether a Florida "sunshine law" requiring elected officials to disclose detailed information about their personal finances violated the officials' privacy right. After acknowledging that personal financial information is within the purview of this amorphous right, the court considered the standard to apply to determine the statute's constitutionality. It concluded that several "important state concerns" justified the disclosure requirement:

> Financial privacy is a matter of serious concern, deserving strong protection. The public interests supporting public disclosure for these elected officials are even stronger. We join the majority of courts considering the matter and conclude that mandatory financial disclosure for elected officials is constitutional.

575 F.2d at 1136. The court thus held that information concerning "personal matters" may be publicly disclosed without violating the

Constitution if a legitimate public interest warrants disclosure. In passing, the court also made this observation:

> The extent of the [privacy] interest is not independent of the circumstances. Plaintiffs in this case are not ordinary citizens, but state senators, people who have chosen to run for office. That does not strip them of all constitutional protection. [citation omitted]. It does put some limits on the privacy they may reasonably expect.

Id. at 1135.

The court in Fadjo v. Coon, 633 F.2d at 1176, stated the relevant inquiry in this manner:

> In deciding upon the merits of Fadjo's case, the district court must balance the invasion of privacy alleged by Fadjo against any legitimate interests proven by the state. This court noted in Plante, supra, that where the privacy right is invoked to protect confidentiality, a balancing standard is appropriate as opposed to the compelling state interest analysis involved when autonomy of decisionmaking is at issue. 575 F.2d at 1134. The court pointed out, however, that because a constitutional right is at stake, 'more than mere rationality must be demonstrated' to justify a state intrusion. Id. Both the Supreme Court and this circuit have upheld state actions impinging on individual interests in confidentiality only after careful analysis . . . . An intrusion into the interest in avoiding disclosure of personal information will thus only be upheld when the government demonstrates a legitimate state interest which is found to outweigh the threat to the plaintiff's privacy interest. (Emphasis added).

When these cases are read together, the following becomes apparent: (1) in addition to the freedom to make certain decisions without government interference, an individual's Fourteenth Amendment liberty interest in privacy encompasses the freedom from being required to disclose certain personal matters; (2) the term "personal matters" is nebulous, but should at least be construed as involving "the most intimate aspects of human affairs," Ramie v. City of Hedwig Village, Texas, 765 F.2d at 492; (3) the public disclosure of personal matters is permissible if there is a "legitimate state interest which is found to outweigh the threat to the plaintiff's privacy interest," Fadjo v. Coon, 633 F.2d at 1176; (4) unlike the common law privacy

test articulated by the Texas Supreme Court in Industrial Foundation of the South v. Texas Industrial Accident Board, supra, the test for determining whether private information may be publicly divulged without violating constitutional disclosural privacy rights is a balancing test, Ramie v. City of Hedwig Village, Texas, supra; Fadjo v. Coon, supra; Plante v. Gonzalez, supra; and (5) whether the subject of the information is a public official or an "ordinary citizen" will affect the nature of his privacy rights, Plante v. Gonzalez, supra.

Turning to the facts of this case, we conclude that home addresses and telephone numbers ordinarily do not qualify as the kind of "intimate aspects of human affairs" that are protected by disclosural privacy. In Open Records Decision No. 169 (1977) at 6, this office reviewed federal and state cases and concluded that

> the overwhelming weight of authority holds that there is normally no legally recognizable privacy interest in one's home address. The Constitution does not recognize such an interest. Tort law does not recognize such an interest. One's home address cannot be considered a highly intimate or embarrassing fact about private affairs such that publication would be highly objectionable to a person of ordinary sensibilities.

As one of these cases observed:

> The addresses of most persons appear in many public records: voting registration rolls, property assessment rolls, motor vehicle registration rolls, etc., all of which are open to public inspection. They also usually appear in such places as the telephone directory and city directory which are available to public inspection. We, therefore, hold that an individual's home address is a public fact and that its mere publication, without more, cannot be viewed as an invasion of privacy.

McNutt v. New Mexico State Tribune Co., 538 P.2d 804, 808 (N.M. App. 1975), cert. denied, 540 P.2d 248 (N.M. 1975). It has not been suggested, and we do not believe, that these particular addresses should be deemed "intimate"; accordingly, we need not balance the individual interest in withholding these addresses with the public interest in access to them to conclude that they are not protected by disclosural privacy. The same is true of these telephone numbers.

No legal authority, therefore, makes "confidential" the home addresses or telephone numbers of these applicants, probationers, or private citizens. No other basis for withholding this information has been cited. It must therefore be released. See Open Records Decision

No. 325 (1982) (attorney general will raise only section 3(a)(1) on behalf of governmental bodies).

Mr. Schulman has also raised additional questions. The Eagle Pass Independent School District has been asked to release "the application-qualifications submitted to the School District by all [ten] applicants for the position of Assistant Mechanic." Mr. Schulman, the attorney for the school district, has asked whether

> the prohibition of disclosure contained in Section 3(a)(2) of information 'which would constitute a clearly unwarranted invasion of personal privacy' would prevent the disclosure of certain information which may tend to be intimate or embarrassing, and to which the public has no legitimate concern. The request for information in the application for employment in regard to illnesses or operations, physical defects, ailments or handicaps, permission to request information from a previous employer, whether or not the applicant has given notice of leaving to a previous employer, and previous monthly earnings may fall into this category.

Section 3(a)(2) is inapplicable, because it does not apply to applicants for employment. Open Records Decision Nos. 345 (1982); 110 (1975). The remaining question is whether any information in the applications is within section 3(a)(1).

The application form records the following information about applicants: birthdate; height and weight; marital status; address and phone number; social security number; illnesses or operations within the past year; physical handicaps; educational training; names, occupations, addresses, and phone numbers of two character references; names of friends or relatives employed by the district; job preferences and abilities; and names and addresses of former employers, dates of employment, kind of work, salary per month, and reasons for leaving. Much of this information has been held disclosable in prior decisions. See, e.g., Open Records Decision Nos. 329 (1982) (reasons for resignation); 277, 273, 264 (1981); 257 (1980) (qualifications of applicants for public employment, including formal education, licenses and certificates, employment experience, professional awards and recognition, and membership in professional organizations); 254 (1980) (social security numbers).

As we have observed, disclosural privacy protects "the most intimate aspects of human affairs," Ramie v. City of Hedwig Village, Texas, 765 F.2d at 492, unless there is a "legitimate state interest [in disclosure] which is found to outweigh the threat to the plaintiff's privacy interest," Fadjo v. Coon, 633 F.2d at 1176. The privacy rights of a private citizen, moreover, are different from the

rights of a public employee or officer. Plante v. Gonzalez, 575 F.2d at 1135. We have been given no information justifying the conclusion that these applicants' educational training; the names and addresses of their former employers, the dates of their employment, the kind of work, their salary per month, and their reasons for leaving; the names, occupations, addresses, and phone numbers of their character references; their job preferences or abilities; and the names of their friends or relatives who are employed by the district, constitute the kind of "intimate" information that is protected by disclosural privacy. In any event, the public interest in this information would justify its disclosure, as it bears on the applicants' past employment record and their suitability for the employment position in question. This information, therefore, is not protected from required disclosure.

On the other hand, we believe that information regarding the applicants' illnesses or operations within the past year and physical handicaps is intimate personal information. Although the situation might be different with respect to some of this information if the individual in question were a public officer or employee, we do not see how the public has any legitimate interest in this kind of private information about an applicant for employment that is sufficient to outweigh the applicant's privacy interest in that information. We therefore conclude that this portion of the applicants' application forms is protected from required disclosure.

Finally, the facts before us do not warrant the conclusion that these applicants' birthdates, height and weight, marital status or social security numbers are "highly intimate" in nature. As a result, this information may not be withheld.

Very truly yours,

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