



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 7, 2008

Mr. Matt Dow
Jackson Walker, L.L.P.
100 Congress Avenue, Suite 1100
Austin, Texas 78701

OR2008-15388

Dear Mr. Dow:

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# 327838.

The Texas Boll Weevil Eradication Foundation, Inc. (the "foundation"), which you represent, received a request for information pertaining to a specified unit, including all (1) employee evaluation reports from 2007, (2) employee performance evaluation reports from 2007, and (3) annual review reports from 2007. You claim that the submitted 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.

Initially, we must address the foundation's procedural obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information that it wishes to withhold. Pursuant to section 552.301(b), a governmental body must ask the attorney general for a decision as to whether requested information must be disclosed not later than the tenth business day after the date of receiving the written request for information. *See* 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 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. *See id.* § 552.301(e).

The documents that you submitted indicate that the foundation received the original request for information on July 25, 2008. The documents further indicate that you sought clarification on August 4, 2008 and received clarification from the requestor on August 27, 2008. *See id.* § 552.222(b) (stating that if information requested is unclear to

governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); Open Records Decision No. 663 at 5 (1999) (ten business-day deadline tolled while governmental body awaits clarification). Thus your ten business-day deadline was September 3, 2008, and your fifteen business-day deadline was September 10, 2008. However, you did not request a ruling from our office until September 10, 2008, and did not submit written comments and the information at issue until September 11, 2008. Consequently, we find that the foundation failed to comply with the procedural requirements of section 552.301 in requesting this decision from our office.

A governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. Of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Section 552.103 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *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 No. 177 (1977); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). In failing to comply with section 552.301, the foundation has waived its claim under section 552.103; therefore, the foundation may not withhold any of the requested information under this exception. Because section 552.102 of the Government Code can provide a compelling reason to overcome this presumption, we will consider your arguments under this section.

We also note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in pertinent part, as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108 [.]

Gov't Code § 552.022(a)(1). The submitted information includes completed performance evaluations of foundation employees. Therefore, as prescribed by section 552.022, the foundation must release this information unless it is confidential under other law. Section 552.102 of the Government Code constitutes other law for purposes of

section 552.022; therefore, we will consider the applicability of this section to the performance evaluations made public under section 552.022(a)(1), as well as the remaining submitted information.

Section 552.102 of the Government Code 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 v. Texas Industrial Accident Board*, 540 S.W.2d 668, 683-85 (Tex. 1976).

In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) it 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. 540 S.W.2d at 685. 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. 540 S.W.2d at 683. Upon review, we find that the information at issue does not contain intimate or embarrassing information, the release of which would be highly objectionable to a reasonable person. Therefore, you may not withhold any of the information at issue under section 552.102. As you raise no further exceptions to the disclosure of the submitted information, it must be released in its entirety to the requestor.¹

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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).

¹We note that the submitted information contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act.

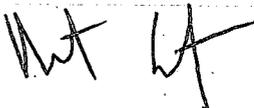
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 challenge 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,



Matt Entsminger
Assistant Attorney General
Open Records Division

MRE/jb

Ref: ID# 327838

Enc. Submitted documents

c: Mr. Mackey L. McKennon
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(w/o enclosures)