



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

May 29, 2003

Mr. A.D. (Gus) Fields
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14135 Midway Road, Suite 250
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OR2003-3636

Dear Mr. Fields:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181818.

The El Paso Firemen & Policemen's Pension Fund (the "fund"), which you represent, received a request for an "electronic list of all retirees in the [fund]. This list should include full name, address and telephone number." The requestor also seeks a "list of the people who have been identified as having received overpayment from the [f]und." You state that the fund does not maintain some responsive information.¹ You claim, however, that the remaining requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.024, 552.101, 552.102, 552.111, 552.117, and 552.1175 of the Government

¹ We note that 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); *Economic Opportunities Dev. Corp. of San Antonio v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ *dism'd*). 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).

Code.² We have considered the exceptions you claim and have reviewed the submitted information.

You claim that the information that is responsive to the second part of the request 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). 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 in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code.³ See *Industrial Found.*, 540 S.W.2d at 683-85. Accordingly, we address your section 552.101 and 552.102 claims together under section 552.101 in conjunction with the common-law right to privacy.

Information is protected from disclosure by 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.* Prior decisions of this office have found that personal financial information not relating to a financial transaction between an individual and a governmental body is protected from disclosure under the common-law right to privacy. See Open Records Decision Nos. 600 (1992), 545 (1990). We note, however, that the right of privacy is purely personal and lapses at death. See *Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); see also Attorney General Opinions JM-229 (1984); H-917 (1976). On the other hand, if the release of information about a deceased person reveals highly intimate or embarrassing information about living persons, the information must be withheld to protect the living individuals' privacy. See Attorney

² We note that section 552.024 is not an exception to disclosure under the Act. Accordingly, we do not address whether any portion of the requested information is excepted from disclosure pursuant to section 552.024 of the Government Code. We also note that because the fund did not submit to this office written comments stating the reasons why section 552.111 of the Government Code would allow the requested information to be withheld, we find that the fund has waived this particular exception to disclosure. See Gov't Code §§ 552.301, .302. Finally, we note that although the fund did not claim that sections 552.101 and 552.102 excepted portions of the requested information from disclosure within the ten business day deadline established in section 552.301(b) of the Government Code, we will address the fund's claims under these particular exceptions to disclosure. See Open Records Decision No. 150 at 2 (1977) (finding compelling reasons to exist when other source of law makes requested information confidential or when third party interests are at stake); see also Gov't Code §§ 552.301, .302.

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.

General Opinion JM-229. Based on our review of your arguments and the information that is responsive to the second part of the request, we find that the entirety of this information consists of personal financial information that is protected by the common-law right to privacy. Accordingly, we conclude that the fund must withhold the entirety of the submitted information that is responsive to the second part of the request pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.

You also claim that portions of the submitted information which are responsive to the first part of the request 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 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 under section 552.117(1) if the official or employee did not timely request confidentiality for this information in accordance with section 552.024 or if the request for confidentiality for this information 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).*

In our opinion, a governmental body is only obliged under section 552.117 to protect information pertaining to employees and officials of that governmental body when it receives a request for information, in this case the fund. We note, for example, that the companion provision to section 552.117, section 552.024 of the Government Code, provides that an official or employee of a governmental body may deny public access to certain information "in the custody of the governmental body." *Gov't Code* § 552.024. We also note that the legislature has established no mechanism for a governmental body to apprise itself when it receives a request for information of whether given individuals were officials or employees of other governmental bodies or whether such individuals had exercised the option under section 552.024 to prohibit the release of their section 552.117 information. We therefore do not believe it was the legislature's intent to require a governmental body to protect section 552.117 information for individuals who have not been officials or employees of that governmental body when it receives a request. Thus, we find in this instance that section 552.117 does not protect section 552.117 information pertaining to officials or employees of governmental bodies other than the fund. You inform us that the information at issue pertains to former employees of the City of El Paso and not current or former officials or employees of the fund. Accordingly, we conclude that no portion of the submitted information which is responsive to the first part of the request is excepted under section 552.117(1) of the Government Code.

You also claim that portions of the submitted information which are responsive to the first part of the request are excepted from disclosure pursuant to section 552.117(2) of the

Government Code. However, as we have noted above, because the fund does not employ the peace officers whose information is at issue, the fund is unable to determine whether these particular individuals are currently licensed as peace officers as defined by Code of Criminal Procedure article 2.12. *See* Crim. Proc. Code art. 2.12. Section 552.117(2) only applies to a governmental body that employs such persons. Accordingly, we conclude that no portion of the submitted information which is responsive to the first part of the request is excepted under section 552.117(2) of the Government Code.

However, you also claim that portions of the submitted information which are responsive to the first part of the request are excepted from disclosure pursuant to section 552.1175 of the Government Code. Section 552.1175, which also applies to current peace officers, is the applicable exception under these circumstances and provides in part that

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(b). However, you do not inform us, and we are unable to ascertain from our review of the information that you have submitted to us, whether any current peace officers noted in the submitted information that is responsive to the first part of the request have notified the fund of his or her election of confidentiality for their section 552.1175 information in accordance with the above-cited subsections 552.1175(b)(1) and (2). *See, e.g.,* Open Records Decision No. 678 (2003) (concluding that county voter registrar was authorized to release voter information made confidential under section 552.1175 to another governmental entity, but that transferred information would not be confidential in possession of transferee until that governmental body receives section 552.1175 notification). Thus, if any such current peace officers have complied with section 552.1175(b) with respect to their home address and home telephone number, the fund must withhold such information contained within the information that is responsive to the first part of the request pursuant to section 552.1175 of the Government Code. If not, the fund must release this particular information to the requestor.

In summary, the fund must withhold the entirety of the submitted information that is responsive to the second part of the request pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy. The fund must withhold the

home addresses and home telephone numbers of current peace officers that are contained within the information that is responsive to the first part of the request to the extent that the current peace officers associated with this particular information elected confidentiality for this information in accordance with section 552.1175 of the Government Code. Otherwise, the fund must release this particular information to the requestor. In any event, the fund must release to the requestor the remaining portions of the submitted information which are responsive to the first part of the request.

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# 181818

Enc. Submitted documents

c: Ms. Deborah C. Ingersoll, President
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(w/o enclosures)