



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

August 27, 2003

Mr. Gilbert Vasquez
The Vasquez Law Firm. P.C.
814 Del Oro Lane
Pharr, Texas 78577

OR2003-6040

Dear Mr. Vasquez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 186707.

The City of Pharr (the "city") received a request for "leave forms, and any time-off requests for all city employe[e]s for the date of June 6, 2003." You claim that the requested information is excepted from disclosure under sections 552.102 and 552.117 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

We note that some of the submitted information appears to have been created after the date that the city received the instant request for information. The Public Information Act (the "Act") does not require a governmental body to disclose information that did not exist at the

¹We note that you raise section 552.305 of the Government Code as an exception to disclosure. Section 552.305 states in relevant part that "[i]n a case in which information is requested under this chapter and a person's privacy or property interests may be involved . . . a governmental body may decline to release the information *for the purpose of requesting an attorney general decision.*" Gov't Code § 552.305 (emphasis added). Thus, section 552.305 does not except information from public disclosure under the Public Information Act (the "Act"). Rather, section 552.305 is a procedural provision permitting a governmental body to withhold information that may be private while the governmental body is seeking an attorney general's decision under the Act. Because you believe the present request implicates the privacy interests of third parties, we consider your privacy arguments pursuant to section 552.102 of the Government Code.

time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). The city need not release such information in response to this request.

We next note that you have not fully complied with section 552.301 of the Government Code. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general 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 or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Although you state that the city received this request on June 6, 2003, you did not submit to this office a copy of the written request for information until June 30, 2003. Consequently, you failed to submit a copy of the written request for information within the fifteen business day period mandated by section 552.301(b) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Compelling reasons exist when the information is made confidential by law or affects the interest of a third party. Open Records Decision No. 630 at 3 (1994). Because the assertion of sections 552.102 and 552.117 of the Government Code provide compelling reasons to overcome the presumption of openness, we will address the claimed exceptions.

Section 552.102(a) of the Government Code protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]"²

²Anything relating to an individual's employment and its terms constitutes information relevant to the individual's employment relationship and is a part of the individual's personnel file. *See* Open Records Decision No. 327 at 2 (1982).

The test for privacy under section 552.102 is the same as the test under section 552.101 in conjunction with common-law privacy.³ See *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.). Under section 552.101, common-law privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. See *Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Because of the greater legitimate public interest in matters involving employees of governmental bodies, privacy under section 552.102 is confined to information that reveals “intimate details of a highly personal nature.” See *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.); Open Records Decision Nos. 473 at 3 (1987), 444 at 3-4 (1986), 423 at 2 (1984). Thus, public employee privacy under section 552.102 is “very narrow.” See Open Records Decision No. 400 at 5 (1983).

We have reviewed the submitted information, and find that the information is not private under the *Industrial Foundation* test. Accordingly, the city may not withhold the submitted information from the requestor based on section 552.102 of the Government Code. Cf. Open Records Decision Nos. 444 at 5 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (information may not be withheld under predecessor to section 552.102 if it is of sufficient legitimate public interest, even if person of ordinary sensibilities would object to release on grounds that information is highly intimate or embarrassing).

You also contend that the submitted records may contain information that the city may be required to withhold pursuant to section 552.117 of the Government Code. Section 552.117(a)(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. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. See Open Records Decision No. 530 at 5 (1989). Therefore, the city may only withhold information under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for

³Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” and encompasses the doctrine of common-law privacy.

confidentiality under section 552.024 prior to the date on which the request for this information was made. For an employee who timely elected to keep his or her personal information confidential, the city must withhold under section 552.117(a)(1) the employee's home address and telephone number, social security number, and any information that reveals whether the employee has family members. The city may not withhold this information under section 552.117(a)(1) for an employee who did not make a timely election to keep the information confidential.

For an employee who failed to make a timely election under section 552.024, a social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and 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 id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained pursuant to any provision of law enacted on or after October 1, 1990.

In summary, for an employee who timely elected to keep his or her personal information confidential, the city must withhold under section 552.117(a)(1) the employee's home address and telephone number, social security number, and any information that reveals whether the employee has family members. The city may not withhold this information under section 552.117(a)(1) for an employee who did not make a timely election to keep the information confidential. Social security numbers may be confidential under federal law. The remaining submitted information must be released 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 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

Mr. Gilbert Vasquez - Page 6

§ 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,

A handwritten signature in black ink, appearing to read "Cindy Nettles". The signature is fluid and cursive, with the first name being more prominent.

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 186707

Enc. Submitted documents

c: Mr. Isanro Pruneda
c/o Mr. Gilbert Vasquez
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(w/o enclosures)