



December 11, 2000

Mr. Devin "Buck" Benson
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OR2000-4663

Dear Mr. Benson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 142018.

The Brownsville Public Utilities Board (the "board") received a request for information related to a job classification and salary study done for the board by Watson Wyatt & Company ("Watson Wyatt"). You claim that the requested information is excepted from disclosure under sections 552.101, 552.110 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the Seventy-sixth Legislature amended section 552.022 of the Government Code to make certain information expressly public, and therefore not subject to discretionary exceptions to disclosure. Section 552.022 now states in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and are not excepted from required disclosure under this chapter unless they are expressly confidential under other law.

Gov't Code § 552.022. One such category of expressly public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108" Gov't Code § 552.022(a)(1). Upon review of the information in Exhibit B, we conclude that this information consists of completed reports and/or evaluations made both for and by the board, and as such, is public information under section 552.022(a)(1), unless it is confidential under another law. You argue that the information in Exhibit B is excepted from disclosure under section 552.111 of the Government Code. Sections 552.111 is a discretionary exception and

not "other law" for purposes of section 552.022.¹ Accordingly, the board must release the information in Exhibit B under section 552.022(a)(1).

We also note that the Market Analysis Report in Exhibit C consists of a completed report made for the board. Therefore, as prescribed by section 552.022, the report in Exhibit C must be released to the requestor unless it is confidential under other law.

You argue that the report is excepted from disclosure under section 552.110(b).² Section 552.110(b) excepts from required public disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *See generally National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. *See Open Records Decision No. 661 (1999)*.

You argue that the Market Analysis Report was generated by Watson Wyatt using salary information collected from other entities and sources, and that Watson Wyatt is in the business of consulting with entities like the board regarding their wages and pay structures. If Watson Wyatt's competitors were given access to the market wage information contained in Exhibit C, you argue, it would cause Watson Wyatt substantial harm, since its competitors could use the market wage information without ever having to prepare it themselves. Upon review of your arguments under section 552.110(b) and the information contained in the Market Analysis Report in Exhibit C, we conclude you have not demonstrated by "specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." Therefore, as we have no other arguments before us for withholding this information under section 552.110, we conclude the Market Analysis Report in Exhibit C must be released to the requestor.

¹Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990) (governmental body may waive informer's privilege), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

²We note that section 552.305(d) provides: "If release of a person's proprietary information may be subject to exception under Section 552.101, 552.110, 552.113, or 552.131, the governmental body that requests an attorney general decision under Section 552.301 shall make a good faith attempt to notify that person of the request for the attorney general decision." You do not inform us, nor is it apparent from the information submitted to this office, that the notice required by section 552.305(d) was sent to Watson Wyatt.

You also seek to withhold the information in Exhibit G as commercial or financial information under section 552.110(b). You state that these documents were provided to the board by Watson Wyatt and relate to other surveys used to compile the market information utilized in the market analysis report. You argue that Watson Wyatt collected this information in the scope of its business, and that release of the information would allow Watson Wyatt's competitors to unfairly use the information. On the basis of this argument and our review of the information contained in Exhibit G, we conclude you have not established that this information is excepted from disclosure under section 552.110(b). Therefore, the information in Exhibit G must be released to the requestor.

We next address your arguments under section 552.111 of the Government Code. You contend that the information contained in the submitted Exhibits D, E, F and H are excepted under section 552.111, which excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency."³ In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). Upon review of the information contained in Exhibits D and E, we agree that a portion of this information is excepted from disclosure under section 552.111. We have marked the information to be withheld.

We also note that the draft of a document that has been released or is intended for release in final form necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document, and may therefore be withheld under section 552.111 of the Government Code. See Open Records Decision No. 559 (1990). Generally, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. Yet, where a document is a genuine preliminary draft that has been released or is intended for release in final form, factual information in that draft which also appears in a released or releasable final version is excepted from disclosure by section 552.111. Open Records Decision No. 559 (1990). However, severable factual information appearing in the draft but not in the final version is not excepted by section 552.111. *Id.* Although information protected by section 552.111 is most commonly generated by agency personnel, information created for an agency by outside consultants acting on the behalf of the agency in an official capacity

³We note that in your brief, you argued that the information in Exhibit H is excepted from disclosure under section 552.110. However, based on your statement that the documents in Exhibit H "represent the internal deliberative process" of the board and should therefore not be disclosed, we are addressing your argument for the information in Exhibit H under section 552.111.

may be within section 552.111. Open Records Decision No. 462 (1987) (construing statutory predecessor). We conclude that the information in Exhibit F may be withheld in its entirety as drafts of documents to be released in final form.

With regard to the information in Exhibit H, we again note that section 552.022 of the Government Code makes certain information expressly public, and therefore not subject to discretionary exceptions to disclosure. Section 552.022(a)(2) makes "the name, sex, ethnicity, salary, title and dates of employment of each employee and officer of a governmental body" public information. Thus, we conclude that only the information in Exhibit H relating to *potential* increases in pay may be withheld under section 552.111. The remainder of the information in Exhibit H must be released to the requestor, with the following exception. The social security numbers of public employees contained in Exhibit H may be confidential. Section 552.117(1) excepts from public disclosure information relating to the home address, home telephone number, and social security number of a current or former government employee, as well as information revealing whether the employee has family members. Section 552.117(1) requires you to withhold this information if a current or former employee requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold this information of a current or former employee who made the request for confidentiality under section 552.024 after this request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 at 5 (1989).

We also note that a social security number is excepted from required public disclosure under section 552.101 of the Government Code in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), *if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. See* Open Records Decision No. 622 (1994). It is not apparent to us that the social security number contained in the records at issue was obtained or is maintained by the board pursuant to any provision of law enacted on or after October 1, 1990. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the board to obtain or maintain a social security number. Therefore, we have no basis for concluding that the social security number at issue was obtained or is maintained pursuant to such a statute and is, therefore, confidential under section 405(c)(2)(C)(vii)(I). We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing the social security number, the board should ensure that the number was not obtained or is not maintained by the board pursuant to any provision of law enacted on or after October 1, 1990.

To summarize, you must release the information in Exhibits B, C, and G in its entirety under section 552.022. The information we have marked in Exhibits D and E may be withheld under section 552.111, as may the information in Exhibit H relating to potential pay increases. The remaining information in Exhibit H must be released, with the exception of the social security numbers contained in Exhibit H to the extent they are confidential under

section 552.117(1) or under federal law. The information in Exhibit F may be withheld in its entirety under section 552.111. The remainder of the submitted information must be released 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 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 General Services 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. 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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/er

Ref: ID# 142018

Encl: Submitted documents

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