



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 21, 2004

Mr. Kuruvilla Oommen
Assistant City Attorney
City of Houston - Legal Department
P.O. Box 1562
Houston, Texas 77251-1562

OR2004-0457

Dear Mr. Oommen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 194611.

The City of Houston (the "city") received two separate requests for information regarding access line fees paid to the city by Time Warner Cable or its entities pursuant to Chapter 283 of the Local Government Code for a certain period of time. Because the requestor of the October 21, 2003 request voluntarily withdrew her submission, the city withdraws its request for an opinion regarding the October 21, 2003 request. However, the city seeks a ruling from this office regarding the November 18, 2003 request. You claim that the requested information is excepted from disclosure under section 552.136 of the Government Code. You also claim that release of the submitted information may implicate the proprietary interests of a third party under section 552.110 of the Government Code, although you take no position as to whether any of the information is so excepted. Accordingly, you state, and provide documentation showing, that you notified the third party, Time Warner Telecom of Texas, LLP ("Time Warner"), of both requests 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 section 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 of the submitted comments and reviewed the submitted representative sample of information.¹

¹ 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.

Initially, we note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in pertinent 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 not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

....

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). Under section 552.022, the submitted account information must be released, unless it is expressly confidential under other law. Time Warner raises sections 552.101 and 552.110 of the Government Code and the city and Time Warner raise section 552.136 of the Government Code. Because these claims are all considered "other law" for the purposes of section 552.022, we will address them accordingly.

Time Warner contends that the requested access line fee information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 283.005 of the Local Government Code.² Section 283.005 provides:

(a) The commission may collect and compile any information from certificated telecommunications providers and municipalities as is necessary to implement this chapter.

(b) The commission shall maintain the confidentiality of the information described by Subsection (a) in accordance with Section 52.207, Utilities Code.

(c) Information provided to municipalities under this chapter shall be governed by confidentiality procedures established by the commission in compliance with Section 52.207, Utilities Code.

Local Gov't Code § 283.005. Section 52.207 provides in relevant part:

² Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information made confidential by other statutes.

(a) In conjunction with the commission's authority to collect and compile information, the commission may collect a report from a holder of a:

(1) certificate of operating authority; or

(2) service provider certificate of operating authority.

(b) The commission shall maintain the confidentiality of information contained in a report collected under this section that is claimed to be confidential for competitive purposes. The confidential information is exempt from disclosure under Chapter 552, Government Code.

Util. Code § 52.207(a)-(b).

Time Warner claims that "copies of checks evidencing access line payments to the City is 'information provided to municipalities' under Chapter 283 and is exempt from disclosure." Time Warner asserts that because municipalities maintain the confidentiality of access line information under section 283.005 of the Local Government Code, copies of checks reflecting the amount of access fees paid to the municipality should also be confidential. However, we note, and Time Warner acknowledges, that an established procedure in which a municipality may maintain the confidentiality of access line fees paid by certified telecommunications providers does not exist. Upon review, we conclude that information revealing access line fees is not made expressly confidential under section 283.005 of the Local Government Code and section 52.207 of the Utilities Code. Thus, the submitted information may not be withheld under section 552.101.

Time Warner also contends that release of its access line fee information would cause Time Warner substantial competitive harm under section 552.110(b) 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." Gov't Code § 552.110(b). An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C.Cir. 1974). An 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 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).*

After reviewing Time Warner's arguments and the information at issue, we find that Time Warner has not sufficiently demonstrated that substantial competitive injury to Time Warner

would likely result from disclosure of the access line fee information. Likewise, we note that the public has a strong interest in knowing the city's compensation arrangement with Time Warner, as reflected by these fees. *See* Open Records Decision No. 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company); Freedom of Information Act Guide & Privacy Act Overview (1995) 151-152 (disclosure of prices charged government is cost of doing business with government); *see also* Gov't Code § 552.022(a)(3) (information in account, voucher, or contract relating to receipt or expenditure of public funds by governmental body is public information). Consequently, the city may not withhold the submitted information based on section 552.110(b) of the Government Code.

We now address the city's and Time Warner's section 552.136 of the Government Code claim. Section 552.136 provides:

(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; or

(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. Accordingly, we conclude that the city must withhold the bank account numbers that we have marked pursuant to section 552.136 of the Government Code. The remaining 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 Dep't of Pub. 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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 194611

Enc. Submitted documents

c: Ms. Rosie M. Boning
Time Warner Telecom
10475 Park Meadows Drive
Littleton, Colorado 80124
(w/o enclosures)

Ms. Diane M. Barlow
Casey & Gentz, L.L.P.
919 Congress Avenue, Suite 1060
Austin, Texas 78701-2157
(w/o enclosures)