



July 3, 2002

Ms. Janice Mullenix  
Associate General Counsel  
Texas Department of Transportation  
125 East 11<sup>th</sup> Street  
Austin, Texas 78701-2483

OR2002-3640

Dear Ms. Mullenix:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 165182.

The Texas Department of Transportation (the "department") received a request for copies of payroll reports submitted by Rayas Electric, Tri-State Electric, and Dan Williams Construction for work performed during 2001. Although you do not take a position with respect to the release of the requested information, you indicate that the information may be excepted from disclosure pursuant to section 552.110 of the Government Code. Pursuant to section 552.305(d) of the Government Code, the department notified two interested third parties, namely Tri-State Electric ("Tri-State") and Dan Williams Company ("Williams"), of the department's receipt of the request and of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); *see also* 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 to disclosure under Public Information Act in certain circumstances). We have considered all claimed exceptions and have reviewed the submitted representative sample documents.<sup>1</sup> We have also considered comments submitted by a representative of the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

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<sup>1</sup> 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.

We note at the outset that the department did not submit any responsive information to us pertaining to Rayas Electric. We, therefore, presume that the department has already provided the requestor with this information to the extent that it exists. If not, you must do so at this time. *See* Gov't Code §§ 552.006, .301, .302; *see also* Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

Next, we note that Tri-State and Williams responded to the department's section 552.305 notice by claiming that the requested information is excepted from disclosure pursuant to sections 552.101 and 552.110 of the Government Code. Section 552.110(b) excepts from 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. *Cf. 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. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure).

Williams and Tri-State argue that their respective responsive information should be withheld from disclosure in its entirety under section 552.110 because it constitutes commercial or financial information the release of which would cause substantial competitive harm to each company. *See* Gov't Code § 552.110(b). Williams contends that the release of its information would give competitors an advantage in the bidding process by allowing them to calculate the manpower costs to Williams on each project and project the number of personnel involved in each project in preparation for other bids. Williams also contends that this knowledge would allow competitors to be advised of a substantial body of information which is directly related to the bid amount submitted. Based on our review of Williams's arguments and its responsive information, we conclude that Williams has demonstrated that the release of its responsive information would cause substantial competitive harm to Williams. Therefore, we conclude that the department must withhold Williams' information from disclosure in its entirety pursuant to section 552.110(b). *See* Open Records Decision No. 639 at 4 (1996). However, we find that Tri-State has not sufficiently demonstrated that the release of its responsive information would cause substantial competitive harm to Tri-State. Accordingly, we conclude that the department may not withhold any portion of Tri-State's responsive information from disclosure pursuant to section 552.110(b) of the Government Code.

However, Tri-State also argues that its responsive information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law

right to privacy.<sup>2</sup> We note that information is protected by the common-law right of 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 Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert denied*, 430 U.S. 931 (1977); *see also* Open Records Decision No. 611 at 1 (1992). Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992), 545 at 4 (1990) ("In general, we have found the kinds of financial information not excepted from public disclosure by common law privacy to be those regarding the receipt of governmental funds or debts owed to governmental entities"), 523 at 4 (1989) (noting distinction under common law privacy between confidential background financial information furnished to a public body about an individual and basic facts regarding a particular financial transaction between the individual and the public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). Having carefully reviewed Tri-State's responsive payroll information, we agree that the information constitutes confidential background financial information furnished to the department about Tri-State's employee salaries that is protected from disclosure under common-law privacy. Accordingly, we conclude that the department must withhold from disclosure the responsive information concerning Tri-State in its entirety pursuant to section 552.101 of the Government Code in conjunction with the common law right to privacy.

In summary, the department must release any responsive information that it maintains regarding Rayas Electric to the extent that it exists, if it has not already done so. The department must withhold Williams' information from disclosure in its entirety pursuant to section 552.110(b) of the Government Code. The department must withhold from disclosure the responsive information concerning Tri-State in its entirety pursuant to section 552.101 of the Government Code in conjunction with the common law right to privacy.

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

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<sup>2</sup> Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses information protected by the common-law right to privacy.

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).

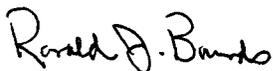
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/seg

Ref: ID# 165182

Enc. Submitted documents

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