



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 7, 2015

Ms. Julie Arrington
City Secretary
Town of Pantego
1614 South Bowen Road
Pantego, Texas 76013

OR2015-16338

Dear Ms. Arrington:

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# 575395.

The Pantego Police Department (the "department") received a request for seven pieces of information pertaining to all male employees of the department during a specified period of time, excluding undercover detectives. We understand the department will redact personal e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.117, 552.119, and 552.152 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted representative sample of information.

¹We note Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

²Although you do not raise section 552.101 of the Government Code in your brief, we understand you to raise this exception based on the substance of your arguments. Further, although you claim section 552.1175 of the Government Code for portions of the submitted information, section 552.117 is the proper exception to raise in this instance because the department holds the submitted information in an employment capacity.

Initially, we address your assertion that complying with the request would require the department to compile or manipulate the data. We note the Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). Additionally, the Act does not require a governmental body to release information that did not exist when it received a request. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1, 452 at 3 (1986), 362 at 2 (1983). In this instance, you state only that the department did not maintain a record in the format sought by the requestor, not that the data responsive to the request did not exist on the date of the request. On the contrary, the submitted information indicates that the department is in possession of the necessary data and has the capacity to respond to the request.

A request for public information that requires a governmental body to program or manipulate existing data is not considered to be a request for the creation of new information. *See* Gov't Code § 552.231; *Fish v. Dallas Indep. Sch. Dist.*, 31 S.W.3d 678, 681-82 (Tex. App.—Eastland 2000, pet. denied) (plaintiffs' request required manipulation of existing data rather than creation of new information); Open Records Decision No. 661 at 6-7 (1999). Thus, if information that is otherwise available to a governmental body can be programmed or manipulated for the purpose of responding to a request for information, then the governmental body has access to information responsive to that request. Accordingly, while the department is not required to create a document in response to the request, documents from which the requested information may be derived would be responsive to this request. A governmental body must make a good faith effort to relate a request to information which it holds. *See* Open Records Decision No. 561 at 8 (1990).

Section 552.231 of the Government Code prescribes procedures that must be followed if, in responding to a request for information, a governmental body would be required to program or manipulate data. *See* Gov't Code § 552.231(a) (written statement described by section 552.231(b) shall be provided to requestor if governmental body determines (1) responding to request for information will require programming or manipulation of data and (2) compliance with request is not feasible or will result in substantial interference with ongoing operations or that information could be made available in requested form only at costs that cover programming and manipulation). A governmental body that fails to follow the requirements of section 552.231 is not released by that section from its obligation to provide the requested information or to seek a ruling from this office as to whether the information is excepted from disclosure. *See Fish*, 31 S.W.3d at 682. Thus, the department's officer for public information carries the duty of promptly producing such public information when it is requested, unless the department wishes to withhold the information. Gov't Code §§ 552.203, .221. Further, a governmental body may not decline to comply with the requirements of the Act on the ground of administrative inconvenience. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976) (cost or difficulty in complying with Act does not determine availability of information). The fact

that it may be burdensome to provide the information at issue does not relieve a governmental body of its responsibility to comply with the Act. *Id.*; Open Records Decision No. 497 (1988). In this instance, the department has submitted information that it has deemed to be responsive to the request. Accordingly, we will consider the department's arguments against disclosure.

Next, we note the requestor seeks seven pieces of information pertaining to the department employees at issue. You have submitted documents that contain information beyond these specific pieces of information. Thus, the portions of the submitted documents that do not consist of the information requested are not responsive to the present request. This ruling does not address the public availability of any information that is not responsive to the request and the department is not required to release that information in response to the request.

We note the employees' names are subject to section 552.022 of the Government Code. Section 552.022(a)(2) provides the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body are expressly public under section 552.022 of the Government Code and may not be withheld unless they are made confidential under the Act or other law. Gov't Code § 552.022(a)(2). Although you assert the employees' names are excepted from disclosure under section 552.103 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body's interests and does not make information confidential under the Act. *See 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 section 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary-exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the department may not withhold the employees' names under section 552.103. However, as sections 552.101, 552.102, and 552.152 of the Government Code can make information confidential under the Act, we will address your arguments under these sections for the information subject to section 552.022(a)(2), as well as the remaining information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found.*, 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered highly intimate or embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Upon review, we find you have not demonstrated how any of the responsive information is highly intimate or embarrassing and not of legitimate public concern. Thus, the responsive information may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

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). We understand you to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code, which is discussed above. *See Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert’s* interpretation of section 552.102(a), and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The Texas Supreme Court also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. Having carefully reviewed the information at issue, we find the department may not withhold any of the responsive information under section 552.102(a) of the Government Code.

Section 552.103 of the Government Code provides, in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov’t Code § 552.103(a), (c). The governmental body claiming section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4* (1990).

You assert the information at issue is subject to section 552.103 of the Government Code. You state the requestor claims the information at issue pertains to a pending legal matter. However, upon review, we find you have not demonstrated the department is a party to the pending legal matter. Accordingly, we conclude the department may not withhold any of the responsive information that is not subject to section 552.022(a)(2) of the Government Code under section 552.103 of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public 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 peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code. *See Gov't Code § 552.117(a)(2)*. We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See Open Records Decision No. 506 at 5-6 (1988)* (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, the department must withhold the information you have highlighted under section 552.117(a)(2) of the Government Code.³

You assert the submitted photographs should be withheld from disclosure under section 552.119 of the Government Code. Section 552.119 provides as follows:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

- (1) the officer is under indictment or charged with an offense by information;
- (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or
- (3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph exempt from disclosure under Subsection (a) may be made public only if the peace officer or security officer gives written consent to the disclosure.

³As our ruling is dispositive, we need not consider your remaining argument against disclosure of this information.

Id. § 552.119. Under section 552.119, a governmental body must demonstrate, if the documents do not demonstrate on their face, release of the photograph would endanger the life or physical safety of a peace officer. Upon review, we find you have failed to demonstrate release of the submitted photographs would endanger an officer's life or physical safety. Accordingly, the submitted photographs may not be withheld under section 552.119 of the Government Code.

Section 552.152 of the Government Code provides:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 [of the Government Code] if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

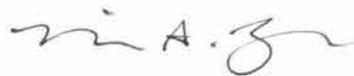
Id. § 552.152. Upon review, we find you have not demonstrated the release of the information at issue would subject the officers at issue to a substantial threat of harm. Accordingly, the department may not withhold the information at issue under section 552.152 of the Government Code.

In summary, the department must withhold the information you have highlighted under section 552.117(a)(2) of the Government Code. The department must release the remaining responsive information.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Nicholas A. Ybarra
Assistant Attorney General
Open Records Division

NAY/cbz

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Enc. Submitted documents

c: Requestor
(w/o enclosures)