



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 15, 2003

Mr. Fernando C. Gomez  
Vice Chancellor and General Counsel  
The Texas State University System  
200 East 10<sup>th</sup> Street, Suite 600  
Austin, Texas 78701-2407

OR2003-6439

Dear Mr. Gomez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 187790.

Sam Houston State University (the "university") received a request for the FES (Faculty Evaluation System) Form 6 for all faculty members and administrators of the College of Criminal Justice for the 2002-2003 academic year. You claim that the requested information is excepted from disclosure under sections 552.102 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. The submitted information, which consists of numerous university FES Form 6's, fits within category (1) of section 552.022, "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by section 552.108." These documents must therefore be released under section 552.022 unless the information is expressly made confidential under other law. Section 552.103 of the Government Code, the litigation exception, is a discretionary exception under the Public Information Act and does not constitute "other law" for purposes of section 552.022. See Open Records Decision Nos. 591 at 2, n.2 (1991); 473 (1987). Consequently, the university may not withhold the requested information from the requestor based on section 552.103 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). 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 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 under the doctrine of common-law privacy as incorporated by section 552.101 of the act. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). For information to be protected from public disclosure by the common law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685.

Information about a public employee's job performance is not information about a person's private affairs. *See* Open Records Decision No. 455 (1987). Moreover, the public interest in such information would justify its disclosure, as it bears on the employee's suitability for the employment position. Thus, information that evaluates a public employee's job performance is not protected from public disclosure based on the doctrine of common-law privacy. *See* Open Records Decision Nos. 464 (1987), 455 (1987). Consequently, we find that the information at issue is not excepted from required public disclosure based on section 552.102 of the Government Code.

In summary, the information at issue is subject to section 552.022(a)(1). Neither section 552.102 nor section 552.103 applies to the information. Thus, the university must release the 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 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,



Kay Hastings  
Assistant Attorney General  
Open Records Division

KH/seg

Ref: ID# 187790

Enc: Submitted documents

c: Dr. Laura B. Myers  
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(w/o enclosures)