



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

June 2, 2003

Mr. Brad Norton  
Assistant City Attorney  
City of Austin - Law Department  
P. O. Box 1088  
Austin, Texas 78767-8845

OR2003-3718

Dear Mr. Norton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181974.

The City of Austin (the "city") received a request for "all files, lists, records, open or closed cases, from the Austin City Attorney's Office, City Manager's Office and the Offices of Human Resources, Pard offices, which report, show or list or refer to each sexual abuse and or harassment and or discrimination claims and or any such reprisal acts by the [city] claimed in the Courts of Texas and/or in Federal Courts, directed to any employees of the [c]ity and or former employees of this city, during the past five years, up to this date." You claim that some of the requested information is excepted from disclosure pursuant to sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted representative sample documents.<sup>1</sup>

Initially, 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 the attorney general for a decision as to whether requested information must be disclosed not later than the tenth business day after the date of receiving the written request for information. *See Gov't Code* § 552.301(b). In addition, section 552.301(e) provides that a governmental body that

---

<sup>1</sup> We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See Open Records Decision Nos. 499 (1988), 497 (1988)*. This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

requests an attorney general decision under section 552.301(a) must, within a reasonable time, but not later than the fifteenth business day after the date of receiving the written request, submit to the attorney general (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld; (2) a copy of the written request for information; (3) a signed statement as to the date on which the written request for information was received by the governmental body or evidence sufficient to establish that date; and (4) a copy of the specific information requested or representative samples of it, if a voluminous amount of the information was requested, labeled to indicate which exceptions apply to which parts of the information. *See* Gov't Code § 552.301(e).

Although you state that the city received the present request on March 14, 2003, we note that the request for information that you forwarded to us for review reveals that the city actually received the request on March 12, 2003. Therefore, the city had until March 27, 2003 to request a decision from us as to whether the requested information must be disclosed to the requestor and until April 3, 2003 to submit to us the items of information required to be submitted to the attorney general under section 552.301(e). The city did not request a decision from us with regard to whether the requested information must be disclosed to the requestor until March 28, 2003 and did not submit the items of information required to be submitted to the attorney general under section 552.301(e) until April 4, 2003. Therefore, we find that the city failed to comply with the procedural requirements of section 552.301 of the Government Code in requesting this decision from us.

Because the city failed to comply with the procedural requirements of section 552.301 in requesting this decision from us, 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 information at issue 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 information at issue is excepted from disclosure pursuant to sections 552.103, 552.107, and 552.111, we note that these exceptions to disclosure are discretionary exceptions to disclosure under the Public Information Act (the "Act") which may be waived by a governmental body.<sup>2</sup> Accordingly, we conclude that the city may not

---

<sup>2</sup> Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general); *see also* *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.--Dallas 1999,

withhold any portion of the information at issue pursuant to sections 552.103, 552.107, or 552.111 of the Government Code. However, since the city claims that the information at issue is excepted from disclosure pursuant to section 552.101 of the Government Code, we will address the city's claim under that particular exception to disclosure.

We also note that portions of the submitted information are excepted from disclosure pursuant to section 552.101 in conjunction with Title I of the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101 *et seq.*<sup>3</sup> The ADA provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. Information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his or her job, is to be treated as a confidential medical record as well. 29 C.F.R. § 1630.14(c). *See also* Open Records Decision No. 641 (1996). Furthermore, the federal Equal Employment Opportunity Commission (the "EEOC") has determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). We have marked the information within the submitted information that is confidential under the ADA and, thus, must be withheld pursuant to section 552.101 of the Government Code.

You claim that the information at issue is excepted from disclosure pursuant to section 552.101 in conjunction with the common-law right to privacy. Section 552.101 also encompasses information that is protected from disclosure under the common-law right to privacy. Information is protected from disclosure under the common-law right to privacy if it (1) contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See 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. *See id.* at 683. This office has long held that some kinds of medical information or

---

no pet.) (governmental body may waive section 552.103). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

<sup>3</sup> 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 other statutes.

information indicating disabilities or specific illnesses are excepted from disclosure pursuant to the common-law right to privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 at 5 (1987) (prescription drugs, illnesses, operations, and physical handicaps).

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. *See Ellen*, 840 S.W.2d at 525. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *See id.* The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *See id.* In concluding, however, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.* Therefore, when there is an adequate summary of an investigation, the summary and any statements of the person under investigation must be released, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure. However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of witnesses and victims must still be redacted from the statements.

Based on our review of your arguments and the information at issue, we find that portions of the submitted information are protected from disclosure under the common-law right to privacy. Accordingly, we conclude that the city must withhold the information that we have marked within the submitted information pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.

Additionally, we note that the submitted information contains some information that may be excepted from disclosure pursuant to section 552.117(2) of the Government Code. Section 552.117(2) excepts from disclosure a peace officer's home address, home telephone number, social security number, and information indicating whether the peace officer has family members, regardless of whether the peace officer made an election under section 552.024 of the Government Code. *See* Gov't Code § 552.117(2). Section 552.117(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Based on our review of the submitted information, we are unable to ascertain whether the information that we have marked within the submitted information as subject to section 552.117(2) is associated with individuals who are still licensed peace officers. If the individuals to whom this information pertains are still licensed peace officers, we conclude that the city must withhold this particular information pursuant to section 552.117(2). *See* Open Records Decision No. 670 at 5-6 (2001) (governmental body "may withhold home addresses and home telephone numbers of peace officers, in addition to social security

numbers and information that reveals whether the peace officer or security officer has family members, without the necessity of requesting an Attorney General decision as to whether the exception under section 552.117(2) applies"). However, if the individuals to whom this particular information pertains are not currently licensed as peace officers, we conclude that the city may not withhold this marked information pursuant to section 552.117(2) of the Government Code. We note that we have marked a representative sample of the types of information that are subject to section 552.117(2) of the Government Code.

However, if the individuals to whom the marked section 552.117(2) information pertains are not currently licensed as peace officers, the marked section 552.117(2) information, as well as the information that we have marked pertaining to other current or former officials or employees of the city, may be excepted from disclosure pursuant to section 552.117(1) 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 timely 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 employee did not request confidentiality for this information in accordance with section 552.024 or if the request for confidentiality under section 552.024 for the information 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)*. Accordingly, we conclude that the city must withhold all of this particular marked information pursuant to section 552.117(1) of the Government Code, if the current or former officials or employees with whom this information is associated timely elected confidentiality for this information in accordance with section 552.024 of the Government Code prior to the time that the city received this request for information. Again, we have marked a representative sample of the types of information that are subject to section 552.117(1) of the Government Code.

Nevertheless, we note that the social security numbers of all of these particular individuals, as well as the social security numbers of other individuals that are contained throughout the submitted information, may be excepted from disclosure pursuant to section 552.101 in conjunction with federal law. The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See Open Records Decision No. 622 (1994)*. The city has cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes it to obtain or maintain social security numbers. Therefore, we have no basis for concluding that these numbers are confidential under section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. We caution the city, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing these social security numbers, the city should ensure that they were not obtained and are not maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

We also note that the submitted information contains motor vehicle information that is subject to section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See Gov't Code § 552.130.* Accordingly, we conclude that the city must withhold the motor vehicle information that we have marked pursuant to section 552.130 of the Government Code, but only if such information constitutes Texas motor vehicle information. We have marked a representative sample of the types of information that are subject to section 552.130 of the Government Code.

Further, we note that some e-mail addresses that are contained within the submitted information are subject to section 552.137 of the Government Code. Section 552.137 provides in relevant 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 requires the city to withhold e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the city, unless the members of the public with whom they are associated have affirmatively consented to their release. 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 with whom they are associated have affirmatively consented to their release. We have marked a representative sample of the types of e-mail addresses that are subject to section 552.137 of the Government Code.

Finally, we note that portions of the submitted information are copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See Attorney General Opinion JM-672 (1987).* A governmental body must allow inspection of copyrighted materials unless an exception to disclosure applies to the information. *See id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making such copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See Open Records Decision No. 550 (1990).*

In summary, the city must withhold the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with the ADA. The city must

withhold the information that we have marked pursuant to section 552.101 in conjunction with the common-law right to privacy. The city must withhold the types of information that we have marked pursuant to section 552.117(2) of the Government Code, if the individuals to whom this information pertains are still licensed peace officers. The city must withhold the types of information that we have marked pursuant to section 552.117(1) of the Government Code, if the current or former officials or employees with whom this information is associated timely elected confidentiality for this information in accordance with section 552.024 of the Government Code prior to the time that the city received this request for information. Social security numbers that are contained within the submitted information may be confidential under federal law. The city must withhold the types of motor vehicle information that we have marked pursuant to section 552.130 of the Government Code, but only if such information constitutes Texas motor vehicle information. The city must withhold the types of e-mail addresses that we have marked pursuant to section 552.137 of the Government Code, unless the members of the public with whom they are associated have affirmatively consented to their release. The city must release the remaining submitted information to the requestor in compliance with applicable copyright law.

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).

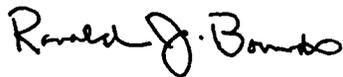
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dep't of Pub. 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# 181974

Enc. Marked documents

c: Mr. Leonard P. Lyons  
2219 Fancy Gap Lane  
Austin, Texas 78745-6909  
(w/o enclosures)