



May 17, 2002

Mr. Robert R. Ray
Assistant City Attorney
City of Longview
P.O. Box 1952
Longview, Texas 75606-1952

OR2002-2646

Dear Mr. Ray:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 163073.

The City of Longview (the “city”) received a request for “copies of any e-mails or other documents pertaining to [the city’s] audit of the hotel/motel occupancy tax fund,” as well as “a copy of one of the letters that was sent to the hotels and motels.” You inform us that the responsive letters to the hotels have been released to the requestor, but claim that the remaining requested information is excepted from disclosure under sections 552.103, 552.108, 552.110, and 552.130 of the Government Code. In addition, pursuant to section 552.305, you notified representatives of certain local businesses of the request and invited them to submit arguments to this office as to why the information at issue should not be released.¹ To date, we have received no arguments from any of these entities. We will therefore consider the exceptions you claim.

Initially, we note that section 552.022 of the Government Code makes certain information public, unless it is expressly confidential under other law. *See* Gov’t Code § 552.022(a). One such category of expressly public information under section 552.022 is “information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body.” Gov’t Code § 552.022(a)(3). Much of the submitted information, such as cancelled checks, receipts, accounts, and deposit slips is subject to release under section 552.022(a)(3). You claim that this information is excepted from disclosure pursuant to sections 552.103 and 552.108 of the Government Code. However, our

¹*See* Gov’t Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov’t Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances).

office has previously concluded that section 552.103 is a discretionary exception. *See* Open Records Decision No.551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation, and does not itself make information confidential). Section 552.108 is also a discretionary exception and, as such, does not make information subject to section 552.022(a)(3) confidential.² *See* Open Records Decision Nos. 586 (1991) (governmental body may waive section 552.108). Accordingly, we conclude that the city may not withhold the checks, receipts, accounts, and deposit slips that we have marked pursuant to sections 552.103 and 552.108 of the Government Code.

Section 552.110, however, does constitute "other law" that would make information subject to section 552.022 confidential, so we will address your argument under section 552.110 for the information subject to release under section 552.022(a)(3). Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).³ This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). The commercial or financial branch of section 552.110 requires a specific factual or evidentiary showing, not conclusory or

² Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

³The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

generalized allegations, that substantial competitive injury would result from disclosure of the information at issue. *See* Open Records Decision No. 661 (1999).

Upon review of the arguments you submitted to this office, we conclude that you have not demonstrated how any of the submitted information is excepted from disclosure as either a trade secret under section 552.110(a) or as commercial or financial information under section 552.110(b). Therefore, the information subject to release under section 552.022(a)(3) may not be withheld under section 552.110.

We note, however, that the some of the copies of checks you've submitted to this office contain the driver's license numbers of the individuals who wrote the checks. These numbers are excepted from disclosure under section 552.130, which provides in relevant part that "[i]nformation is excepted from the requirement of Section 552.021 if the information relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state" You must therefore withhold the Texas driver's license numbers contained in the responsive personal checks under section 552.130. We have marked the numbers to be withheld.

We also note that the cancelled checks, receipts, accounts, and deposit slips which fall within the scope of section 552.022(a)(3) contain bank account and routing numbers that are subject to section 552.136 of the Government Code. Section 552.136 provides, in relevant part, as follows:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Accordingly, you must withhold from disclosure the marked account and routing numbers contained within the cancelled checks, receipts, accounts, and deposit slips pursuant to section 552.136 of the Government Code.

For the remaining information not subject to section 552.022(a)(3), we will consider your argument under section 552.108. Section 552.108, the "law enforcement exception," provides:

(a) [i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of 552.021 if: (1) release of the information would interfere with the detection, investigation or prosecution of crime; (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;

...

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [public disclosure] if: (1) release of the internal record or notation would interfere with law enforcement or prosecution; (2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication;

...

(c) This section does not except from the requirements of Section 552.021 information that is basic information about an arrested person, an arrest, or a crime.

Generally, a governmental body claiming section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. See Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(a); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). We note that although you raise section 552.108, you do not specify which subsection of this exception operates to protect the requested information from release. You assert, however, that the information the city seeks to withhold pertains to an ongoing investigation being conducted by the Longview police department (the "department"). You state that "[t]he city's Finance Manager and Internal Auditor . . . created various charts showing hotel tax receipts and noting various discrepancies that appear to be the result of the former employee's alleged theft. Other charts were created showing discrepancies in other funds . . . from which money may have been stolen. The audit was conducted at the request of the [department] to aid them in their investigation of the alleged theft, and the resulting documents were turned over to the police department." We note that where an incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information which relates to the investigation or prosecution. See, e.g., Open Records Decision Nos. 474 (1987), 372 (1983).

We therefore conclude that, with the exception of the documents subject to section 552.022(a)(3), the submitted information for which you raise the law enforcement exception is excepted from disclosure under section 552.108(a)(1). *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). We have marked the information that may be withheld under section 552.108(a)(1). Upon review of this information, we agree that it does not include basic information subject to release under section 552.108(c).

To summarize, a portion of the information in the submitted documents is subject to section 552.022(a)(3) and may not be withheld in this case under either sections 552.103, 552.108, or 552.110. This information must be released to the requestor, with the exception of the information excepted from disclosure under sections 552.130 and 552.136. The remainder of the submitted information may be withheld under section 552.108(a)(1).

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, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, 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 Hadassah Schloss at the Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 163073

Enc. Submitted documents

c: Ms. Jo Lee Ferguson
Longview News-Journal
P.O. Box 1792
Longview, Texas 75606
(w/o enclosures)

Imperial Inn
Accounts Payable
1019 East Marshall Avenue
Longview, Texas 75601
(w/o enclosures)

American Thrifty Inn
Accounts Payable
2015 East Marshall Avenue
Longview, Texas 75601
(w/o enclosures)

Contessa Inn
Accounts Payable
717 Highway 31
Longview, Texas 75601
(w/o enclosures)

Economy Inn
Accounts Payable
Highway 80 West Marshall
Longview, Texas 75601
(w/o enclosures)

Globe Inn
Accounts Payable
1300 East Marshall Avenue
Longview, Texas 75601
(w/o enclosures)

La Quinta Inn
Accounts Payable
502 South Access Road IH 20
Longview, Texas 75601
(w/o enclosures)

Lone Star Motel
Accounts Payable
1915 East Marshall Avenue
Longview, Texas 75601
(w/o enclosures)

Longview Comfort Suites
Accounts Payable
3307 4th Street
Longview, Texas 75601
(w/o enclosures)

Longview Inn
Accounts Payable
605 IH 20
Longview, Texas 75601
(w/o enclosures)

Microtel Inns and Suites
Accounts Payable
803 North Access Road
Longview, Texas 75601
(w/o enclosures)

Palace Inn
Accounts Payable
2107 East Marshall Avenue
Longview, Texas 75601
(w/o enclosures)

Park Ridge Inn
Accounts Payable
2020 East Marshall Avenue
Longview, Texas 75601
(w/o enclosures)

Rain Tree Motel
Accounts Payable
518 West Marshall Avenue
Longview, Texas 75601
(w/o enclosures)

Ramada Inn
Accounts Payable
419 North Spur 63
Longview, Texas 75601
(w/o enclosures)

Stratford House Inn
Accounts Payable
3100 Estes Parkway
Longview, Texas 75601
(w/o enclosures)

Sunset Inn
Accounts Payable
1308 West Marshall Avenue
Longview, Texas 75601
(w/o enclosures)

Tex An
Accounts Payable
1402 East Marshall Avenue
Longview, Texas 75601
(w/o enclosures)

Travel Lodge
Accounts Payable
3304 South Eastman Road
Longview, Texas 75601
(w/o enclosures)

Texas Lodge
Accounts Payable
1507 East Marshall Avenue
Longview, Texas 75601
(w/o enclosures)