



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 6, 1996

Ms. Becky R. Espino
Texas State University System
333 Guadalupe, Suite 810
Austin, Texas 78701-3942

OR96-2045

Dear Ms. Espino:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 101879.

The Texas State University System (the "system") received a request for "[a]ll performance evaluations conducted on Dr. Rex Cottle, president of Lamar University in Beaumont, by the Texas State University System Board of Regents and the former Lamar University System." You have submitted to this office the "former board's 1994 and 1995 evaluations." You do not raise any exceptions under the Open Records Act as to these evaluations, but claim that Dr. Cottle's privacy and property rights may be implicated by the request. You have also submitted "back-up materials to those evaluations," asking whether this information is responsive to the request and, if so, whether this information may be excepted from required public disclosure under sections 552.107 and 552.111 of the Government Code.¹

Section 552.301 of the Government Code provides that a governmental body must ask the attorney general for a decision as to whether requested documents must be disclosed not later than the tenth calendar day after the date of receiving the written request. The system received the written request for information on August 14, 1996. This office did not receive a request for a decision until August 28, 1996, more than ten days after the requestor's written request. Therefore, we conclude that the system has failed to meet its ten-day deadline for requesting an opinion from this office.

¹It is the burden of the governmental body to determine which information in its possession is responsive to a particular request for information. Gov't Code § 552.301(b)(3). Therefore, we do not address your question of whether the "back-up materials" are responsive to the request or whether these materials are excepted from required disclosure under sections 552.107 and 552.111.

When a governmental body fails to request a decision within ten days of receiving a request for information, the information at issue is presumed public. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this presumption. *See id.* Normally, a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 (1977) at 2.

Pursuant to section 552.304, Dr. Cottle provided his own reasons why two memoranda, one dated February 20, 1995 and the other dated August 4, 1995, should be withheld from public disclosure pursuant to sections 552.101 and 552.102 of the Government Code.

Section 552.102 protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The protection of section 552.102 is the same as that of the common-law right to privacy under section 552.101. *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). For information to be protected from public disclosure under the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation of the South v. Texas Industrial Accident Board*, 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.

Evaluations of public employees are not typically excepted from disclosure. *See* Open Records Decision Nos. 615 (1993) (Gov't Code § 552.111 does not extend to internal administrative or personnel matters), 473 (1987) at 3 (even highly subjective evaluations of public employees may not ordinarily be withheld under Gov't Code § 552.102), 470 (1987) at 4 (public employee's job performance does not generally constitute his private affairs), 464 (1987) at 2 (public has interest in evaluations of administrators at public universities). Having reviewed the information submitted to us, we conclude that the information requested is not excepted under sections 552.101 and 552.102 of the Government Code and that the system must release this information to the requestor.²

²Dr. Cottle also asserts that portions of the memoranda he seeks to be withheld portray his "professional and personal character in false light." False light privacy is not an actionable tort in Texas. *See Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex. 1994). Therefore, a governmental body may not withhold information under section 552.101 of the Government Code merely because it might place a person in a false light. *See* Open Records Decision No. 579 (1990).

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 may 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,

A handwritten signature in black ink, appearing to read "Todd Reese". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Todd Reese
Assistant Attorney General
Open Records Division

RTR/rho

Ref.: ID# 101879

Enclosures: Submitted documents

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