



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 3, 2005

Jesús Toscano, Jr.
Administrative Assistant City Attorney
City of Dallas
1500 Marilla, - Room 7DN
Dallas, Texas 75201

OR2005-01823

Dear Mr. Toscano:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 218578.

The City of Dallas (the "city") received a request for 22 categories of information concerning applications or requests received by the city after December 31, 2003 for the approval of tax-exempt bonds and/or low-income housing tax credits and other related information. The city received a separate request for all information pertaining to a specified multi-family housing development, to include information relating to Odyssey Residential Holdings, L.P. ("Odyssey"). Because information responsive to the first request encompasses information responsive to the second request, we will address these requests together.¹ You claim that a portion of the requested information is excepted from disclosure under section 552.111 of the Government Code. You assert that the remaining submitted information may be excepted from disclosure under sections 552.101 and 552.110, but you make no arguments regarding these exceptions. Instead, pursuant to section 552.305, you have notified the relevant third parties of the request and of their opportunity to submit comments to this office.² See Gov't Code § 552.305 (permitting interested third party to submit to attorney

¹To the extent that the information at issue in the first request is not sought by the second requestor, it is not responsive to the second request and need not be released to the second requestor.

²The third parties notified by the city are: Provident Realty Advisors, Inc. ("Provident"); Southwest Housing Development ("Southwest"); Family Gateway; Sphinx Development ("Sphinx"); Churchill Residential, Inc. ("Churchill"); Odyssey; Related Capital, Inc. ("Related Capital"); and Housing Systems, Inc. ("Housing Systems").

general reasons why requested information should not be released); 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 in certain circumstances). We have received arguments from or on behalf of Provident.³ We have considered all claimed exceptions and reviewed the submitted information.⁴ We have also considered arguments submitted by one of the requestors. *See* Gov't Code § 552.304 (allowing interested party to submit comments indicating why requested information should or should not be released).

Initially we note that a portion of the submitted information is subject to a previous ruling by this office. *See* Open Records Letter No. 2005-00432 (2005). The facts and circumstances surrounding that ruling do not appear to have changed. Therefore, to the extent that the submitted records consist of the same information that was at issue in Open Records Letter No. 2005-00432 (2005), the city must comply with our prior ruling.⁵ *See* Open Records Decision No. 673 at 6-7 (2001) (criteria of previous determination regarding specific information previously ruled on). To the extent the submitted information is not subject to our prior ruling, we address the submitted arguments.

We first address section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses the common-law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric

³We note that in the letter dated January 26, 2005, Provident asks this office to clarify our ruling in Open Records Letter No. 2005-00432 (2005) to except from disclosure certain information that was previously ordered to be released to the requestor. We decline to issue such a clarification in this ruling. *Cf.* Gov't Code § 552.301(f) (prohibiting governmental body from asking this office to reconsider our decision).

⁴We assume that, to the extent any additional responsive information existed on the date the city received this request, such information has been released to the requestor. If you have not released any such information, you must do so at this time. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under circumstances).

⁵Provident asserts that "[a]ccording to Section 552.233 of the Act, it is improper for a requestor to submit a request for information if the request is 'repetitious or redundant' with regard to a prior request." Although there is no section 552.233 of the Government Code, section 552.232 outlines procedures a governmental body may follow if the governmental body does not wish to release information again in response to repetitious or redundant requests. However, this section does not prohibit a governmental body from responding to a repetitious request. *See* Gov't Code § 552.232(a)(1).

treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: an individual's criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (citing *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)); personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

In Open Records Decision No. 373 (1983), this office found that "all financial information relating to an individual—including sources of income, salary, mortgage payments, assets, . . . retirement and state assistance benefits, and credit history—ordinarily satisfies" the first prong of the *Industrial Foundation* test. The second part of the *Industrial Foundation* test requires that the information in question not be of legitimate concern to the public. In general, this office has found the public to have a legitimate interest in information regarding the receipt of governmental funds or debts to governmental entities. Open Records Decision No. 545 at 4 (1990); *see also* Open Records Decision Nos. 480 (1987), 385 (1983). After reviewing the arguments and the submitted information, we conclude that a portion of the information must be withheld under section 552.101 and the doctrine of common-law privacy. We have indicated the information that must be withheld.

We next address the city's argument under section 552.111 of the Government Code for the submitted memorandum. Section 552.111 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." 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. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). An agency's policymaking functions 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. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5. After reviewing your arguments and the submitted memorandum, we have marked the information that may be withheld under section 552.111 of the Government Code. The remainder of the

memorandum is factual and may not be withheld pursuant to section 552.111. *See Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5.

We turn now to the exceptions Provident claims under the Act. Section 552.110(b) of the Government Code 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). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See Open Records Decision No. 661 at 5-6 (1999)* (stating that business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). Having considered Provident’s arguments, we find that the company has made only conclusory allegations that release of its information would cause the company substantial competitive injury and has provided no specific factual or evidentiary showing to support these allegations. Accordingly, no portion of the submitted information may be withheld pursuant to section 552.110(b).

Provident’s final assertion is that section 552.131 of the Government Code applies to the information at issue. This exception protects “information [that] relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body.” Gov’t Code § 552.131. Because Provident has not explained, and the submitted documents do not reflect, that the city was negotiating with Provident or any other party to “locate, stay, or expand in or near the [city’s] territory” or that these proposals relate to such negotiations, we find that section 552.131 does not apply in this instance, and no information may be withheld on that basis.

We finally note that an interested third party is allowed ten business days after the date of its receipt of the governmental body’s notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See Gov’t Code § 552.305(d)(2)(B)*. As of the date of this decision, none of the remaining third parties has submitted to this office any reasons explaining why their information should not be released. Therefore, these parties have provided us with no basis to conclude that they have a protected proprietary interest in any of the submitted information. *See, e.g., Gov’t Code § 552.110(b)* (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); *Open Records Decision Nos. 552 at 5 (1990)* (party must establish *prima facie* case that information is trade secret), *542 at 3 (1990)*. Therefore, the submitted information relating to these third parties must be released.

In summary, the city must comply with Open Records Letter No. 2005-00432 (2005) with respect to responsive information that was previously ruled on. The personal financial information must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. The information marked in the submitted memorandum may be withheld under section 552.111 of the Government Code. The remaining information must be released.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 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,



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Assistant Attorney General
Open Records Division

EAS/krl

Ref: ID#218578

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