



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 18, 2005

Mr. Christian T. Souza
Assistant Criminal District Attorney
Criminal District Attorney's Office
Kaufman County
100 W. Mulberry
Kaufman, Texas 75142

OR2005-09432

Dear Mr. Souza:

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# 234627.

Kaufman County (the "county") received a request for twelve categories of information concerning the septic system located on the requestor's property, a named septic system sales and service business, certain employees or agents of the county, septic system permits issued by the county, county filings with the Texas Commission on Environmental Quality, and related information. You state that the county has released some information to the requestor, and the submitted correspondence indicates that some of the requested information does not exist.¹ You claim that the submitted information is exempted from disclosure under sections 552.101, 552.102, 552.117, 552.1175, and 552.130 of the Government Code.² We

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²Although you raise section 552.024 of the Government Code, we note that section 552.024 is not an exception to public disclosure under chapter 552 of the Government Code. Rather, this section permits a current or former official or employee of a governmental body to choose whether to allow public access to certain information relating to the current or former official or employee that is held by the employing governmental body. *See Gov't Code* § 552.024. Please note that section 552.117 is the proper exception to raise when arguing the confidentiality of such information.

have considered the exceptions you claim and reviewed the submitted representative sample of information.³

We initially address your assertion that, in order to comply with portions of the request, the county would “need computer programmers to write software” to generate a certain responsive list or lists. A request for public information that requires a governmental body to program or manipulate existing data is not considered to be a request for the creation of new information. *See* Gov’t Code § 552.231; *Fish v. Dallas Indep. Sch. Dist.*, 31 S.W.3d 678, 681-82 (Tex. App.—Eastland 2000, pet. denied) (plaintiffs’ request required manipulation of existing data rather than creation of new information); Open Records Decision No. 661 at 6-7 (1999). Thus, if information that is otherwise available to a governmental body can be programmed or manipulated for the purpose of responding to a request for information, then the governmental body has access to information that is responsive to that request.⁴ Section 552.231 prescribes procedures that must be followed if, in responding to a request for information, a governmental body would be required to program or manipulate data. *See* Gov’t Code § 552.231(a) (written statement described by section 552.231(b) shall be provided to requestor if governmental body determines (1) that responding to request for information will require programming or manipulation of data and (2) that compliance with request is not feasible or will result in substantial interference with ongoing operations or that information could be made available in requested form only at costs that cover programming and manipulation). The county’s letter to the requestor, which you have submitted for our review, reflects that you have sent the requestor the required notice and invoice, and that upon response and payment he will receive the requested material.

Turning to your claimed exceptions, section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes. Section 182.052 of the Utilities Code provides in relevant part:

(a) Except as provided by Section 182.054, a government-operated utility may not disclose personal information in a customer’s account record, or any information relating to the volume or units of utility usage or the amounts billed to or collected from the individual for utility usage, if the customer requests that the government-operated utility keep the information

³We 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.

⁴We note that the Act defines “manipulation” as “the process of modifying, reordering, or decoding of information with human intervention.” Gov’t Code § 552.003(2). “Programming” is defined as “the process of producing a sequence of coded instructions that can be executed by a computer.” *Id.* § 552.003(4).

confidential. However, a government-operated utility may disclose information related to the customer's volume or units of utility usage or amounts billed to or collected from the individual for utility usage if the primary source of water for such utility was a sole-source designated aquifer.

(b) A customer may request confidentiality by delivering to the government-operated utility an appropriately marked form provided under Subsection (c)(3) or any other written request for confidentiality.

Util. Code § 182.052(a)-(b). "Personal information" under section 182.052(a) means an individual's address, telephone number, or social security number. *See id.* § 182.051(4); *see also* Open Records Decision No. 625 (1994) (construing statutory predecessor). Wastewater and sewer service are both included in the scope of utility services covered by section 182.052. Util. Code § 182.051(3). We note, however, that these provisions apply only to a government-operated utility. As the submitted information pertains to private septic systems, none of it consists of utility records of customers of a government-operated utility. Therefore, none of the submitted information is confidential under section 182.052, and it may not be withheld under section 552.101 in conjunction with this provision.

Section 552.102 excepts from 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). This exception 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 privacy analysis under section 552.102(a) is the same as the common-law privacy standard under section 552.101. *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.) (addressing statutory predecessor).⁵ 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 protects the specific types of information that are 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 concluded that other types of information also are private under section 552.101. *See* Open Records Decision No. 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,

⁵Section 552.101 of the Government Code also encompasses common-law privacy.

or emotional/mental distress). Upon review, we conclude none of the submitted information that relates to county employees is highly intimate or embarrassing, and the county may not withhold any of the information under section 552.101 in conjunction with common-law privacy or under section 552.102.

The county also asserts that some of the submitted information is excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the current and former 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, prior to the date that the governmental body receives a request for such information, that this information be kept confidential under section 552.024 of the Government Code. While you argue that “non-disclosure forms . . . are not necessary to withhold address and telephone information [of current or former county employees]” because such forms “apply only to the extent that an employee would want to opt-out of the statutory non-disclosure provision,” we note that this is an incorrect interpretation of sections 552.024 and 552.117, and contrary to the plain language of these provisions. *See* Gov’t Code §§ 552.024(a), (c), (d), 552.117(a)(1). The above listed information may only be withheld under section 552.117(a)(1) if the employee to whom such information pertains made an election for confidentiality under section 552.024 prior to date on which the governmental body receives the request for information. *See* Open Records Decision No. 530 at 5 (1989). Section 552.117(a)(2) excepts this same information of a peace officer regardless of whether the officer requests confidentiality under section 552.024 or 552.1175.⁶

You indicate that certain individuals at issue were licensed peace officers employed by the county. Therefore, we agree that the county must withhold information pertaining to these individuals under section 552.117(a)(2).⁷ With respect to the remaining officials or employees of the county whose information appears in the submitted documents, pursuant to section 552.117(a)(1), the county must withhold personal information that pertains to these individuals to the extent they made timely elections to keep such information confidential. This information may not be withheld for individuals who did not make a timely election. We have indicated the information that must be withheld if section 552.117 applies.

Finally, we address the applicability of section 552.130 of the Government Code to the driver’s license number reflected on the submitted permit application. 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.” Gov’t Code § 552.130. In accordance with section 552.130, the county must withhold the driver’s license number we have marked.

⁶“Peace officer” is defined by article 2.12 of the Code of Criminal Procedure.

⁷As our ruling is dispositive for this information, we need not address the applicability of section 552.1175.

In summary, the county must withhold the information we have marked that pertains to licensed peace officers who were formerly employed by the county under section 552.117(a)(2), and, pursuant to section 552.117(a)(1), the county must withhold personal information that pertains to a current or former official or employee who made a timely election to keep such information confidential. The marked driver's license number must be withheld under section 552.130. The remaining 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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 "R.B. Rapfogel". The signature is fluid and cursive, with the first name "R.B." and the last name "Rapfogel" clearly distinguishable.

Robert B. Rapfogel
Assistant Attorney General
Open Records Division

RBR/krl

Ref: ID# 234627

Enc. Submitted documents

c: Mr. Harold F. Cook
380 Mockingbird Lane
Combine, Texas 75159
(w/o enclosures)