



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

February 13, 2003

Mr. Mark T. Sokolow
City Attorney
City of Port Arthur
P.O. Box 1089
Port Arthur, Texas 77641-1089

OR2003-1001

Dear Mr. Sokolow:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 176521.

The City of Port Arthur (the "city") received a request for all documents relevant to the revolving loans made to eight named entities. Although you do not take a position with respect to the release of the requested information, you indicate that some of the requested information may be excepted from disclosure under sections 552.102 and 552.110 of the Government Code. You indicate, and provide documentation showing, that the city has notified each of the eight third parties of the request for information in order to afford each entity an opportunity to supply objections to release of the submitted information. *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). We have considered all submitted arguments and reviewed the submitted information.

Initially, we note that you have not submitted any information relevant to the revolving loans made to two of the named entities. Further, you have not indicated that such information does not exist or that you wish to withhold any such information from disclosure. Therefore, to the extent information relevant to the revolving loans made to JavaCo Deli and Silver Spoon exists, we assume that you have released it to the requestor. If you have not released any such information, you must release it to the requestor at this time. *See* Gov't Code §§ 552.301(a), .302.

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, only one third party, Encore Inking and Recycling Services ("Encore"), has submitted to this office correspondence stating that its information should not be released. Therefore, the remaining third parties have provided us with no basis to conclude that they have a protected proprietary interest in any of the submitted information. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Thus, none of the information pertaining to the third parties other than Encore may be withheld under section 552.110.

Encore indicates that the requested information pertaining to them is excepted under sections 552.101, 552.110, and 552.113 of the Government Code. However, upon review of Encore's correspondence, we find that Encore has failed to demonstrate the applicability of any exception to its information. Nonetheless, we do note the existence of information pertaining to Encore and the other third parties that must be protected under sections 552.101 and 552.130. The remaining information pertaining to Encore, however, may not be withheld under section 552.110 or 552.113.

The submitted documents contain information that is excepted from disclosure under section 552.101 in conjunction with common-law privacy. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information that is protected by the common-law right of privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), cert. denied, 430 U.S. 931 (1977).

This office has determined that some personal financial information is highly intimate or embarrassing and thus meets the first part of the *Industrial Foundation* test. *See* Open Records Decision Nos. 600 (1992) (Employee's Withholding Allowance Certificate; designation of beneficiary of employee's retirement benefits; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history), 523 (1989). In addition, common-law privacy generally protects the "background" financial information of an individual, that is, information about the individual's overall financial status and past financial history. Open Records Decision Nos. 523 at 3-4 (1989), 373 at 3 (1983). We note, however, that common-law privacy

protects the rights of individuals, not corporations. *See* Open Records Decision Nos. 620 (1993) (corporation has no common law privacy interest in its financial information), 192 (1978); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). We have marked the personal financial information that is excepted from disclosure under section 552.101 and common-law privacy.

Section 552.101 also excepts information made confidential by statutory law. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential.¹ Tax return information is defined as data furnished to or collected by the IRS with respect to the determination of the possible existence of liability of any person under title 26 of the United States Code for any tax.² The information submitted by the city includes tax return information. Therefore, we have marked the submitted documents that must be withheld from disclosure under section 552.101 as information deemed confidential by federal statute.

Additionally, the submitted information contains social security numbers that may be excepted from required public disclosure under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), *if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990*. *See* Open Records Decision No. 622 (1994). However, it is not apparent to us that the social security numbers contained in the information at issue were obtained or are maintained by the city pursuant to any provision of law enacted on or after October 1, 1990. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the city to obtain or maintain a social security number. Therefore, we have no basis for concluding that the social security numbers at issue were obtained or are maintained pursuant to such a statute and are, therefore, confidential under section 405(c)(2)(C)(vii)(I). We caution the city, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number, the city should ensure that this number was not obtained or is not maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

We also note that the submitted documents include information that is protected by section 552.130 of the Government Code. Section 552.130 protects from disclosure driver's license and motor vehicle information. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

¹*See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms).

²*See* 26 U.S.C. § 6103(b)(2).

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

The submitted information contains a driver's license number. We have marked the driver's license number that must be withheld under section 552.130.

In summary, we have marked the personal financial information that must be withheld under section 552.101 and common-law privacy, as well as the tax return information that is protected by section 6103(a) of title 26 of the United States Code in conjunction with section 552.101. Prior to releasing any social security number, the city should ensure that the number was not obtained or is not maintained by the city pursuant to any provision of law enacted on or after October 1, 1990. Lastly, we have marked the driver's license number that must be withheld under section 552.130. The city 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 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,



Heather Pendleton Ross
Assistant Attorney General
Open Records Division

HPR/sdk

Ref: ID# 176521

Enc: Submitted documents

c: Mr. Paul Noyola
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(w/o enclosures)

Mr. Terry Fontenot
Ms. Kelly Draper
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Mr. Joseph & Ms. Ruenette Bolden
Encore Inking
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Mr. Don Collins
Site Rite Optical
427 H. O. Mills Boulevard
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Mr. Benny & Ms. Phyllis Morgan
Golden Chicken
5049 9th Street
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Mr. David & Ms. Patricia Jones
Silver Spoon
308 Highway 365
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Mr. Reginald & Ms. Tina Provost
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4500 Bethany
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Ms. Kathryn Pressler
Victoria's Closet
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