



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

April 8, 1996

Mr. John Steiner  
Division Chief  
City of Austin  
Department of Law  
P.O. Box 1088  
Austin, Texas 78767-1088

OR96-0496

Dear Mr. Steiner:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 35250.

The City of Austin (the "city") received a request for any day planner or desk calendar (1993 through August 2, 1995) for the archivist of the Austin History Center. You claim that the portions of the calendars that reflect the archivist's personal appointments are not "public records" under section 552.002 of the Government Code. We have considered your argument and have reviewed the documents at issue.

Information is generally public if it is collected, assembled, or maintained under a law, 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.<sup>1</sup> See Gov't Code § 552.021(a). Information is generally public information within chapter 552 of the Government Code when it relates to the official business of a governmental body or is used by a public official or employee in the performance of official duties, even though it may be handwritten or in the possession of one person. See Open Records Decision No. 635 (1995). In Open Records Decision No. 635 (1995), this office addressed the issue of whether calendars are public information within the scope of chapter 552. In that opinion, this office concluded that

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<sup>1</sup>The definition of "public information" was amended by the Seventy-fourth Legislature, effective September 1, 1995. See Gov't Code § 552.002. However, this amendment does not change our analysis of whether the calendar at issue is public information as defined under chapter 552.

a former Railroad Commissioner's calendars were public information and therefore subject to the provisions of chapter 552 based on the following factors: (1) the use of state resources to maintain the calendars; (2) the fact that the calendars were not in the commissioner's sole possession but were accessible to another commission employee; and (3) the presence of significant commission-related entries in the calendar. *Id.* at 6.

In reaching this conclusion, the opinion discussed the factors considered in determining whether an employee's appointment calendar was subject to the federal Freedom of Information Act: whether the document is in the agency's control, was generated within the agency, and has been placed into the agency's files, as well as whether and to what extent the employee who created the document used it to conduct agency business, and whether personal items were on the calendar. Open Records Decision No. 635 (1995) at 4 (citing *Bureau of Nat'l Affairs, Inc. v. United States Dep't of Justice*, 742 F.2d 1484 (D.C. Cir. 1984)). The opinion also considered the factors used to determine whether employees' calendars are corporate or personal documents for purposes of discovery. Some of these factors are: (1) who prepared the document; (2) the nature of its contents; (3) its purpose or use; (4) who possessed it; (5) who had access to it; (6) whether the corporation required its preparation; (7) whether its existence was necessary to or in furtherance of corporate business; and (8) the ratio of personal to corporate entries. *Id.* at 5 (citing *In re Grand Jury Proceedings*, 55 F.2d 1012 (5th Cir. 1995)).

We presume that the calendar was purchased by the city. After reviewing the document and the number of work-related items that are listed on the calendar, we conclude that the entire calendar is public information and therefore subject to chapter 552. You argue that the calendar may be segregated into public and non-public sections, with the archivist's personal activities relegated to the non-public section. We disagree. As we stated in Open Records Decision No. 635 (1995):

A public employee must know his or her schedule, including personal appointments, to plan work-related activities effectively. Therefore, including personal appointments and activities on an appointment calendar used primarily to schedule work-related activities serves an official or work-related purpose. *Cf.* Ethics Advisory Opinion No. 172 (1993) at 2.

Therefore, in this instance, all the information in the calendar is used by a public employee in the performance of official duties and is subject to the provisions of chapter 552.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."<sup>2</sup> This section encompasses common-law and constitutional privacy. Common-law privacy 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). 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 type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information 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.

The constitutional right to privacy protects two interests. Open Records Decision No. 600 (1992) at 4 (citing *Ramie v. City of Hedwig Village*, 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. Open Records Decision No. 600 (1992) at 4. 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)).

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), 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),

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<sup>2</sup>The Office of the Attorney General will raise section 552.101 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse or the detailed description of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have reviewed the documents submitted for our consideration and have marked the information that must be withheld under constitutional or common-law privacy.

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.

Yours very truly,



Stacy E. Sallee  
Assistant Attorney General  
Open Records Division

SES/rho

Ref.: ID# 35250

Enclosures: Marked documents

cc: S. Mitchell  
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(w/o enclosures)