



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 23, 2010

Ms. Sheri Dye
Assistant District Attorney
Bexar County District Attorney's Office
300 Dolorosa, Fifth Floor
San Antonio, Texas 78205

OR2010-11032

Dear Ms. Dye:

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# 387733.

The Bexar County Constable's Office (the "county") received a request for the middle initials, dates of birth, ages, addresses, forwarding information, and other private information for two named individuals.¹ You claim the submitted information is excepted from disclosure under sections 552.102, 552.103, and 552.117 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

Initially, we must address the county's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant

¹Because you have not submitted a complete copy of the request for information, we take our description, in part, from your brief.

²Although you also raise section 552.1175 of the Government Code, the proper exception in this instance is section 552.117 of the Government Code because the county holds the information at issue in an employment context.

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.

to section 552.301(e), a governmental body must 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* Gov't Code § 552.301(e). You state the county received the request for information on May 4, 2010. However, you did not fax this office a representative sample of the specific information requested or deposit such information into the mail until July 14, 2010. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Additionally, as of the date of this letter you have not submitted a complete copy of the written request for information. Consequently, we find the county failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption the requested information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *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); *see also* Open Records Decision No. 630 (1994). Generally, a governmental body may demonstrate a compelling reason to withhold information by showing the information is made confidential by another source of law or affects third party interests. *See* ORD 630. You claim the submitted information is excepted from disclosure by sections 552.102, 552.103, and 552.117 of the Government Code. However, section 552.103 is discretionary in nature. This section serves only to protect a governmental body's interests and may be waived; as such, it does not constitute a compelling reason to withhold information for purposes of section 552.302. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decisions No. 665 at 2 n.5 (2000) (discretionary exceptions in general). Consequently, the county may not withhold the submitted information pursuant to section 552.103 of the Government Code. However, because sections 552.102 and 552.117 are mandatory exceptions that can provide compelling reasons for non-disclosure, we will address the applicability of these exceptions to the submitted information.

Section 552.102(a) 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). Section 552.102 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). 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(a) is the same as the common-law privacy test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976).

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. 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. In this instance, the submitted information consists of basic personnel information pertaining to former county employees. The public generally has a legitimate interest in information that relates to public employment and public employees. See Open Records Decisions Nos. 423 at 2 (1984) (scope of public employee privacy is narrow); see also Attorney General Opinion MW-283 (1980) (public employee's date of birth not protected under privacy); Open Records Decision No. 455 at 7 (1987) (birth dates, names, and addresses are not protected by privacy). Therefore, because the submitted information is of legitimate public interest, no portion of this information may be withheld under section 552.102(a) of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home addresses, home telephone numbers, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code.⁴ Gov't Code § 552.117(a)(2). Section 552.117(a)(2) is also applicable to a peace officer's cellular telephone and pager numbers, if the cellular telephone or pager services are paid for by the officer with his or her own funds. See Open Records Decision No. 670 at 6 (2001) (extending section 552.117(a)(2) exception to personal cellular telephone number and personal pager number of peace officers).

In this instance the submitted information reflects the individuals at issue are no longer employed by the county, and it is unclear whether they are currently licensed peace officers as defined by article 2.12. We have marked the home addresses, home telephone numbers, family member information, and social security numbers that relate to the named individuals. To the extent the individuals are currently licensed peace officers as defined by article 2.12, this information must be withheld under section 552.117(a)(2) of the Government Code. We have also marked an individual's cellular telephone number. You do not inform this office whether or not this number pertains to a cellular telephone paid for by the individual. Thus,

⁴"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

if the individual to whom this number pertains is currently a licensed peace officer and the cellular service associated with this number is paid for by that officer, the county must withhold this information under section 552.117(a)(2) of the Government Code. Otherwise, this cellular telephone number may not be withheld under section 552.117(a)(2). However, if the former county employees are no longer licensed peace officers, then their personal information may be subject to section 552.117(a)(1) of the Government Code.

Section 552.117(a)(1) excepts from 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 this information be kept confidential under section 552.024. *See Gov't Code § 552.117(a)(1)*. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989)*. Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Therefore, if the named individuals are no longer peace officers as defined by article 2.12, then to the extent they timely elected confidentiality under section 552.024 the county must withhold the home addresses, home telephone numbers, family member information, and social security numbers we have marked under section 552.117(a)(1). If the named individuals are no longer peace officers and did not timely elect to keep the marked information confidential, that information must be released.⁵ As with section 552.117(a)(2), the county may only withhold the marked cellular telephone number under section 552.117(a)(1) if the cellular telephone service was paid for with the employee's own funds. *See ORD 670 at 6*. Thus, if the individual whose cellular telephone number we marked is no longer a licensed peace officer but did elect to keep this number confidential and paid for the service associated with that number, then the county must withhold the marked cellular telephone number under section 552.117(a)(1). However, if this individual is no longer a peace officer and did not elect to keep his information confidential, or did not pay for the service associated with this cellular telephone number, then the marked cellular telephone number must be released.

The remaining information contains personal e-mail addresses that are subject to section 552.137 of the Government Code.⁶ Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See Gov't*

⁵We note that to the extent the former employees' social security numbers are not excepted under section 552.117 of the Government Code, section 552.147(b) of the Government Code authorizes a governmental body to redact living persons' social security numbers from public release without the necessity of requesting a decision from this office under the Act. *Gov't Code § 552.147*.

⁶The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

Code § 552.137(a)-(c). The e-mail addresses we marked in the remaining information are not specifically excluded by section 552.137(c). As such, these e-mail addresses must be withheld under section 552.137, unless the owners of the addresses have affirmatively consented to their release.⁷ *See id.* § 552.137(b).

In summary, to the extent the named individuals are currently licensed peace officers, the county must withhold the personal information we marked under section 552.117(a)(2) of the Government Code. To the extent the named individuals are no longer licensed peace officers but did timely elect to keep their personal information confidential pursuant to section 552.024 of the Government Code, the county must withhold the marked personal information under section 552.117(a)(1) of the Government Code. In either case, the marked cellular telephone number may only be withheld if the cellular telephone service was paid for with the employee's own funds. To the extent these individuals are no longer licensed peace officers and did not elect to keep this information confidential, the information we marked under section 552.117 must be released. Unless the owners of the addresses have affirmatively consented to their release, the county must withhold the personal e-mail addresses we marked under section 552.137 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/eeg

⁷This office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including private e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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Enc. Submitted documents

cc: Requestor
(w/o enclosures)