



November 18, 1999

Ms. Lilia Ledesma-Gonzalez  
Assistant City Attorney  
City of McAllen  
P.O. Box 220  
McAllen, Texas 78505-0220

OR99-3323

Dear Ms. Ledesma-Gonzalez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 130588.

The City of McAllen (the “city”) received a request for, *inter alia*, a list of employees terminated from the Wastewater Department for the years 1996, 1997 and 1998. You indicate that no such list exists, but you imply that the city has the ability to review its personnel files and compile such a list. You further indicate, however, that “it is my understanding that the governmental entity does not have to create a document that is not already in existence.” It is well-established that a governmental body is not required to prepare new information in response to a request for information. Open Records Decision Nos. 452 (1986), 342 (1982). It is similarly well-established that a governmental body is not required “to compile or extract information if it can be made available by giving the requestor access to the records themselves.” Open Records Decision Nos. 243 (1980), 127 (1976); *see also* Open Records Decision Nos. 144 (1976), 87 (1975).<sup>1</sup> A governmental body has a duty to make a good faith effort to relate a request for information to that

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<sup>1</sup> On the other hand, some compilation and manipulation of information stored in an electronic medium is required under the Texas Public Information Act. *See* Gov’t Code § 552.231. In Attorney General Opinion No. JM-672 (1987), our office cited *Industrial Foundation of the South, Inc. v. Texas Industrial Accident Board*, writing: “In most cases, the act does not require the preparation of an extensive new computer program to obtain particular sets of information. Whether certain programming constitutes the creation of new material must be determined on a case-by-case basis.”

information which the governmental body holds. Open Records Decision No. 561 at 8 (1990). If the city holds information from which the requested information can be obtained, the city must provide that information to the requestor, unless it is otherwise exempted from disclosure. You have provided for our review certain documents that are responsive to the above-referenced request, and you assert that the information, in its entirety, is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We assume you have released other documents responsive to the request. The documents provided for our review appear to be information from the personnel file of a former employee of the city's Wastewater Department.

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* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the act. Therefore, we will first address whether section 552.101 applies to the information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 552.101 also encompasses common-law 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). Therefore, 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 at 1 (1992).

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 at 4 (1992). 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 at 5-7 (1987) (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 at 5 (1987) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5<sup>th</sup> 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), and 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), and information concerning the intimate relations between individuals and their family members. *See* Open Records Decision No. 470 (1987).

The information we have reviewed reflects the on-the-job behavior of a public employee (disciplinary action forms and memoranda), and how that employee became separated from the employment relationship. You state: “as to the report, cause and reason behind the termination of employee Sean Ramirez, the city contends this type of information is not open for public disclosure under Section 552.102 of the Government Code.” Our review of the documents at issue reveals no information that is considered private. The alleged inappropriate on-the-job conduct of a public employee is information of legitimate concern to the public. Hence we do not believe that these documents are protected from disclosure by a right of privacy. Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 444 (1986) (reason for public employee's demotion, dismissal, or resignation is of public interest). Accordingly, you must release the documents.

We note, however, that the submitted information includes the home address of a current or former city official or employee<sup>2</sup>. It is possible that this information may be confidential under section 552.117 of the Government Code. Of those public employees who elected to withhold from public disclosure certain personal information pursuant to section 552.024 of the Government Code, section 552.117 excepts from required public disclosure information that relates to the home address, home telephone number, social security number, or that reveals whether the employee has family members. *See* Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold such information of a current or former official or employee who made the section 552.024 request for confidentiality *after* this request for information was made. Whether a particular piece of information is public must be determined at the time of the request for the information. Open Records Decision No. 530 at 5 (1989). Therefore, if Mr. Ramirez has elected to not allow public access to this information in accordance with the procedures of section 552.024 of the Government Code,

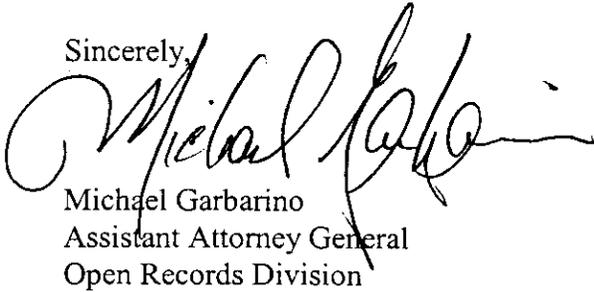
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<sup>2</sup>We have marked the information at issue, contained on the document titled “Advice of Change and Authorization of Salary Payment,” dated August 5, 1997.

and prior to when the present request for information was made, we believe that the city must withhold this information from required public disclosure pursuant to section 552.117.

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,

A handwritten signature in black ink, appearing to read "Michael Garbarino". The signature is fluid and cursive, with a long horizontal stroke at the end.

Michael Garbarino  
Assistant Attorney General  
Open Records Division

MG/jc

Ref: ID# 130588

Encl. Submitted documents

cc: Mr. Antonio R. Alvarado  
605 Nyssa Avenue  
McAllen, Texas 78501  
(w/o enclosures)