



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 21, 2012

Ms. Caroline Kelley
City Attorney
City of Missouri City
1522 Texas Parkway
Missouri City, Texas 77489

OR2012-15059

Dear Ms. Kelley:

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# 465580.

The City of Missouri City (the "city") received a request for (1) records related to a specified citation; (2) policies pertaining to the issuance of citations; and (3) information concerning two named city police officers, including records of their years of service and training, one officer's current status, the other officer's supervisory experience, and complaints involving the officers. You claim the requested information is excepted from disclosure under sections 552.102, 552.103, 552.117, 552.1175, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.

We first note you have not submitted any records related to the specified citation or any policies of the city or its police department pertaining to the issuance of citations. We therefore assume the city has released any information responsive to those aspects of the present request that existed when the city received the request. If not, then any such information must be released immediately.¹ See Gov't Code §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

¹We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

We next note the city did not comply with its deadline under section 552.301(b) of the Government Code in requesting this decision. Section 552.301 prescribes procedures a governmental body must follow in asking this office to determine whether requested information is excepted from public disclosure. See Gov't Code § 552.301(a). Section 552.301(b) requires the governmental body to ask for the attorney general's decision and claim its exceptions to disclosure not later than the tenth business day after the date of its receipt of the written request for information. See *id.* § 552.301(b). Section 552.302 of the Government Code provides that if a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. See *id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

You indicate the city received the present request for information on June 22, 2012; therefore, the city's ten-business-day deadline under section 552.301(b) was July 9. Section 552.308 of the Government Code provides that when the Act requires a submission within a specified time period, the requirement is met if the submission is sent by first class mail "with postage . . . prepaid," and the postmark date is within the required time period. Gov't Code § 552.308(a). The envelope in which you submitted the city's request for this decision, the request for information, and the information at issue bears a meter mark of July 6. The envelope reflects, however, that it was returned for insufficient postage and placed in the mail again on July 16. Thus, the city did not comply with section 552.301 in requesting this decision, and the submitted information is therefore presumed to be public under section 552.302. This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). The city claims section 552.103 of the Government Code, which is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. See Gov't Code § 552.007; *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 Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). The city's claim under section 552.103 does not constitute a compelling reason for non-disclosure under section 552.302. In failing to comply with section 552.301 of the Government Code, the city waived section 552.103 and may not withhold any of the submitted information under that exception. We will consider the city's claims under sections 552.102, 552.117, 552.1175, and 552.130 of the Government Code, which can provide compelling reasons for non-disclosure.

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). The Texas Supreme Court has held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. See *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336, 348 (Tex. 2010). You have marked the

information the city seeks to withhold under this exception. We agree the date of birth you have marked must be withheld under section 552.102(a) of the Government Code. We find the remaining information you have marked does not fall within the scope of section 552.102(a). We have marked that information, which must be released.

Section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the officer has family members, regardless of whether the officer complies with sections 552.024 or 552.1175 of the Government Code. *See Gov't Code §§ 552.117, .024.* We note section 552.117(a)(2) protects a peace officer's personal cellular telephone number if the officer pays for the cellular telephone or pager service with his or her personal funds. *See Open Records Decision No. 670 at 6 (2001).* Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. You have marked the information the city seeks to withhold under section 552.117(a)(2). We find some of the marked information does not fall within the scope of the exception. We have marked that information, which must be released. We agree the city must withhold the remaining information you have marked and the additional information we have marked under section 552.117(a)(2) of the Government Code, including a cellular telephone number if the officer personally pays for the cellular service.²

Section 552.130 of the Government Code excepts from disclosure information related to a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country. *See Gov't Code § 552.130(a)(1).* You have marked the information the city seeks to withhold under section 552.130. Except for the information we have marked that does not fall within the scope of the exception and must be released, we agree the information you have marked must be withheld under section 552.130 of the Government Code.

Lastly, we note some of the remaining information appears to be protected by copyright law. A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See Open Records Decision No. 180 at 3 (1978); see also Open Records Decision No. 109 (1975).* A custodian of public records also must comply with copyright law, however, and is not required to furnish copies of records that are copyrighted. *See ORD 180 at 3.* A member of the public who wishes to make copies of copyrighted materials 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.

In summary, except for the information we have marked for release, the city must withhold (1) the information you have marked under section 552.102(a) of the Government

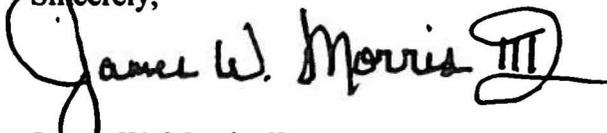
²As we are able to make this determination, we need not address your claim under section 552.1175 of the Government Code.

Code; (2) the information you have marked and the additional information we have marked under section 552.117(a)(2) of the Government Code, including a cellular telephone number if the officer personally pays for the cellular service; and (3) the information you have marked under section 552.130 of the Government Code. The rest of the submitted information must be released, but any information protected by copyright may only be released in accordance with copyright law.

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,

A handwritten signature in black ink that reads "James W. Morris III". The signature is written in a cursive style with a large initial "J" and a stylized "M".

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

JWM/bhf

Ref: ID# 465580

Enc: Submitted documents

c: Requestor
(w/o enclosures)