



August 2, 2001

Mr. Ted E. Michael
Director of Human Resources
Sam Houston State University
1816 Avenue I
Frels Building, Room 122
Huntsville, Texas 77341-2356

OR2001-3364

Dear Mr. Michael:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150228.

Sam Houston State University (the "university") received a request for copies of Annual Merit Review Forms for all employees assigned to the Custodian Department and the Staff Evaluation Summary and the processing instructions for the years 2000 and 2001.¹ Because you have not submitted the Staff Evaluation Summary or the processing instructions, we assume that you have released these records. If not, you must do so at this time. *See* Gov't Code §§ 552.301, .302. You claim that the Annual Merit Review Form is excepted from disclosure under section 552.102 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note that the university submitted a blank Annual Merit Review Form. Pursuant to section 552.301(e)(1)(D), a governmental body is required to submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Based on our review of the request and your claim that the details of the employee's performance are private, we believe that the requestor asked for completed Annual Merit Review Forms. Because you have only submitted a blank form, you have failed to submit a copy of the requested information or a representative sample as required by section 552.301(e)(1)(D) of the Government Code.

¹We note that the requestor asks that you redact the social security numbers as they are protected by federal law. We, note, however, that social security numbers are only confidential under federal law if they are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* 42 U.S.C. § 405(c)(2)(C)(viii)(I). Because the requestor asks that you redact the social security numbers, you need not release the social security numbers to the requestor.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301(e) 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 Gov't Code § 552.302); Open Records Decision No. 319 (1982). You contend that employees expect the Annual Merit Review Form to be kept confidential. However, information that is subject to disclosure under the Public Information Act may not be withheld simply because a party anticipates or requests confidentiality. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

You also argue that releasing the Annual Merit Review form would invade the personal privacy of employees and, therefore, the form should be withheld under section 552.102 of the Government Code. Section 552.102 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 for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Government Code. See *Industrial Found.*, 540 S.W.2d 668 at 683-85.²

The doctrine of common law privacy protects information that contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and the information must be of no legitimate concern to the public. *Id.* However, the scope of public employee privacy is narrow and there is a legitimate public interest in a public employee's job performance. See Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of employee privacy is narrow). Therefore, employee evaluations are not excepted in their entirety under section 552.102 of the Government Code. See also Gov't Code § 552.022(a)(1).

² Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information protected by the common law right of privacy.

Furthermore, because you have only submitted a blank form, we are unable to discern whether the completed review form contains any information that would be excepted under privacy or otherwise confidential by law. Because we have no basis for finding that any of the requested information is confidential, we have no choice but to order the information released per section 552.302. If you believe the information is confidential and may not lawfully be released, you must challenge the ruling in court as outlined below.

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).

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, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, 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 Department of Public 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 General Services Commission 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 that reads "Jennifer Bialek". The signature is written in a cursive style with a large initial "J".

Jennifer Bialek
Assistant Attorney General
Open Records Division

JHB/sdk

Ref: ID# 150228

Enc: Submitted documents

c: Mr. Paul N. Manoli
61 Edgewood
Huntsville, Texas 77320
(w/o enclosures)