



ATTORNEY GENERAL OF TEXAS
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April 16, 2013

Ms. Donna L. Johnson
Counsel for Gulf Coast Waste Disposal Authority
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OR2013-06181

Dear Ms. Johnson:

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# 484205 (Reference No. GCWDA13-001).

The Gulf Coast Waste Disposal Authority (the "authority"), which you represent, received a request for information regarding the authority's deferred compensation plan, defined contribution pension plan, and retirement health savings plan, including plan investment menus, a list of service providers, and the last request for proposal issued for the plans' record-keeper and the contract for the winning vendor. You state you do not have information responsive to a portion of the request.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.110, and 552.143 of the Government Code. Additionally, you state release of the submitted information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, you notified the third parties of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *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 considered the exceptions you claim and reviewed the submitted information.

¹The Act does not require a governmental body to release information that did not exist when it received a request or to create responsive information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

Initially, we note you have not submitted the requested list of service providers or the requested contract. To the extent any such information was maintained by the authority when it received the request for information, we assume it has been released.² If the authority has not released any such information, it must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

Next, we note, and you acknowledge, the authority has not complied with the time periods prescribed by section 552.301 of the Government Code in seeking an open records decision from this office. *See* Gov't Code § 552.301. When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public and must be released unless there is a compelling reason to withhold it. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *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); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason may exist to withhold information when the information is made confidential by another source of law or affects third party interests. *See* Open Records Decision No. 150 at 2 (1977). Because sections 552.101, 552.110, and 552.143 can provide a compelling reasons to overcome this presumption, we will address the applicability of those sections to the submitted information.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. This section encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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. *See id.* at 681-82. The type of information considered intimate or 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. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See* Open Records Decision Nos. 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history).

You seek to withhold the submitted annual reports for the authority's 401 qualified plan, 457 deferred compensation plan, and retirement health savings plan under section 552.101 in conjunction with common-law privacy. Upon review, we find no portion of the submitted

²*See Bustamante*, 562 S.W.2d 266.

information is highly intimate or embarrassing and of no legitimate public concern. Therefore, the authority may not withhold any portion of the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy.

You also raise section 552.110 of the Government Code as an exception to disclosure. However, because section 552.110 is designed to protect the interests of third parties, not those of governmental bodies, a governmental body may not raise section 552.110 on behalf of a third party. Therefore, if we do not receive comments from a third party explaining why the information at issue should not be released, we will conclude section 552.110 is not applicable. 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 letter, we have not received comments from any of the third parties explaining why any portion of the remaining information should not be released. Therefore, we have no basis to conclude any of the third parties has a protected proprietary interest in the submitted information. *See Open Records Decision Nos. 661 at 5-6 (1999)* (to prevent disclosure of commercial or financial information, third party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), *552 at 5 (1990)* (party must establish *prima facie* case that information is trade secret), *542 at 3*. Accordingly, the authority may not withhold any of the submitted information on the basis of any proprietary interest the third parties may have in it.

You also claim the submitted information is excepted from disclosure under section 552.143 of the Government Code. Section 552.143 provides in relevant part:

(a) All information prepared or provided by a private investment fund and held by a governmental body that is not listed in Section 552.0225(b) is confidential and excepted from the requirements of Section 552.021.

(b) Unless the information has been publicly released, pre- and post-investment diligence information, including reviews and analyses, prepared or maintained by a governmental body or a private investment fund is confidential and excepted from the requirements of Section 552.021, except to the extent it is subject to disclosure under Subsection (c).

Gov't Code § 552.143 (a)-(b). You claim the submitted information is subject to subsections 552.143(a) and (b) of the Government Code. Upon review, we find you have failed to demonstrate that any portion of the submitted information was prepared or provided to the authority by a private investment fund for the purposes of subsection 552.143(a). Additionally, we find you have failed to demonstrate that any portion of the submitted information consists of pre- or post-investment diligence information prepared or maintained by the authority or a private investment fund for the purposes of subsection 552.143(b). Accordingly, the authority may not withhold any portion of the submitted information under

section 552.143 of the Government Code. As you raise no further exceptions to disclosure, the submitted information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Kristi L. Wilkins
Assistant Attorney General
Open Records Division

KLW/bhf

Ref: ID# 484205

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
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