



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

February 27, 2003

Ms. Paula J. Alexander
General Counsel
Metropolitan Transit Authority
P. O. Box 61429
Houston, Texas 77208-1429

OR2003-1251

Dear Ms. Alexander:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 177159.

The Metropolitan Transit Authority of Harris County (the "authority") received two requests from the same requestor encompassing the following categories of information:

- 1) e-mail correspondence between the requestor and Diane Olmos for a specified period of time;
- 2) documents in Diane Olmos' and Vel A. Watkins' personnel files;
- 3) documents relating to authority employees' use of computers for sending and receiving email messages;
- 4) information from the authority's website that is "intended to prohibit or discourage members of the public from corresponding with Metro employees by e-mail";
- 5) identifying information for all "rules, laws, ordinances or other restrictive covenants that prohibit members of the public from sending e-mail messages to Metro employees"; and
- 6) documents relating to complaints made by any authority employee about email messages that he or she received.

You state that the authority will release information that is responsive to request items 1, 3, and 6, as well as some information that is responsive to request item 2. You state that the authority does not maintain information that would be responsive to request item 4.¹ You also state that request item 5 would require the authority to conduct legal research and that the authority is not required to do so in responding to a request for public information. We agree. See Open Records Decision Nos. 563 at 8 (1990) (considering request for federal and state laws and regulations). You claim that the remaining requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.102, 552.117, 552.130, and 552.137 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information. We have also considered comments submitted by the requestor. See Gov't Code § 552.304 (providing that person may submit comments stating why information should or should not be released).

Initially, we note that the requestor asserts that the authority did not request a decision from our office with respect to the information at issue within ten business days of its receipt of the requestor's requests for information as required by section 552.301(b) of the Government Code. See Gov't Code § 552.301(b). The authority states that it received the requestor's requests "on or about December 3, 2002." However, the information that you have submitted to us for our review indicates that the authority received the requests on December 2, 2002, the first business day following the authority's actual receipt of the e-mailed requests.² Therefore, the authority had until December 16, 2002 to request a decision from our office regarding both requests. However, the authority did not request a decision from our office with regard to the requested information until December 17, 2002. Therefore, we find that the authority failed to comply with the procedural requirements of section 552.301 in requesting this decision from our office. See Gov't Code § 552.301(b).

Because the authority failed to comply with the procedural requirements of section 552.301 in requesting this decision, the information at issue is now presumed public. See Gov't Code § 552.302; see also *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The authority must demonstrate a compelling interest in order to overcome the presumption that the requested information is now public. See *id.* Normally, a compelling interest is

¹ It is implicit in several provisions of the Public Information Act (the "Act") that the Act applies only to information already in existence. See Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. See Attorney General Opinion H-90 (1973); see also Open Records Decision Nos. 87 (1975), 342 at 3 (1982), 416 at 5 (1984), 452 at 2-3 (1986), 555 at 1-2 (1990), 572 at 1 (1990). A governmental body must only make a good faith effort to relate a request to information which it holds. See Open Records Decision No. 561 at 8 (1990).

² See Gov't Code § 552.301(c) (stating that written request includes request made in writing sent to officer for public information or person designated by officer by electronic mail or facsimile transmission).

demonstrated when some other source of law makes the requested information confidential or when third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Since the authority claims that the remaining requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.102, 552.117, 552.130, and 552.137, we will address the authority's claims.

You claim that the information at issue is excepted from disclosure pursuant to 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). Section 552.102(a) is generally applicable to information relating to a public official or employee. *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 from disclosure under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected from disclosure under the common-law right to privacy as incorporated by section 552.101 of the Government Code. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Accordingly, we address the authority's section 552.102 claim under section 552.101.³

Information is protected from disclosure under the common-law right to privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See id.* After carefully reviewing your arguments and the information at issue, we find that no portion of this information is protected from disclosure under the common-law right to privacy. *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) (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). Accordingly, we conclude that the authority may not withhold any portion of the information at issue under section 552.101 of the Government Code in conjunction with the common-law right to privacy.

³ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by the common-law right to privacy.

You also claim that portions of the information at issue are excepted from disclosure pursuant to section 552.117 of the Government Code. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code § 552.117(1)*. However, information that is responsive to a request may not be withheld from disclosure under section 552.117(1) if the employee did not request confidentiality for this information in accordance with section 552.024 or if the request for confidentiality under section 552.024 was not made until after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*.

The submitted information reflects that the employees who are the subjects of these requests authorized the release of their home addresses and home telephone numbers to any person(s) as public information. The authority must withhold these employees' family member information and social security numbers pursuant to section 552.117(1), if these employees timely elected under section 552.024 to keep this specific information confidential prior to the authority's receipt of these requests. We have marked this type of information for your review. However, if these employees did not make such an election prior to the authority's receipt of these requests, then the authority must release this specific information to the requestor.

Nevertheless, we note that the employees' social security numbers may be confidential under section 552.101 in conjunction with federal law. Section 552.101 also encompasses information that is protected from disclosure by other statutes. The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that 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 Open Records Decision No. 622 (1994)*. The authority has cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes it to obtain or maintain these social security numbers. Therefore, we have no basis for concluding that they are confidential under section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. We caution the authority, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing these social security numbers, the authority should ensure that they were not obtained and are not maintained by the authority pursuant to any provision of law enacted on or after October 1, 1990.

In addition, you claim that portions of the information at issue are excepted from disclosure pursuant to section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See Gov't Code § 552.130*. Accordingly, we conclude that the authority must withhold the Texas motor vehicle information that we have marked pursuant to section 552.130 of the Government Code.

Finally, you claim that e-mail addresses that are contained within the information at issue are subject to section 552.137 of the Government Code. Section 552.137 provides in relevant part:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. Section 552.137 requires the authority to withhold e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the authority, unless the members of the public have affirmatively consented to their release. Section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or web address. Accordingly, we conclude that the authority must withhold the e-mail address that we have marked pursuant to section 552.137 of the Government Code, unless the member of the public with whom it is associated has affirmatively consented to its release.

In summary, the authority must withhold the marked family member information and social security numbers of the subject employees pursuant to section 552.117(1) of the Government Code, if these employees timely elected under section 552.024 of the Government Code to keep this specific information confidential prior to the authority's receipt of these requests. The subject employees' social security numbers may otherwise be confidential under federal law. The authority must withhold the Texas motor vehicle information that we have marked pursuant to section 552.130 of the Government Code. The authority must withhold the e-mail address that we have marked pursuant to section 552.137 of the Government Code, unless the member of the public with whom it is associated has affirmatively consented to its release. The authority must release the remaining submitted information to the requestor.

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).

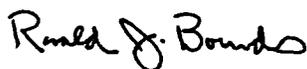
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 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 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 177159

Enc. Marked documents

c: Mr. Spence Kerrigan
8623 Kempridge
Houston, Texas 77080-4311
(w/o enclosures)