Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 13, 1995

Ms. J. Sage White
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR95-599

Dear Ms. White:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 32802.

The City of Austin (the "city") received a request for eighteen employment applications from current and former city employees. You claim that portions of the requested information are excepted from disclosure under sections 552.101 and 552.103(a). We have considered the exceptions you claimed and have reviewed the documents at issue.

Section 552.103(a) excepts from disclosure information:

> (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and
>
> (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The city must meet both prongs of this test for information to be excepted under 552.103(a). *See* Open Records Decision No. 511 (1988) at 3 (review of litigation exception by attorney general).

Suit is already pending between the requestor and the city. Therefore, the only remaining question is whether the requested documents are related to the litigation. We have reviewed the documents at issue and conclude that they are related to the subject of the litigation. Accordingly, the city may withhold these documents under section 552.103(a). We note that the applicability of section 552.103(a) ends if the other parties to the litigation obtain the information or when the litigation is concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 (1982) at 3, 349 (1982) at 2. We note also that the section 552.103(a) exception is discretionary with the governmental entity asserting the exception. Open Records Decision No. 542 (1990) at 4. The city may therefore choose to release the information, with the exception of any information protected by sections 552.101 and 552.117. Gov't Code § 552.007.

Section 552.101 excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Federal law may prohibit disclosure of these applicants' social security numbers. A social security number is excepted from required public disclosure under section 552.101 of the act in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(vii), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994); *see also* 42 U.S.C. § 405 (c)(2)(C)(v) (governing release of social security number collected in connection with the administration of any general public assistance, driver's license or motor vehicle registration law). Based on the information you have provided, we are unable to determine whether the social security numbers are confidential under this federal statute. We note, however, that section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information. Therefore, prior to releasing any social security number information, you should ensure that the information is not confidential under this federal statute.

You have highlighted the medical history of one applicant and all of the applications contain questions pertaining to the applicants' medical history. Although you did not raise 552.101 with regard to this information, this office will raise that exception on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987). Section 552.101 encompasses both common-law privacy and

constitutional 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). Under common law privacy, 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, Texas*, 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. *Id.* 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* 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 documents and believe that some of the submitted information meets the privacy test under section 552.101. We have marked the information that you must withhold. The remainder of the medical history information does not meet the test for either common law or constitutional privacy and may not be withheld.

Finally, you claim that section 552.117 excepts from disclosure portions of the requested information. In pertinent part, section 552.117 excepts from disclosure the home addresses and home telephone numbers of all current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024.[1] We understand that all of the applicants were hired by the city, although all of them may not be currently employed by the city. The protection of section 552.117, once fixed, continues after the employment relationship ends.

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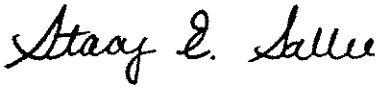
[1]The Seventy-fourth Legislature has significantly amended the Open Records Act effective September 1, 1995. *See* Act of May 29, 1995, H.B. 1718, 74th Leg., R.S. (to be codified at Gov't Code Ch. 552) (copy available from House Document Distribution). We do not address in this ruling whether these recent amendments to the Open Records Act will affect requests for this information that are made on or after September 1, 1995.

Therefore, section 552.117 requires you to withhold the home addresses and home telephone number of officials or employees who requested that this information be kept confidential under section 552.024. You may not, however, withhold the home address or home telephone number of officials or employees who made the request for confidentiality under section 552.024 after this request for the documents 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 (1989) at 5. Additionally, you may not withhold this information for any employee who retired prior to the effective date of section 552.117. Open Records Decision No. 488 (1988) at 4.[2]

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 under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Government Section

SES/RHS/rho

Ref.: ID# 32802

Enclosures: Marked documents

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[2]We note that this office has previously held that the privacy branch of section 552.101 does not protect home addresses and home telephone numbers of government employees. *See* Open Records Decision No. 488 (1988) at 4 and authorities cited therein.