



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 8, 2004

Mr. George A. Staples
Taylor Olson Adkins Sralla Elam
6000 Western Place, Suite 200
Fort Worth, Texas 76107-4654

OR2004-7657

Dear Mr. Staples:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 208625.

The City of Westworth Village (the "city"), which you represent, received a request for fifteen categories of information encompassing a specified time interval and relating to three named individuals, the police chief, open records requests, and the city's "official definition" of certain types of conduct. You claim that the some of the requested information is excepted from disclosure under sections 552.101, 552.102, 552.117, and 552.137 of the Government Code. We have considered the exceptions you claim and have reviewed the representative sample information you submitted.¹ We assume that the city has released the other types of information to which the requestor seeks access, to the extent that such information existed when the city received this request. If not, then the city must release any such information at this time.² We note that the Act does not require the city to release

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the city to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

²See Gov't Code §§ 552.006, .221, .301, .302; Open Records Decision No. 664 (2000).

information that did not exist when it received this request or to create responsive information.³

Initially, we address your representations with regard to the request for "all electronic storage media, on which [three named individuals] has saved or has had saved for her [sic]." You inform us that "such media includes copyrighted programs, operating systems, etc. [sic]" In Open Records Decision No. 581 (1990), this office determined that certain computer-related information that had no significance other than its use as a tool for the maintenance, manipulation, or protection of public property was not the kind of information that is made public under section 552.021 of the Act. *Id.* at 6. We also stated, however, that information maintained within computer information systems is subject to release under the Act, unless the information is excepted from disclosure. *See id.* at 7. Thus, to the extent that the requested electronic storage media consist of computer programs, operating systems, or other such computer-related materials that have no significance other than their use as tools for the maintenance, manipulation, or protection of city property, the Act does not require the city to release such materials to the requestor. However, any information maintained in the electronic storage media that is responsive to this request is subject to release unless it is excepted from disclosure. *See also* Gov't Code §§ 552.002, .006.

You do not indicate whether or to what extent the submitted information is representative of any responsive information maintained in the electronic storage media. To the extent that the submitted information is not representative of any such information, you have failed to comply with section 552.301 of the Government Code in requesting a decision concerning this category of the request. *See* Gov't Code § 552.301(e)(1)(D) (governmental body must submit specific information that it seeks to withhold or representative sample of such information). Therefore, to the extent that the submitted information is not representative of any responsive information maintained in the electronic storage media, any such information must be released. *See id.* § 552.302.⁴

In this regard, you assert that "[t]he city has no way to provide copies of such [electronic storage] media." You ask "whether [such media] may be provided as paper copies as permitted by Section 552.228." Section 552.228 governs requests for information in an electronic medium and provides as follows:

³*See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

⁴You contend that the electronic storage media include "copyrighted programs, operating systems, etc., which are excepted from disclosure under either Section 552.027 . . . or Section 552.101." We note that the copyright law does not make information confidential for the purposes of section 552.101. *See* Open Records Decision No. 660 at 5 (1999). Furthermore, section 552.027 does not except information from disclosure. Rather, this section addresses the applicability of the Act to information contained in books or publications. *See* Gov't Code § 552.027(a)-(c). You do not indicate that the electronic storage media consist of or contain any such books or publications.

(a) It shall be a policy of a governmental body to provide a suitable copy of public information within a reasonable time after the date on which the copy is requested.

(b) If public information exists in an electronic or magnetic medium, the requestor may request a copy either on paper or in an electronic medium, such as a diskette or on magnetic tape. A governmental body shall provide a copy in the requested medium if:

(1) the governmental body has the technological ability to produce a copy of the requested information in the requested medium;

(2) the governmental body is not required to purchase any software or hardware to accommodate the request; and

(3) provision of a copy of the information in the requested medium will not violate the terms of any copyright agreement between the governmental body and a third party.

(c) If a governmental body is unable to comply with a request to produce a copy of information in a requested medium for any of the reasons described by this section, the governmental body shall provide a paper copy of the requested information or a copy in another medium that is acceptable to the requestor. A governmental body is not required to copy information onto a diskette or other material provided by the requestor but may use its own supplies.

Gov't Code § 552.228; *see also* 1 T.A.C. § 111.66. Thus, section 552.228 permits the requestor to seek access to and obtain information in an electronic medium, provided that the information exists in that medium and provided that the three conditions specified by section 552.228(b) are met. If the three conditions are not met, then the governmental body must provide a copy of the information on paper or in another medium that is acceptable to the requestor. *See id.* § 552.228(c). Although you state that the city "has no way to provide copies" of the requested electronic storage media, you also ask whether the media may be provided as paper copies. Accordingly, we understand you to state that the city is capable of providing paper copies of any responsive information that is maintained in the electronic storage media. Therefore, to the extent that the city must release any such information, the information must be provided as paper copies or in another medium that is acceptable to the requestor. *See id.* § 552.228(a)-(b).

You also ask "whether anything other than non-copyrighted material need be provided[.]" A governmental body must allow inspection of copyrighted materials, unless an exception to disclosure applies to the information. *See Attorney General Opinion JM-672 (1987)*. An officer for public information also must comply with the copyright law, however, and is not

required to furnish copies of materials that are copyrighted. *Id.* A member of the public who wishes to make copies of copyrighted materials must do so unassisted by the governmental body. In making 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 at 8-9 (1990).

Next, we address the exceptions you claim with regard to the submitted information. Section 552.102 excepts from required public 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 applicable to information that relates to public officials and employees. *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). The analysis of whether information is private under section 552.102(a) is the same as the test for common-law privacy under section 552.101.⁵ *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.). Information must be withheld from the public under section 552.101 in conjunction with common-law privacy when the information 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* *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the types of information held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has since concluded that other types of information also are private under section 552.101. *See* Open Records Decision Nos. 659 at 4-5 (1999) (summarizing information attorney general has held to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress).

You indicate that the submitted information relates to city employees. As this office has often noted, the public has a legitimate interest in information that relates to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 542 at 5 (1990) (information in public employee's resume not protected by constitutional or common-law privacy under statutory predecessors to Gov't Code §§ 552.101 and 552.102), 470 at 4 (1987) (public employee's job performance does not generally constitute his or her private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees), 405

⁵Section 552.101 excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”

at 2 (1983) (manner in which public employee performed his or her job cannot be said to be of minimal public interest). We have reviewed the submitted documents and conclude that they contain no information that is protected by common-law privacy. Therefore, the city may not withhold any of the submitted information under section 552.102.

Section 552.117(a)(1) excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this information be kept confidential under section 552.024. The determination of whether a particular item of information is protected by section 552.117(a)(1) must be determined as of the date of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, the city may only withhold information under section 552.117(a)(1) on behalf of a current or former employee who requested confidentiality under section 552.024 prior to the date of the city's receipt of this request for information. The city may not withhold information under section 552.117(a)(1) on behalf of a current or former employee who did not timely elect under section 552.024 to keep the requested information confidential. We have marked information that is excepted from disclosure under section 552.117(a)(1) if it relates to a current or former city employee who made a timely election under section 552.024 to keep the marked information confidential.

The city may also be required to withhold the marked social security number under section 552.101. A social security number is confidential under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act if it was obtained or is maintained by a governmental body under any provision of law enacted on or after October 1, 1990.⁶ *See* 42 U.S.C. § 405(c)(2)(C)(viii)(I); Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that the social security number in question is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, and we are aware of no law, enacted on or after October 1, 1990 that requires or authorizes the city to obtain or maintain a social security number. Thus, we have no basis for concluding that the social security number in question was obtained or is maintained under such a law and is therefore confidential under the federal law. We caution you, however, that the Act imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, before releasing the marked social security number, the city should ensure that it was not obtained and is not maintained under any provision of law enacted on or after October 1, 1990.

Section 552.137 makes certain e-mail addresses confidential. As amended by the 78th Legislature, this exception provides as follows:

- (a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating

⁶Section 552.101 also encompasses information that is made confidential under another statute.

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.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Section 552.137 excepts from public disclosure certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. Section 552.137 is not applicable to the types of e-mail addresses listed in section 552.137(c). Likewise, section 552.137 does not apply to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. The e-mail address that we have marked must be withheld under section 552.137, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure.

In summary: (1) to the extent that the requested electronic storage media consist of computer programs, operating systems, or other such computer-related materials that have no significance other than their use as tools for the maintenance, manipulation, or protection of public property, the Act does not require the city to release such materials to the requestor;

(2) any information maintained in the electronic storage media that is responsive to this request for information is subject to release, unless the information is excepted from disclosure; (3) to the extent that the submitted information is not representative of any responsive information maintained in the electronic storage media, any such information must be released; (4) any such information must be released as paper copies or in another medium that is acceptable to the requestor; (5) in releasing copyrighted information, the city must comply with copyright law; (6) the city must withhold the information that we have marked under section 552.117(a)(1) if it relates to a current or former city employee who timely requested confidentiality for the information under section 552.024; (7) the city may be required to withhold the marked social security number under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code; and (8) the marked e-mail address must be withheld under section 552.137, unless the owner of the e-mail address has affirmatively consented to its public disclosure. With the exception of any information that the city is required to withhold under sections 552.117, 552.101, or 552.137, the submitted information must be released.

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).

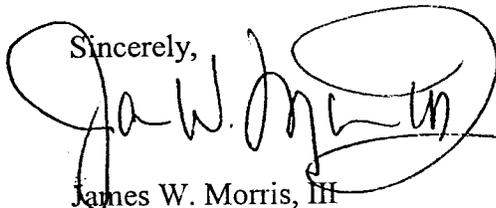
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is written in a cursive style and is positioned above the typed name and title.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 208625

Enc: Submitted documents

c: Ms. Donna Tuggle
5825 Carb Drive
Westworth Village, Texas 76114
(w/o enclosures)