



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 10, 1995

Ms. Evelyn Johnson
Acting Manager
Materials Management
Capital Metro
2910 East Fifth Street
Austin, Texas 78702

OR95-1059

Dear Ms. Johnson:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 33172.

Capital Metro received an open records request for records relating to an investigation by Capital Metro into the eligibility of the subcontractor on Capital Metro's current diesel fuel contract, Arrow Oil Company ("Arrow"), to be awarded the contract as a minority business enterprise ("MBE"). You contend that the requested information comes under the protection of the "litigation" exception, section 552.103 of the Government Code. We note, however, that all of the records you have submitted to this office in connection with this request were provided to Capital Metro by Arrow, which would be the defendant in any subsequent legal action resulting from the investigation. Even if this office were to assume *arguendo* that litigation is likely to result from the investigation, section 552.103 does not protect from public disclosure information that is in the hands of both parties in litigation. Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, Capital Metro may not withhold any of the requested information pursuant to this exception.

We note, however, that certain information contained in the records at issue come under the protection of common-law privacy as incorporated into section 552.101 of the Government Code, which excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Information may be withheld under common-law privacy if it meets the criteria the Texas Supreme Court articulated for section 552.101 in *Industrial Foundation*

v. Texas Industrial Accident Board, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Under *Industrial Foundation*, a governmental body must withhold information on common-law privacy grounds only if the information is highly intimate or embarrassing information regarding an individual's private affairs *and* it is of no legitimate concern to the public. *Id.* at 683-85.

We believe that a private individual's checking account number is the kind of information that this office previously has concluded falls within the protection of common-law privacy. In Open Records Decision No. 373 (1983) this office addressed the availability of personal financial information submitted to a city by an applicant for a housing rehabilitation grant. The decision concludes as follows:

all financial information relating to an individual -- including sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits, retirement and state assistance benefits, and credit history -- ordinarily satisfies the first requirement of common law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities.

Open Records Decision No. 373 (1983) at 3. In Open Records Decision No. 545 (1990) this office applied a similar presumption to determine that, absent "special circumstances," information concerning a public employee's participation in a deferred compensation plan is protected from disclosure by common-law privacy. Open Records Decision No. 545 (1990) at 4-5; *see also* Open Records Decision No. 600 (1992) at 9-12. Whether the public has a legitimate interest in such information, however, must be determined on a case-by-case basis. Open Records Decision No. 373 (1983) at 4; *see also* Open Records Decision Nos. 600 (1992), 545 (1990).

Consistent with previous decisions of this office, we believe that the checking account number contained in the records at issue is intimate and embarrassing information about an individual's private affairs. *See Industrial Found.*, 540 S.W.2d at 685. Furthermore, we find no legitimate public interest in this type of information. *See id.* Consequently, we conclude that the checking account number is private under the common law, and Capital Metro must withhold it pursuant to section 552.101 of the Government Code. For similar reasons, we have marked other information that Capital Metro must withhold because it reveals a third party's personal financial transactions that are of no legitimate public interest.

We have also regarded your request for an open records decision as one made pursuant to section 552.305 of the Government Code and have informed representatives of Arrow of the pending open records request and of their responsibility to explain why portions of Arrow's records currently held by Capital Metro were excepted from public disclosure, with the caveat that their failure to do so would result in this office instructing

you to disclose the information. However, Arrow's attorney, in responding to our notice, has not established that any portion of Arrow's records constitutes a "trade secret," *see* RESTATEMENT OF TORTS § 757 cmt. b (1939), and thus has failed make a *prima facie* case that the requested information is excepted from required public disclosure under section 552.110 of the Government Code. *See* Open Records Decision No. 552 (1990).

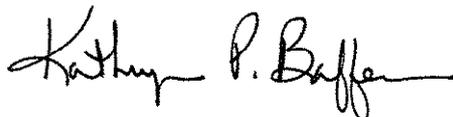
Section 552.110 also protects "commercial or financial information obtained from a person *and privileged or confidential by statute or judicial decision.*" (Emphasis added.) Arrow's attorney contends that its records are confidential under the Code of Federal Regulations. Title 49, part 23, of the code contains provisions governing the participation by MBEs in Department of Transportation programs and includes the following confidentiality provision regarding the disclosure of an MBE's records:

(h) Recipients [of federal funds who administer MBE programs] shall safeguard from disclosure to unauthorized persons information that reasonably may be regarded as confidential business information, *consistent with Federal, state and local law.* [Emphasis added.]

49 C.F.R. § 23.53(h). This provision does not in and of itself make any information confidential, but rather only serves to alert administrators of MBE programs to the fact that information provided by MBEs may be confidential under *other* law. For example, we note that included among the requested documents are certain income tax records; these tax records are specifically made confidential by federal law and therefore must be withheld. *See* 26 U.S.C. § 6103. However, Arrow's attorney has not directed this office to any other federal law that specifically makes any of the information at issue confidential. If you believe that any other information coming within the ambit of the open records request in fact is made confidential by other federal law, you must resubmit that information to this office and demonstrate the applicability of that particular law. Absent such a demonstration, Capital Metro must release the requested information in its entirety except as discussed above.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kathryn P. Baffes
Assistant Attorney General
Open Records Division

KPB/RWP/rho

Ref.: ID# 33172

Enclosures: Marked documents

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