



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 7, 2008

Ms. Helen Valkavich
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2008-00228

Dear Ms. Valkavich:

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# 300522.

The City of San Antonio (the "city") received a request for information pertaining to a bid and awarded contract between the city and EMR Elevator Company ("EMR") for elevator services. You indicate that the submitted information may be excepted under sections 552.101, 552.110, 552.113, and 552.131 of the Government Code, but take no position as to whether this information is excepted under those sections. However, EMR asserts that some of its information is excepted under sections 552.101, 552.102, and 552.110 of the Government Code. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have reviewed the submitted arguments and the submitted information.

EMR asserts that some of the submitted information is not responsive to the request for information. A governmental body must make a good faith effort to relate a request to information held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). After reviewing the request for information, we find that the city has made a good-faith effort to relate the request to the information that the city maintains, and that the submitted information is responsive to the request. Thus, we will examine the arguments for its exception from disclosure under the Act.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses the doctrine of common-law privacy, which protects information that (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). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. In this respect, common-law privacy under the Act differs from the privacy right protected under the exemptions of the federal Freedom of Information Act (“FOIA”) that prohibit the disclosure of information that “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” See 5 U.S.C. §§ 552(b)(6), (7)(C). To determine whether the FOIA exemptions prohibit disclosure, federal courts must balance the individual’s privacy interest against the public interest in disclosure. See, e.g., *U.S. Dep’t of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994); *Sherman v. U.S. Dep’t of the Army*, 244 F.3d 357, 366 (5th Cir. 2001) (individual researching service awards of soldiers failed to articulate clearly compelling public interest in disclosure of soldiers’ social security numbers); *Halloran v. Veterans Admin.*, 874 F.2d 315, 319 (5th Cir. 1989). In applying common-law privacy under Texas law, however, the courts have rejected the balancing of interests test. See *Indus. Found.*, 540 S.W.2d at 681-82 (under policy determination that Texas legislature made in enacting predecessor to section 552.101, court is not free to balance public’s interest in disclosure against harm to person’s privacy); *Ross v. Midwest Communications, Inc.*, 870 F.2d 271, 272 (5th Cir. 1989) (court rejected “open-ended balancing of interests” and instead applied *Industrial Foundation* test). As the Third Court of Appeals has noted, the requirement of showing both elements of the *Industrial Foundation* test properly “balances” the individual’s privacy and the articulated purpose of the Act. *Hubert*, 652 S.W.2d at 550 (under the Act, “the proper way to evaluate a claimed invasion of privacy is to apply the state tort law dealing with that injury”). The type 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 treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Industrial Found.*, 540 S.W.2d at 683.

EMR acknowledge that its employee names and work locations in the submitted information are not intimate or embarrassing; nevertheless, EMR argues that pursuant to the FOIA balancing test, “information relating to employees can, in fact, be private without being intimate or embarrassing.” As we discussed above, however, the application of the “balancing of interests” to common-law privacy under the Act has been rejected by the Texas courts. See *Hubert*, 652 S.W.2d at 550. Thus, as the EMR employee names and work locations are not intimate or embarrassing, this information is not private under common-law privacy, and the city may not withhold the information under section 552.101 on that ground.

Section 552.101 also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5; see *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985). We find that the EMR employee names and work locations are not confidential under constitutional privacy; therefore, the city may not withhold this information under section 552.101 on that ground.

EMR claims that portions of its information are excepted from disclosure under section 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102 (a). However, section 552.102 only protects information in a personnel file of a governmental body, not a private third party. The submitted information is not from the personnel file of a governmental body. Accordingly, the city may not withhold the submitted information from disclosure pursuant to section 552.102.

EMR asserts that its customer information is excepted under section 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." 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 requested information. See Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm). Having considered EMR's arguments and reviewed the information at issue, EMR has shown that release of its customer information would cause substantial competitive injury; therefore, we agree that the city must withhold this information, which we have marked, under section 552.110(b). The city must release the remaining 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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 Office of the Attorney General 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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/jh

Ref: ID# 300522

Enc. Submitted documents

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