



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 7, 2005

Ms. Charlotte A. Drew
The Drew Law Firm
14884 Highway 105 West
Montgomery, Texas 77356

OR2005-10999

Dear Ms. Drew:

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# 237473.

The Magnolia Volunteer Fire Department (the "department"), which you represent, received a request for the requestor's personnel file and "all papers, notes or other documentation of any kind concerning [the requestor]." You contend that the submitted information is not subject to disclosure under the Act. In the alternative, you claim that some of the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, and 552.117 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

Initially, we address your argument that the submitted information is not subject to the Act because the information does not relate to the receipt or expenditure of public funds. Under the Act, all information, with certain exceptions, that is collected, assembled, or maintained by a "governmental body" is subject to required public disclosure. *See* Gov't Code § 552.002(a)(1). Section 552.003(1)(A)(xii) includes within the definition of governmental body "the part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds." We also note that the receipt of public funds for the general support of the activities of a private organization brings that organization within the definition of a "governmental body." *See* Open Records Decision No. 228 (1979).

"Whether or not a particular nonprofit volunteer fire department [is a governmental body subject to the Act] depends on the circumstances in each case, including the terms of the

contract between the department and the public entity.” Attorney General Opinion JM-821 at 5 (1987) (citation omitted). In Attorney General Opinion JM-821, this office held that the Cy-Fair Volunteer Fire Department (“Cy-Fair”) was a governmental body for purposes of the Act’s predecessor to the extent that it was supported by public funds received pursuant to its contract with the Harris County Rural Fire Prevention District No. 9 (“RFPD”). *See id.* In issuing that opinion, this office analyzed the contract between Cy-Fair and RFPD, noting that Cy-Fair received public funds to provide all of RFPD’s needed services. *See id.* This office also noted that the contract provided that Cy-Fair must submit one-year operating budgets and a three-year capital expenditure budget to RFPD for approval. Consequently, this office found that the contract provided for the general support of Cy-Fair for purposes of the Act’s predecessor. *Id.*

In this instance, you state the department receives its funding from private fundraising and donations, private billing for certain department services, and a contract for services with the Montgomery County Emergency Services District No. 10 (“ESD”). You have submitted for our review the department’s contract with ESD, entitled “Fire Protection and Rescue Services Agreement” (the “Agreement”). Under that contract, the department provides “emergency fire control, suppression and extinguishment [sic] services, first responder services and emergency rescue services to and for the benefit of the residents, other individuals and property within [ESD’s] territory.” *See* Agreement, art. III. The contract also provides that the ESD will reimburse the department for specified costs incurred while providing these services. Furthermore, the contract specifically provides that the department “shall utilize responsible, competent and well-trained personnel in its provision of the referenced emergency services.” *See id.* art. V, § 3, art. VI. The department is also required under the contract to provide ESD with reports relating to the department’s budget and training for department personnel, to include a roster of all personnel of the department, and all other persons employed on a full- or part-time basis by the department, during the twelve months prior to the report date. *See id.* art. IX, § 18, art. X, § 6.

Based on your representations, our review of the contract at issue, and our holding in Attorney General Opinion JM-821, we find that ESD provides general support to the department, making the department a governmental body to the extent it receives ESD’s financial support. *See* Attorney General Opinion JM-821 at 5 (1987); *see also* Gov’t Code § 552.003(1)(A)(xii). We further find that the submitted personnel information relates to a department function supported by public funds, and thus the submitted information is public information subject to release under the Act. Accordingly, we will address your arguments against release of the submitted information under the Act.

First, however, we must address a procedural matter. Under section 552.301 of the Government Code, a governmental body must request a decision and state the exceptions to disclosure that it claims within 10 business days after the date of its receipt of the request for information. *See* Gov’t Code § 552.301(b). In this instance, the department failed to claim section 552.107(1) within the ten-business-day period prescribed by section 552.301(b). Section 552.107(1) is a discretionary exception to disclosure and may be waived. *See id.* § 552.007; Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under

Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). The department's claim under section 552.107(1) is not a compelling reason for non-disclosure under section 552.302 of the Government Code. *See* Gov't Code § 552.302; Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Therefore, the department may not withhold any of the submitted information under section 552.107. However, we will address your claims under sections 552.101, 552.102, 552.103, and 552.117.

We begin with section 552.103 of the Government Code, as it is the most inclusive exception you claim. Section 552.103 provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records

Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

You inform us that the department is not aware of any pending litigation to which the submitted information would be related. You state, however, that the department expects the requestor to initiate litigation regarding recent disciplinary matters. Having considered your arguments, we find that you have not demonstrated that the department reasonably anticipated litigation on the date of its receipt of this request for information. We therefore conclude that the department may not withhold any of the submitted information under section 552.103 of the Government Code.

Next, we consider your claims under sections 552.101 and 552.102 of the Government Code. 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 exception encompasses the common law right to privacy. Common law privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The common law right to privacy encompasses the types of information that are held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (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). This office has identified other types of information that 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).

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). Section 552.102(a) is applicable to information that relates to public officials and employees. The privacy analysis under section 552.102(a) is the same as the common law privacy test under section 552.101 of the Government Code. *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). Accordingly, we will address your privacy claims under sections 552.101 and 552.102 together.

You acknowledge that the requestor’s own personnel information may not be withheld from him on privacy grounds. *See* Gov’t Code § 552.023; Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning

himself).¹ You assert, however, that the submitted documents contain other private information. We note that the submitted information relates to personnel matters and other official business of the department. As a general rule, such information is a matter of legitimate public interest. Therefore, having considered your arguments and reviewed the information at issue, we conclude that the department may not withhold any of the submitted information on privacy grounds under section 552.101 or section 552.102 of the Government Code. *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), 473 at 3 (1987) (fact that public employee received less than perfect or even very bad evaluation not private), 400 at 5 (1983) (statutory predecessor to Gov't Code § 552.102 protected information only if release would lead to clearly unwarranted invasion of privacy).

You also raise section 552.117 of the Government Code. Section 552.117(a)(1) excepts from public disclosure the present and former home addresses and telephone numbers, social security number, and family member information of a current or former official or employee of a governmental body who timely requests under section 552.024 that this information be kept confidential. We note that section 552.117 does not protect from disclosure information that concerns an individual who is merely a volunteer for the department and not a current or former department official or employee. Therefore, the department may not withhold information that pertains to volunteers under section 552.117. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express and cannot be implied), 478 at 2 (1987) (language of confidentiality statute controls scope of protection), 465 at 4-5 (1987) (statute explicitly required confidentiality).

Whether a particular item of information is protected by section 552.117 must be determined at the time the request for the information is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, the department may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. To the extent that the information that we have marked under section 552.117 is the home telephone or personal cell phone number or family member information of a current or former official or employee of the department, such information must be withheld under section 552.117(a)(1) if the individual to whom it pertains timely requested confidentiality for the information under section 552.024. The department may not withhold information under section 552.117(a)(1) on behalf of a current or former official or employee who did not make a timely election to keep the information confidential. Furthermore, the marked information may not be withheld under section 552.117 to the extent that it relates to a volunteer.

¹Section 552.023(a) provides that “[a] person or a person’s authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person’s privacy interests.”

Next, we address the e-mail addresses that the department seeks to withhold. With respect to this information, section 552.137 of the Government Code provides in part:

(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 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.

Gov't Code § 552.137(a)-(c).² 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. The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. Likewise, section 552.137 is not applicable 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.

²Unlike other exceptions to disclosure, this office will raise section 552.137 on behalf of a governmental body, as it is a mandatory exception and may not be waived. See Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

We have marked the submitted e-mail addresses that appear to be confidential under section 552.137(a). The department must withhold the marked e-mail addresses under section 552.137, unless the owner of a particular e-mail address has affirmatively consented to its public disclosure.

Lastly, we note that some of the remaining information appears to be protected by copyright. A governmental body must allow inspection of copyrighted information 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 copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information 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).

In summary: (1) to the extent that the information marked under section 552.117 is the home telephone number, personal cell phone number, or family member information of a current or former official or employee of the department, the marked information must be withheld under section 552.117(a)(1) if the individual to whom it pertains timely requested confidentiality for the information under section 552.024; and (2) the marked e-mail addresses must be withheld under section 552.137, unless the individual to whom an e-mail address belongs has affirmatively consented to its public disclosure. The rest of the submitted information must be released.³ Information that is protected by copyright must be released in compliance with 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).

³We note that the submitted documents contain private information relating to the requestor that the department would be required to withhold from the public. Should the department receive another request for this same information from a person who would not have a right of access to the requestor's private information, the department should resubmit this information and request another ruling. *See* Gov't Code §§ 552.301(a), .302.

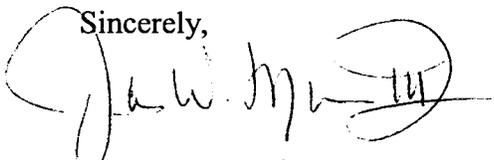
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 "James W. Morris, III". The signature is written in a cursive style with a large initial "J" and a flourish at the end.

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

JWM/sdk

Ref: ID# 237473

Enc: Submitted documents

c: Mr. Joey Hartman
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(w/o enclosures)