



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 17, 2008

Mr. Charles E. Zech
Denton, Navarro, Rocha & Bernal, P.C.
2517 North Main Avenue
San Antonio, Texas 78212

OR2008-00836

Dear Mr. Zech:

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# 299872.

The City of Live Oak (the "city"), which you represent, received a request for all files contained on the computer of a named individual, and a list of items on the computer that the city is "not providing" to the requestor. The requestor subsequently limited his request to a particular time period. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request). You state that the city does not maintain the requested list.¹ You claim that the remaining requested information is not public information subject to the Act. Alternatively, you claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.117, and 552.137 of the Government Code. You state that the city will withhold social security numbers under section 552.147 of the Government Code.² You also indicate that a portion of the submitted information may be subject to third party proprietary interests. Pursuant

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

to section 552.305 of the Government Code, you have notified HPI Real Estate Services (“HPI”) of the request and of its right to submit arguments to this office as to why the 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 the Act in certain circumstances). We have received correspondence from HPI. We have considered the submitted arguments and reviewed the submitted representative sample of information.³

We first address your contention that the requested information is not subject to the Act. Section 552.002(a) of the Act provides:

(a) In this chapter, “public information” means information that is collected, assembled, or maintained under a law or ordinance or in connection with transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov’t Code § 552.002(a). Information is generally subject to the Act when it is held by a governmental body and it relates to the official business of a governmental body or is used by a public official or employee in the performance of official duties. *See* Open Records Decision No. 635 (1995). You indicate that the submitted information is non-business related. *See id.* (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). After reviewing the submitted information, we agree that the information we have marked in Exhibits F, G, H, and J does not relate to the city’s transaction of official business and is therefore not public information subject to the Act. Therefore, the city is not required to disclose the information we have marked in Exhibits F, G, H, and J. We find, however, that the remaining documents that you claim are not public information consist of records reflecting day-to-day business within the city, and are therefore subject to the Act. Therefore, we will address the applicability of the claimed exceptions to the remaining records that are subject to the Act.

We will now address your general assertion that the responsive information should be withheld because the requestor is “fishing” for information and failed to identify “any

³We 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.

specific document or piece of public information that he is searching for and does not identify the subject matter of the information he seeks to review[.]” We note, however, that a governmental body may not inquire into the purpose for which the requested information will be used. *See* Gov't Code § 552.222(a). We also note that the administrative inconvenience of providing public records to a requestor in response to an open records request does not constitute sufficient grounds for denying such a request. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976). Further, a governmental body must make a good faith effort to relate a request to information which it holds. *See* Open Records Decision No. 561 at 8 (1990) (construing statutory predecessor). Therefore, the city may not refuse to comply with any portion of this request on the basis that doing so would be burdensome, and may only withhold the responsive information if it is excepted from disclosure under the Act or made confidential by law.

We next address the city's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(e-1) provides the following:

A governmental body that submits written comments to the attorney general under Subsection (e)(1)(A) shall send a copy of those comments to the person who requested the information from the governmental body. If the written comments disclose or contain the substance of the information requested, the copy of the comments provided to the person must be a redacted copy.

Gov't Code § 552.301(e-1). The city states that it sent to the requestor a copy of its written comments submitted to this office pursuant to section 552.301(e)(1)(A). You state that the shaded portions of the city's brief were redacted in the copy sent to the requestor. After reviewing the city's brief sent to the requestor, we determine that the city redacted information from the copy that does not disclose or contain the substance of the information requested; therefore, we conclude that the city failed to comply with the procedural requirements of section 552.301(e-1) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of 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 id.* § 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 section 552.302); Open Records Decision No. 319 (1982). The presumption that information is public under section 552.302 can be overcome by demonstrating that the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Although the city claims an exception to disclosure under section 552.107 of the

Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)). In failing to comply with section 552.301, the city has waived section 552.107 and may not withhold any of the requested information under that exception. However, the applicability of your other claimed exceptions can provide compelling reasons for non-disclosure, and therefore we will consider whether the city may withhold any of the submitted information under sections 552.101, 552.117, and 552.137 of the Government Code.

You claim that some of the submitted information may be subject to section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. *See* Gov't Code § 552.117(a)(1); *see also* Open Records Decision No. 670 (2001) (extending section 552.117(a)(1) exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). We note, however, that the protection afforded by section 552.117 does not extend to information relating to a deceased family member. *Cf.* Attorney General Opinions JM-229, H-917 (1976) ("We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death."); Open Records Decision No. 272 (1981). Thus, the city may only withhold information under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. Therefore, the city must withhold the information we have marked under section 552.117(a)(1) provided that the individual at issue timely elected to keep his personal information confidential.

You assert that some of the information in Exhibit K is excepted under section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). We note that subsection (c) specifically excludes an e-mail address "provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public. *Id.* at § 552.137(c)(4). The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c), and you inform us that the individuals to whom the e-mail addresses belong have not consented to their release.

We have reviewed the information that you have highlighted in yellow in Exhibit K, and agree that some of it must be withheld under 552.137 of the Government Code. However, we find that the remainder of this information, which we have marked for release, is not the type of information that may be withheld under section 552.137, and the city may not withhold it on that ground. We have marked some additional information in Exhibit K that must be withheld under section 552.137.

HPI claims that the information in Exhibit L is “not within the scope of the request.” As noted above, a governmental body is required to make a good-faith effort to relate a request to information that it holds. *See* ORD 561 at 8. Based on our review of the request and of the submitted information, we find that the city has made a good-faith effort to relate the request to information that the city maintains. Accordingly, we conclude that the submitted information in Exhibit L is responsive to the request and we will address HPI’s arguments against disclosure of this information.

HPI claims that its information is excepted from disclosure pursuant to section 552.110(b) of the Government Code. Section 552.110(b) protects “[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). This exception to disclosure 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. Gov’t Code § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). After reviewing the submitted information and HPI’s arguments, we find that HPI has failed to provide specific factual evidence demonstrating that release of the information at issue would result in substantial competitive harm to the company. Accordingly, we determine that none of this information is excepted from disclosure under section 552.110(b). *See* Open Records Decision No. 661 (1999) (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue).

HPI also raises section 552.131 of the Government Code. Section 552.131 relates to economic development information and provides in part:

(a) Information is excepted from [required public disclosure] if the information 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 and the information relates to:

(1) a trade secret of the business prospect; or

(2) commercial 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.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131. Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" and "commercial 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." *Id.* This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See* Gov't Code § 552.110(a)-(b). Because HPI has neither demonstrated that the remaining information qualifies as a trade secret for purposes of section 552.110(a) of the Government Code, nor made the specific factual or evidentiary showing required under section 552.110(b) that the release of the information would result in substantial competitive harm, we also conclude that the city may not withhold any of the information in Exhibit L pursuant to section 552.131(a). Furthermore, we note that section 552.131(b) is designed to protect the interests of governmental bodies, not third parties. Accordingly, none of the information of HPI is excepted under section 552.131(b) of the Government Code.

We note that some of the information in Exhibit L is subject to section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy. Common-law privacy 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. *See Indus. Found.*, 540 S.W.2d at 685. This office has 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)* (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities). We have marked the information in Exhibit L that is protected by common-law privacy. The city must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.

In summary, the information we have marked in Exhibits F, G, H, and J is not public information subject to the Act. The city must withhold the information we have marked under section 552.117(a)(1) of the Government Code, provided that the individual at issue timely elected to keep his personal information confidential. Except for the information that we have marked for release, the city must withhold the e-mail addresses marked in Exhibit K under 552.137 of the Government Code. The city must withhold the information we have marked in Exhibit L under section 552.101 in conjunction with common-law privacy. The remaining 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 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/mcf

Ref: ID# 299872

Enc. Submitted documents

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