



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

February 2, 2006

Ms. Liza Marie Aguilar
Hermansen, McKibben, Woolsey & Villarreal, L.L.P.
555 North Carancahua, Suite 1100
Corpus Christi, Texas 78478

OR2006-01128

Dear Ms. Aguilar:

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# 241415.

The Corpus Christi Housing Authority (the "authority"), which you represent, received a request for: 1) the requestor's personnel file; 2) resumes pertaining to specified employee positions for the year 2005; 3) the salary history and performance reviews pertaining to specified employee positions for the years 2003, 2004, and 2005; 4) documents regarding equal employment opportunity claims, grievances, charges, or allegations of harassment and gender or sex discrimination filed against the authority in 2003, 2004, and 2005; and 5) documents pertaining to religious activities permitted or prohibited by the authority. You state that the authority does not maintain information responsive to the second category of requested information. We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed). You state that you have released portions of the requested information to the requestor, but claim that the remaining requested information is excepted from disclosure under sections 552.103, 552.107, 552.111, 552.117, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We must first address the procedural requirements of section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the tenth business day after the date of receiving the written request. Gov't Code § 552.301(b). 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 written 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. *Id.* § 552.301(e).

You state, and provide documentation showing, that the authority received the request for information on November 7, 2005. Based on this date, the tenth business day following the authority's receipt of the written request was November 22, 2005, and the fifteenth business day was December 1, 2005. Although you timely submitted a request for a ruling and documents as required by section 552.301(e) for portions of the third category of requested information, you also provide documentation showing that the authority asked the requestor to clarify the request with respect to the fourth and fifth categories of requested information on November 28, 2005.¹ *See* Gov't Code § 552.222; *see also* Open Records Decision No. 31 (1974) (stating that when governmental bodies are presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed). We note that the authority did not seek clarification until after the tenth business day. Thus, the statutory period was not tolled for purposes of subsections 552.301(a) and (b). *See* Open Records Decision No. 663 at 5 (1999) (providing that time period is tolled during the clarification process). Consequently, we conclude that the authority failed to comply with the procedural requirements of section 552.301 of the Government Code in requesting this decision from us regarding information responsive to items four and five of the requested information.

Next, we note that the authority did not assert sections 552.103, 552.107, and 552.111 until December 5, 2005. We therefore find that the authority failed to raise these exceptions within the ten day business period mandated by section 552.301(b). The authority also did not submit to this office copies or representative samples of the specific information requested in items four and five of the request until December 12, 2005, December 13, 2005, and January 6, 2006, past the fifteen day deadline required by section 552.301(e). Consequently, we conclude that the authority failed to fully comply with the procedural requirements of section 552.301 of the Government Code in requesting this decision from us.

Because the authority failed to comply with the procedural requirements of section 552.301 in requesting this decision, the information responsive to this portion of the request is now presumed public and must be released unless a compelling reason exists to withhold the information. *See* Gov't Code § 552.302; *see also* *Hancock v. State Bd. of Ins.*, 797 S.W.2d

¹ Although the authority states it sought a clarification from the requestor on November 18, 2005 and November 21, 2005, the authority did not send a clarification request to the requestor's correct address until November 28, 2005. We note the requestor's correct address was provided to the authority on November 7, 2005, in her initial request for information.

379 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing that the information is made confidential by another source of law or affects third party interests. See Open Records Decision Nos. 630 (1994), 150 at 2 (1977). Sections 552.103, 552.107, and 552.111 of the Government Code are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived by the governmental body. Thus, sections 552.103, 552.107, and 552.111 do not demonstrate compelling reasons to withhold information from the public. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 676 at 11-12 (2002) (claim of attorney-client privilege under section 552.107 or Texas Rule of Evidence 503 does not provide compelling reason for purposes of section 552.302 if it does not implicate third party rights), 663 (1999) (governmental body may waive section 552.111); see also Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). We therefore determine the authority may not withhold the information submitted on December 12, 2005, December 13, 2005, and January 6, 2006 under sections 552.103, 552.107, or 552.111. However, because section 552.117 can provide a compelling reason for non-disclosure, we will consider your arguments regarding this exception for the untimely submitted information, as well as your arguments for the timely submitted information.

The authority contends that section 552.117 is applicable to portions of the submitted information. Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of current or former employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. See Open Records Decision No. 530 at 5 (1989). The authority may only withhold information under section 552.117(a)(1) on behalf of current or former employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. You provide documentation showing that the employees at issue have timely elected under section 552.024 to keep their personal information confidential. Therefore, the authority must withhold the information we have marked under section 552.117.

You also note that the submitted information includes Texas-issued motor vehicle record information. Section 552.130 of the Government Code 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. Accordingly, the authority must withhold the Texas motor vehicle record information we have marked pursuant to section 552.130.

We note that a portion of the remaining submitted information is subject to section 552.101 of the Government Code in conjunction with common law privacy.² Section 552.101 excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included 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. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have marked information that must be withheld by the authority under section 552.101 in conjunction with common law privacy.

In summary, the authority must withhold 1) the information we have marked under section 552.101 of the Government Code in conjunction with common law privacy; 2) the marked addresses, home telephone numbers, social security numbers, and any information that reveals whether the employees at issue have family members under section 552.117 of the Government Code; and 3) the Texas motor vehicle record information we have marked under section 552.130 of the Government Code. The remaining information must be released.³

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

² This office will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

³ As our ruling is dispositive, we do not address your remaining arguments.

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,



Lisa V. Cubriel
Assistant Attorney General
Open Records Division

LVC/segh

Ref: ID# 241415

Enc: Submitted documents

c: Ms. Christina Botello
4914 Valley Mill Drive
Corpus Christi, Texas 78413
(w/o enclosures)