



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

February 12, 2003

Mr. Kevin D. Pagan
Deputy City Attorney
City of McAllen
P. O. Box 220
McAllen, Texas 78505-0220

OR2003-0941

Dear Mr. Pagan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 176512.

The City of McAllen (the "city") received a request for seven categories of information relating to the suspension of the city's fire department chief. You state that the city has released all responsive information to the requestor, with the exception of information that is responsive to request item 4 of the request.¹ You claim, however, that the remaining requested information pertaining to request item 4 is excepted from disclosure pursuant to sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that person may submit comments stating why information should or should not be released).

Initially, we note that the requestor asserts that the city has not provided her with certain inspection records that are responsive to request item 5 of the request. The city asserts that it has provided the requestor with all information that is responsive to this request item. Whether the city maintains additional information that is responsive to request item 5 presents a fact issue. This office cannot resolve factual disputes in the open records opinion process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986).

¹ We note that it is implicit in several provisions of the Public Information Act (the "Act") that the Act applies only to information already in existence. *See* Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. *See* Attorney General Opinion H-90 (1973); *see also* Open Records Decision Nos. 87 (1975), 342 at 3 (1982), 416 at 5 (1984), 452 at 2-3 (1986), 555 at 1-2 (1990), 572 at 1 (1990). A governmental body must only make a good faith effort to relate a request to information which it holds. *See* Open Records Decision No. 561 at 8 (1990).

Where a fact issue cannot be resolved as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our opinion or upon those facts that are discernible from the documents submitted for our inspection. *See* Open Records Decision No. 552 at 4 (1990). Accordingly, we need not further address request item 5 of the request.

Next, we must address the procedural requirements of section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply to information that is requested of a governmental body not later than the tenth business day after the date of receiving the written request for information. *See* Gov't Code § 552.301(b). The submitted information reflects that the city received the requestor's request for information on November 5, 2002. It appears that the city asked the requestor to clarify her request on November 18, 2002. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (stating that when governmental bodies are presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed). Thus, the ten business day time period to request a decision from our office under section 552.301(b) was tolled on the date that the city sought clarification from the requestor. *See* Gov't Code § 552.301(b); *see also* Open Records Decision No. 663 at 5 (1999) (providing that ten-day period is tolled during the clarification process). You state, and provide documentation showing, that the requestor clarified her request on November 21, 2002. Accordingly, we conclude that the ten business day time period for requesting a decision from our office resumed on November 22, 2002. Thus, the deadline for submitting a request to our office was November 26, 2002. You submitted your request for decision to our office on December 4, 2002. Consequently, the city failed to comply with section 552.301 of the Government Code in requesting a decision from our office with respect to the requested information.

Because the city failed to comply with the procedural requirements of section 552.301 in requesting this decision, the information at issue is now presumed public. *See* Gov't Code § 552.302; *see also* *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The city must demonstrate a compelling interest in order to overcome the presumption that the requested information is now public. *See id.* Normally, a compelling interest is demonstrated when some other source of law makes the requested information confidential or when third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Although the city claims that the submitted information is excepted from disclosure pursuant to section 552.101 in conjunction with the common-law informer's privilege, we note that a claim under the informer's privilege may be waived by a governmental body since the privilege belongs to the government. *See* Open Records Decision No. 549 at 6 (1990). In this instance, the board waived its interest in its informer's privilege claim by failing to comply with the requirements of section 552.301 of the Government Code. Accordingly, we

conclude that the city may not withhold any portion of the submitted information under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. However, since the city also claims that the submitted information is excepted from disclosure pursuant to section 552.101 in conjunction with a federal statute and the common-law right to privacy, we will address those particular claims.

You claim that the submitted information is excepted from disclosure pursuant to section 552.102 of the Government Code. 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). Section 552.102(a) is generally applicable to information relating to a public official or employee. See Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). 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 from disclosure 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 from disclosure under the common-law right to privacy as incorporated by section 552.101 of the Government Code. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Accordingly, we address the city's section 552.101 and 552.102 claims together.²

Information is protected from disclosure under the common-law right to privacy 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. See *id.* After carefully reviewing your arguments and the information at issue, we find that no portion of this information is protected from disclosure under the common-law right to privacy. See Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (statutory predecessor applicable when information would reveal intimate details of highly personal nature), 405 at 2 (1983) (manner in which employee performed his job cannot be said to be of minimal public interest), 400 at 5 (1983) (statutory predecessor protected information only if its release would lead to clearly unwarranted invasion of privacy). Accordingly, we conclude that the city may not withhold any portion of the information at issue under section 552.101 of the Government Code in conjunction with the common-law right to privacy.

² Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. See Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by the common-law right to privacy.

You also claim that the submitted information is excepted from disclosure pursuant to section 552.101 in conjunction with section 2000e-8(e) of title 42 of the United States Code. Section 552.101 also encompasses information that is protected from disclosure by other statutes. Section 2000e-8(e) provides:

It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty, of a misdemeanor and upon conviction thereof, shall be fined not more than \$1,000, or imprisoned not more than one year.

42 U.S.C. § 2000e-8(e). Title VII of the Civil Rights Act of 1964 and related federal regulations apply to information held by the EEOC that was obtained during an EEOC investigation of employment discrimination. *See id.* We have previously held that “the federal statute only restricts disclosure by those enforcing the Equal Employment Opportunity Act.” *See* Open Records Decision Nos. 245 (1980), 155 (1977), 59 (1974); *see also Whitaker v. Carney*, 778 F2d 216 (1985), *cert denied*, 479 U.S. 813 (1986) (title VII proscribes release of information only when held by EEOC or EEOC employees, not when held by employer). The statute prohibits employees of the EEOC from releasing any information pertaining to a discrimination complaint unless a complainant files a lawsuit to remedy the discriminatory practice. *See id.*; *see also* 29 C.F.R. 1601.22. This prohibition does not extend to an employer’s disclosure of information relating to a claim of employment discrimination. *See* Open Records Decision No. 155 at 2 (1977). Furthermore, no other federal statute or regulation prevents an employer’s disclosure of information relating to a claim of employment discrimination. *See* Open Records Decision Nos. 132 (1976). As the submitted information is maintained by the city and not by employees of the EEOC, we conclude that the city may not withhold any portion of the information pursuant to section 552.101 of the Government Code in conjunction with section 2000e-8(e) of title 42 of the United States Code.

We note that portions of the submitted information are subject to section 552.117 of the Government Code. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov’t Code § 552.117(1). However, information that is responsive to a request may not be withheld from disclosure under section 552.117(1) if the official or employee did not request confidentiality in accordance with section 552.024 or if the request for confidentiality under section 552.024 was not made until after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be

determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Based on our review of the submitted information, we conclude that the city must withhold the information that we have marked under section 552.117(1) of the Government Code, if the current or former employees or officials with whom this information is associated requested confidentiality for this information in accordance with section 552.024 prior to the city's receipt of this request.

We also note that portions of the remaining information at issue contain e-mail addresses that are subject to section 552.137 of the Government Code. Section 552.137 makes certain e-mail addresses confidential and provides in pertinent part:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. Section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or web address. Accordingly, we conclude that the city must withhold the e-mail addresses that we have marked pursuant to section 552.137 of the Government Code, unless the members of the public in question with whom they are associated have affirmatively consented to their release.

In summary, the city must withhold the information that we have marked under section 552.117(1) of the Government Code, if the current or former employees or officials with whom this information is associated requested confidentiality for this information in accordance with section 552.024 prior to the city's receipt of this request. The city must withhold the e-mail addresses that we have marked pursuant to section 552.137 of the Government Code, unless the members of the public in question with whom they are associated have affirmatively consented to their release. The city must release the remaining submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 176512

Enc. Marked documents

c: Mrs. Patsy M. Rogers
4533 North 1st Lane
McAllen, Texas 78504
(w/o enclosures)