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**Legal Q&A**

By Evelyn W. Njuguna, TML Legal Counsel

**Q: What documents in a city employee's personnel file are excepted from disclosure under the Public Information Act (PIA)?**

A: The premise of the PIA is that all information "collected, assembled, or maintained" by or for a city is public information, unless an exception applies. TEX. GOV'T CODE § 552.002(a). Most information—such as salary, evaluations, and reprimands—is public information. However, a number of exceptions to disclosure apply to documents that may be found in an employee's personnel file.

A city is prohibited from disclosing the social security number of a living person. TEX. GOV'T CODE § 552.147(a). A document that is otherwise public information, and which contains an employee's social security number, may be disclosed by redacting the social security number. A city is not required to obtain an attorney general's opinion prior to redacting an employee's social security number. *Id.* § 552.147(b).

A current or former employee's home address, home telephone number, or information regarding the employee's family members may not be disclosed if the employee has requested that the city not reveal this information. TEX. GOV'T CODE § 552.024. Cities are required to ask each employee, within fourteen days of the employee's date of hire, appointment, or ending of service with the city, whether he or she wants this information to be treated confidentially. *Id.*

A peace officer's home address, home telephone number, and any information about the peace officer's family members is automatically excepted from disclosure, even if the peace officer does not ask the city to keep this information confidential. TEX. GOV'T CODE § 552.117(a).

In a very limited exception, the PIA also allows a city to withhold information in an employee's personnel file if disclosure of the information "would constitute a clearly unwarranted invasion of personal privacy." TEX. GOV'T CODE § 552.102(a). This exception only applies to information that "contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and is not of legitimate concern to the public." *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (citing *Indus. Found. v. Texas Indus. Accident Bd.*, 540 S.W. 2d 668, 685 (Tex. 1976)).

An employee or an employee's authorized representative has an unfettered right to access the employee's personnel file. TEX. GOV'T CODE § 552.023(a). A councilmember or authorized city official has an inherent right to access an employee's personnel file if the records are requested in the individual's official capacity. *Id.* Tex. Att'y Gen. Op. JM-119 (1983). It is recommended that a city adopt a written policy regarding how a

councilmember or city official can access an employee's personnel file and to protect the information.

The above exceptions do not cover every document that may be in an employee's personnel file. Thus, any request should be reviewed by local legal counsel immediately.

**Q: Is a city required to provide an employee with a meal break or rest period, and does the city have to compensate an employee who takes such a break?**

A: A city is not required to provide an employee with a meal period or rest period. However, if a city allows an employee to take such a break, whether the break would be compensable depends on the duration of the break and whether the employee worked during the break.

A city is not required to compensate an employee for a meal break if the following requirements are met: (1) the employee is completely relieved from performing any job duty; (2) the employee is free to leave the worksite; and (3) the meal break is at least thirty minutes long. *See Bernard v. IBP.*, 154 F.3d 259, 265 (5th Cir. 1998); 29 C.F.R. §785.19. Rest breaks, including coffee breaks or smoking breaks, that are between five and ten minutes long are compensable. 29 C.F.R. §785.15.

**Q: Can a city deduct from an employee's salary or require an employee to reimburse the city for damage to or loss of city equipment, such as a laptop computer or cellular phone?**

A: It depends on whether an employee is exempt or non-exempt under the Fair Labor Standards Act (FLSA). Section 13(a)(1) of the FLSA provides a complete exemption from minimum wage and overtime for an employee who meets the duties test (administrative, executive, or professional), is paid at a rate of at least \$455 per week, and is compensated on a "salary basis." 29 U.S.C §213(a) (1); 29 C.F.R. §541.600(a). For an employee to be considered paid on a "salary basis," the employee must be paid "a predetermined amount...not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. §541.602(a).

Subject to limited exceptions, the FLSA requires an exempt employee to receive the full salary for any week in which the employee performs any work, regardless of quantity or quality of work. *Id.* Making deductions from the salary of an exempt employee's pay for any reason, other than for what is provided for under the regulations, would result in a violation of the "salary basis" rule and a loss of the employee's exempt status. 29 C.F.R. §541.710.

Recently, the Department of Labor (DOL) held that a deduction from the salary of an exempt employee for the loss, damage, or destruction of the employer's property is an impermissible deduction, and would destroy the employee's exempt status because the employee's salary would not be "guaranteed" or paid "free and clear." Dep't Labor Op. FLSA2006-7 (2006). This holds true even if an employer and an employee have entered

into an agreement that the employer will deduct for any damages, or that the employee will receive the full salary and the employer will seek a reimbursement. *Id.*

With regard to non-exempt employees, the DOL opined that a policy allowing an employer to deduct from the salary of a non-exempt employee for damages would be valid as long as the employee's pay does not go below the minimum wage. *Id.*

**Q: What is compensatory time off, and when is an employer authorized to grant it?**

A: Under the FLSA, a city is required to compensate a non-exempt employee with overtime pay at the rate of 1½ times the employee's regular rate of pay for any hour worked in excess of forty in a given work week. 29 U.S.C. §207(a). Public agencies, including cities, are permitted to provide non-exempt employees with compensatory time off (comp time) in lieu of overtime cash payments. 29 U.S.C. §207(o). Other than public safety employees (police officers, fire fighters, and paramedics), all non-exempt employees may accrue up to 240 hours. *Id.* Public safety employees may accrue up to 480 hours of comp time. *Id.* Any hours over 240 or 480, as the case may be, have to be compensated as overtime cash payments. 29 U.S.C. §207(o) (3) (A). A city is required to adopt a policy prior to requiring its employees to take comp time. *Id.*

Although not required by the FLSA, a city can also provide comp time to exempt employees if it so desires.

An employer is required to honor an employee's request to use comp time within a reasonable time, provided the use does not unduly disrupt the operations of the employer. 29 U.S.C. §207(o) (5). A city can also compel its employees to use comp time, even if an employee does not request to use the comp time. *Christensen v. Harris County*, 529 U.S. 576, 585 (2000).