



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 19, 2008

Mr. Thomas P. Brandt
Fanning, Harper, & Martinson
4849 Greenville Avenue, Suite 1300, Two Energy Square
Dallas, Texas 75206

OR2008-15889

Dear Mr. Brandt:

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# 330030.

The Arts of Collin County Commission, Inc. (the "commission"), which you represent, received a request for documents provided to the commission as a result of the dissolution of the Arts of Collin County Foundation, Inc. (the "foundation").¹ You claim that some of the requested information is not subject to the Act; alternatively, you claim that the submitted information is excepted from disclosure under sections 552.101, 552.104, and 552.139 of the Government Code. We have considered your arguments and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, you inform us that the requestor modified his request to permit redaction of email addresses and bank account numbers. This ruling does not address the public availability of any information that is not responsive to the request, and the commission is not required to release this information in the submitted documents pursuant to this request.

¹You inform us that the commission is a local government corporation that was "created to construct and operate certain performing and cultural arts facilities," and that the foundation was a Texas non-profit corporation that "sought donations for the performing arts facility that the Commission is responsible for constructing and operating."

You next assert that Exhibits 11-13 are not public information for purposes of the Act. The Act applies only to public information. See Gov't Code §§ 552.021, 552.221. Section 552.002 of the Act defines "public information" as information "collected, assembled, or maintained under a law or ordinance or in connection with the 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." *Id.* § 552.002(a). You assert that Exhibits 11-13 are not public information because they "only came into the control of the Commission when they were delivered to the Commission by the Foundation in connection with dissolution of the Foundation." You also contend that the commission "has the ability to reject documents provided to it by the Foundation and that rejected documents do not become public information under the Act."² However, after review of the commission's arguments and the information at issue, we conclude that the requested information was acquired by and is in the possession of the commission in connection with the transaction of its official business. *Id.* § 552.002(a). Therefore, Exhibits 11-13 constitute public information that is subject to the Act and may only be withheld if an exception to disclosure under the Act applies.

You assert that some of the submitted information is excepted under 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." 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). 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 treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. We have marked the information that the commission must withhold under section 552.101 in conjunction with common-law privacy. The remaining information is not highly intimate or embarrassing; therefore, the remaining information is not confidential under common-law privacy, and the commission may not withhold it on that ground.

You assert that Exhibit 9 is excepted under section 552.104 of the Government Code, which excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive situations. See Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held

²We do not address the commission's assertion that it "does not intend to retain or maintain Exhibit Nos. 11 through 13 and would like to destroy them or return them to the individual responsible for Foundation records that were not provided to the Commission."

that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate that it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You inform us that Exhibit 9 consists of various lists generated by the foundation of individuals, businesses, and entities who are potential donors for the commission's projects. You assert this information is excepted under section 552.104 for the following reasons:

The commission, like most, if not all, arts-related projects in the Dallas-Fort Worth Metroplex, relies on third-parties to provide donations in order to cover at least part of its costs . . . Public disclosure of the potential donor list[s] would provide competing entities with a ready list of potential donors that they could use in order to try and get donations before the Commission has the opportunity to contact those individuals, businesses, and other entities. Since the funds for potential donations for many potential donors is limited, disclosure of this information would be detrimental to the Commission's competitive advantage in seeking donations as a way to reduce the costs of the Commission's project to the general public.

Based on your representations and our review, we find you have established that release of most of the information in Exhibit 9 would cause specific harm to the commission's marketplace interests. Accordingly, with the exception of the information that we have marked for release, the commission may withhold Exhibit 9 under section 552.104 of the Government Code.

You assert that some of the information in Exhibit 10 is excepted under section 552.139 of the Government Code. Section 552.139 provides that information is excepted from required public disclosure "if it is information that relates to computer network security or to the design, operation, or defense of a computer network." Gov't Code § 552.139(a). You state that Exhibit 10 contains computer network user names and passwords. Based on your representation and our review of the submitted information, we agree that the commission must withhold the information you have marked in Exhibit 10 under section 552.139 of the Government Code.

To conclude, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and the information you have marked under section 552.139 of the Government Code. With the exception of the information we have marked for release, the commission may withhold Exhibit 9 under section 552.104 of the Government Code. The commission must release the remaining information.

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). If the governmental body does not file suit over 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).

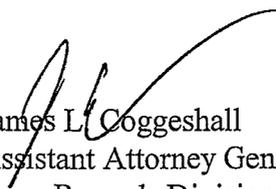
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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/ma

Ref: ID# 330030

Enc. Submitted documents

cc: Requestor
(w/o enclosures)