OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

April 18, 2002

Mr. Jesús Toscano, Jr.
Administrative Assistant City Attorney
City of Dallas
1500 Marilla
Dallas, Texas 75201

OR2002-1975

Dear Mr. Toscano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 161438.

The City of Dallas (the "city") received a request for sixteen categories of information regarding the recent Dallas Police Department Lieutenant Assessment Center testing and results. You state that you have released some of the requested information to the requestor, but that the city does not have any information responsive to categories 5, 7, 8, and 12 of the request.[1] You also claim that some of the requested information is excepted from disclosure under sections 552.101, 552.111, 552.117, 552.122, and 552.137 of the Government Code.[2] You have also notified Booth Research Group, Inc. ("Booth"), a third party whose proprietary interests have been implicated by the request, of the request for information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons

[1] We note that a governmental body is not required to obtain information not in its possession. Open Records Decision No. 558 (1990). Further, the Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986).

[2] As you did not submit to this office written comments stating the reasons why section 552.111 would allow the information to be withheld, we find that you have waived this exception. *See* Gov't Code §§ 552.301, .302.

why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted representative sample of information.[3]

At the outset, we must address the city's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You state that the city received the present request on January 30, 2002. We note, however, that the city did not submit the specific information requested until February 22, 2002.[4] Therefore, the city failed to submit this information within the fifteen-business-day deadline as required by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Section 552.122 is a discretionary exception that protects only the interests of a governmental body and can be waived. *See generally* Open Records Opinion No. 665 at 2 n.5 (2000) (defining term 'discretionary exception'). As such, this exception does not make information confidential, nor does it protect a third party's interests. As sections 552.101, 552.117, and 552.137 of the Government Code provide a compelling reason to overcome the presumption of openness, we will address your arguments under those exceptions. Further, we believe that the interests of a third party in withhold

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[3]We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

[4]Although the city's brief to this office is dated February 21, 2002, and was faxed to this office on February 21, 2002, the envelope in which the brief was mailed along with the requested information is postmarked February 22, 2002. Thus, the requested information was not actually submitted to this office until February 22, 2002.

information present a compelling reason to overcome the presumption that the requested information is public. Consequently, we will consider the applicability of section 552.110 to the submitted information.

In a letter sent to the city, a copy of which you have submitted to this office, Booth claims that some of the requested information is excepted under section 552.110(b) of the Government Code. Section 552.110(b) protects commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(b). The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. *See* Open Records Decision No. 661 (1999).

After reviewing Booth's brief, we conclude that Booth has demonstrated the applicability of section 552.110(b) to much of the submitted information. We are unable to conclude, however, that Booth has established the applicability of section 552.110(b) to information that would identify the independent or external assessors. We have marked the submitted information that must be withheld under section 552.110(b).

You assert that the blue highlighted portions of Exhibit G are exempt from disclosure. Section 552.136 makes certain access device numbers confidential and provides in pertinent part:

> (a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:
>
> > (1) obtain money, goods, services, or another thing of value;
> >
> > (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.
>
> (b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. You explain that the blue highlighted portions of Exhibit G consist of the city's five digit personnel identification number and that these numbers are used as the first five digits of a six digit account number at the City Employees Credit Union. You further assert that the release of these personnel identification numbers could give members

of the general public access to credit union account records. Based on your representations, we conclude that the city must withhold the personnel identification numbers of those employees who are in fact members of the credit union under section 552.136 of the Government Code.[5]

Section 552.117(2) excepts from public disclosure information that reveals a peace officer's home address, home telephone number, social security number, and whether the officer has family members.[6] Accordingly, we have marked the information in Exhibits F and G that the city must withhold under section 552.117(2) of the Government Code. *See also* Open Records Decision No. 670 (2001) (providing that a governmental body may withhold information under section 552.117(2) without requesting a decision from this office).

Section 552.137 of the Government Code 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. [Emphasis added.]

Section 552.137 requires the board to withhold e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the members of the public have affirmatively consented to their release. As there is no indication that the members of the public have consented to release of the email addresses in question, the city must withhold from disclosure the e-mail addresses of members of the public in Exhibits F and I, which we have marked, pursuant to section 552.137 of the Government Code.

Finally, we note that some of the submitted materials are copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

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[5] As we are able to make this determination, we need not address your argument under section 552.101 of the Government Code.

[6] "Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

To summarize: (1) we have marked the submitted information that must be withheld under section 552.110(b); (2) we have marked the information in Exhibit G that must be withheld under section 552.136 for employees who are members of the city's credit union; (3) we have marked the information in Exhibits F and G that must be withheld under section 552.117(2); (4) we have marked the information in Exhibit F and I that must be withheld under section 552.137; (5) the remaining information must be released; and (6) while the city must allow inspection of copyrighted information not otherwise excepted from disclosure, the city need not furnish copies of such 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 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 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,

Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/sdk

Ref: ID# 161438

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