



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

December 19, 2002

Mr. Ken Johnson
Assistant City Attorney
City of Waco
P.O. Box 2570
Waco, Texas 76702-2570

OR2002-7299

Dear Mr. Johnson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 173924.

The City of Waco (the "city") received two requests for information relating to two former city employees. You state that some of the requested information does not exist. Chapter 552 of the Government Code does not require the city to release information that did not exist when it received a request or to create responsive information. *See* Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). You also state that the city has released some of the requested information. You claim that the remaining requested information is excepted from disclosure under section 552.102 of the Government Code. We have considered the exception you claim and have reviewed the information you submitted.

We first note that the city seeks to withhold from one of the requestors information that has been released to the other requestor. Chapter 552 of the Government Code does not permit selective disclosure of public information. *See* Gov't Code § 552.007. If information has been released voluntarily to any member of the public, that same information may not be withheld from further disclosure, unless its public release is expressly prohibited by law. *See also* Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988).

You claim that the information the city seeks to withhold is private under section 552.102 of the Government Code. Section 552.102(a) excepts from public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" This exception is applicable to information that relates to public

employees.¹ The test of employee privacy under section 552.102(a) is the same as the test of common-law privacy under section 552.101 in conjunction with *Industrial Foundation v. Texas Industrial Accident Board*.² Common-law privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. See 540 S.W.2d at 685. Because of the greater legitimate public interest in information that relates to public employees, privacy under section 552.102(a) is confined to information that reveals "intimate details of a highly personal nature." See *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.--Austin 1983, writ ref'd n.r.e.); Open Records Decision Nos. 473 at 3 (1987), 444 at 3-4 (1986), 423 at 2 (1984). Thus, privacy under section 552.102(a) is "very narrow." See Open Records Decision No. 400 at 5 (1983).

You state that the information that the city seeks to withhold "deal[s] with working relationships that if disclosed would constitute a clearly unwarranted invasion of personal privacy[.]" However, having reviewed this information, we find that it relates almost entirely to the conduct of public employees in the workplace and thus is a matter of legitimate public interest. Therefore, none of the submitted information is excepted from public disclosure under section 552.102 of the Government Code. See also Open Records Decision Nos. 470 at 4 (1987) (employee's job performance does not generally constitute that person's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees), 423 at 2 (1984) (statutory predecessor applicable when information would reveal intimate details of highly personal nature), 405 at 2 (1983) (manner in which employee performed his job cannot be said to be of minimal public interest), 400 at 5 (1983) (statutory predecessor protected information only if its release would lead to clearly unwarranted invasion of privacy).

We note, however, that section 552.117 may be applicable to some of the requested information. Section 552.117(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024. Whether a particular item 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). Therefore, the city may only withhold information under section 552.117 on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For a current or former employee who timely elected to keep his or her personal information confidential, the city must withhold the employee's home

¹See 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).

²Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

address and telephone number, social security number, and any information that reveals whether the employee has family members. The city may not withhold this information under section 552.117 for a current or former employee who did not make a timely election to keep the information confidential. We have marked a small amount of information that the city may be required to withhold under section 552.117. We note, however, that the city may not withhold this information under section 552.117 from the person to whom it pertains. *See Gov't Code § 552.023.*³

In summary, the city may be required to withhold the marked information from one of the requestors under section 552.117. The rest of the submitted information must be released.

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).

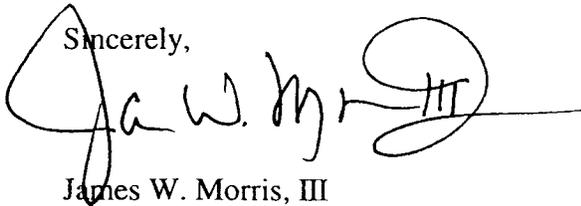
³Section 552.023(a) provides that "[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests." *See also* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body to provide her with information concerning herself).

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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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, appearing to read "James W. Morris, III". The signature is stylized with a large, circular flourish at the end.

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

JWM/sdk

Ref: ID# 173924

Enc: Marked documents

c: Ms. Jessica McFarlen
610 Old Rosenthal Road
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