



July 14, 1999

Ms. Alejandra I. Villarreal
Wickliff & Hall
1-5 S. St. Mary's Street, Suite 700
San Antonio, Texas 78205

OR99-1957

Dear Ms. Villarreal:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 125964.

The Board of Trustees of the San Antonio Water System ("SAWS"), which you represent, received a request for the order in which the applicants for the position of Director of Customer Service were ranked. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.104, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the information at issue.

Initially, we note that chapter 552 of the Government Code imposes a duty on a governmental body seeking an open records decision pursuant to section 552.301 to submit that request to the attorney general and state the exceptions that apply within ten business days after the governmental body's receipt of the request for information. SAWS received the request for information on April 19, 1999, but you did not raise section 552.104 until May 7, 1999, more than ten business days after SAWS received the request. A governmental body waives the protection of section 552.104 by failing to timely raise it. *See* Open Records Decision No. 592 (governmental body may waive section 552.104). Thus, section 552.104 cannot be applied to the information at issue here.

You contend that the requested information is protected by a right of privacy under sections 552.101 and 552.102. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 552.102 protects information in personnel files only if it meets the test articulated under section 552.101 for common-law invasion of privacy. *Hubert v. Harte-Hanks Tex. Newspapers*, 652

S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Accordingly, we will consider your section 552.101 and section 552.102 claims together.

The common-law right to privacy protects information 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. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). 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.

Section 552.101 also encompasses the constitutional right to privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

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), 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).

The information at issue is not the type of information considered to be highly intimate and embarrassing. *See* ORD 455. Furthermore, the public has a legitimate interest in the selection process used to fill positions at public entities regardless of whether that process culminates in the hiring of an applicant. For these reasons, we conclude that the requested information is not excepted from disclosure under section 552.101 or section 552.102.

Finally, you contend that the requested information is excepted from disclosure under section 552.111. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency’s policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. ORD 615 at 4-5. Having carefully considered your arguments, we conclude that the requested information is not excepted from disclosure pursuant to section 552.111 because it does not relate to the policymaking processes of SAWS. Therefore, SAWS must release the information to the requestor.

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,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref: ID# 125964

Encl. Submitted documents

cc: Mr. Larry McMahan
8418 Crooked Sky
San Antonio, Texas 78250
(w/o enclosures)