

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 23, 2004

Mr. E. Dwain Psencik
Massey, Balentine & Psencik, P.C.
P.O. Drawer 2809
San Angelo, Texas 76902-2809

OR2004-2198

Dear Mr. Psencik:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 197989.

The City of Eden (the "city"), which you represent, received a request for information pertaining to the Eden Detention Center (the "center"). Specifically, the requestor seeks a complete copy of the most recent Intergovernmental Agreement between the Federal Bureau of Prisons (the "bureau") and the city and the associated "Form A" and "Form B" cost documents for the center. The city asserts that the submitted information is excepted from public disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. We have considered your arguments and have reviewed the submitted information.

Initially, we note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(3) provides that information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body is public unless that information is expressly made confidential under other law. Gov't Code § 552.022(a)(3). The records at issue are contracts between the city and the bureau for the operation of the center. Accordingly, the submitted information must be released unless it is confidential by law or excepted under section 552.104. *See* Gov't Code § 552.104(b) (specifically stating that Gov't Code § 552.022 does not apply to information that is excepted under this provision). Since you assert that the information is confidential by law or excepted under section 552.104, we will address your arguments against disclosure.

Initially, you argue that, based on this office's reasoning in Open Records Decision No. 561 (1990), all of the submitted information is confidential by law. In Open Records Decision No. 561, this office concluded, among other things, that when a federal entity shares confidential information with a state agency, the information remains confidential in the hands of the state entity. In this instance, the records you seek to withhold are not the confidential records of a federal entity that were transferred to the city, but are instead the records of the city. Thus, the city may not withhold any of the submitted information based on our reasoning in Open Records Decision No. 561.

You also argue that an October 12, 2001 memorandum issued by the Department of Justice makes the submitted information confidential. The memorandum, which you have submitted for our review, relates to federal agencies' decision-making processes under the federal Freedom of Information Act ("FOIA"); it does not make information confidential by law. You contend that if this request had been made upon the bureau, it would have been denied, at least in part, under FOIA. We note that FOIA only applies to federal agencies; its provisions are not applicable to records held by a governmental body of the State of Texas. *See* Open Records Decision No. 561 at 7 (1990). Furthermore, this office has stated in numerous opinions that information in the possession of a governmental body of the State of Texas is not confidential or excepted from disclosure merely because the same information is or would be confidential in the hands of a federal agency. *See, e.g.*, Attorney General Opinion MW-95 (1979) (concluding that neither FOIA nor the federal Privacy Act of 1974 applies to records held by state or local governmental bodies in Texas); Open Records Decision No. 124 (1976) (concluding fact that information held by federal agency is excepted by FOIA does not necessarily mean that same information is excepted under the Public Information Act when held by Texas governmental body). Finally, you assert that the requestor should be ordered to seek the requested information from the bureau under FOIA. As we previously noted, the records at issue relate to the official transaction of the city's business. This is exactly the type of information that is subject to the Public Information Act. *See* Gov't Code § 552.002 (defining public information). It would be highly inappropriate for this office to order the requestor to seek a local entity's records from a federal entity. *See* Gov't Code § 552.001 (stating that it is policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about affairs of government and official acts of public officials and employees). Thus, the city may not withhold any of the submitted information on the basis of the submitted memorandum or FOIA.

Next, you assert that the submitted information is excepted under section 552.104. Section 552.104 of the Government Code excepts from required public disclosure "information which, if released, would give advantage to competitors or bidders." Gov't Code § 552.104. The protections of section 552.104 serve two purposes. One purpose is to protect the interests of a governmental body by preventing one competitor or bidder from gaining an unfair advantage over others in the context of a pending competitive bidding process. Open Records Decision No. 541 (1990). The other purpose is to protect the

legitimate marketplace interests of a governmental body when acting as a competitor in a particular competitive situation. Open Records Decision No. 593 (1991). In both instances, the governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. Open Records Decision No. 593 at 2 (1991). Although you assert section 552.104, you do not explain how the release of the submitted information will affect an ongoing competitive situation. By failing to do so, the city has waived its section 552.104 claim. *See* Open Records Decision No. 541 (1990) (Gov't Code § 552.104 may be waived by governmental body); *see also* Gov't Code § 552.301(e)(1)(A) (stating that governmental body must provide arguments explaining applicability of claimed exception). Accordingly, the submitted information may not be withheld under section 552.104.

You also claim that the submitted information is excepted from disclosure under section 552.110(b) of the Government Code. Section 552.110(b) protects the property interests of private parties by excepting from disclosure 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. Gov't Code § 552.110(b). We note that, by its terms, section 552.110 only protects the interests of the person from whom the information was obtained. The provision does not protect the interests of the governmental body that receives proprietary information nor does it allow a governmental body to assert section 552.110 for information it creates. Pursuant to section 552.305 of the Government Code, a governmental body that receives a request for information that implicates the proprietary interests of a third party is required to notify the third party of the request and of its opportunity to submit comments to this office explaining why the requested information should not be released. *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). An interested third party has ten business days after the date of its receipt of the governmental body's notice 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, this office has not received arguments from any third party indicating a proprietary interest in the submitted information. Thus, the city may not withhold any of the submitted information under section 552.110(b).

Finally, you contend that some of the submitted information is protected from disclosure under section 552.101. Section 552.101 of the Government Code excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses the common-law right to privacy. Information must be withheld from disclosure under section 552.101 in conjunction with common-law privacy when the information is (1) highly intimate or embarrassing, such

that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) of no legitimate public interest. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). You contend that the submitted records contain salary information that is protected by privacy. We note, however, that a public employee's salary does not pertain to the employee's private affairs. *See Industrial Found.*, 540 S.W.2d at 685; *see also* Open Records Decision Nos. 423 at 2 (1984) (scope of public employee privacy is narrow), 342 at 3 (1982) (certain information about public employees, including position, experience, tenure, salary, and educational level, has long been held disclosable) Furthermore, the public has a legitimate interest in financial transactions between an individual and a governmental body. *See* Open Records Decision Nos. 545 (1990), 373 (1983); *see generally* Gov't Code § 552.022(a)(2) (stating, among other things, that public employee's salary is expressly public). Thus, none of the submitted information is protected by section 552.101 in conjunction with the doctrine of common-law privacy. Since this office has not received comments from any other entity explaining why the submitted information should not be released, we conclude that the submitted information must be released in its entirety. *See* Gov't Code § 552.304 (providing that any interested party may submit comments explaining why the submitted information should or should not be released).

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,

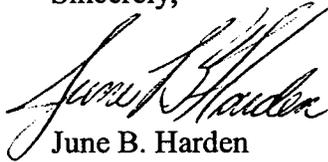
at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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 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 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,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/seg

Ref: ID# 197989

Enc: Submitted documents

c: Mr. Allen Beinke
Loeffler Jonas & Tuggey, L.L.P.
1001 Congress Avenue, Suite 350
Austin, Texas 78701
(w/o enclosures)

CAUSE NO. 3712

| | | |
|---|---|-------------------------------------|
| CCA OF TENNESSEE, INC., D/B/A | § | IN THE DISTRICT COURT OF |
| CORRECTIONS CORPORATION OF | § | |
| AMERICA, | § | |
| Plaintiff, | § | |
| | § | |
| V. | § | |
| | § | |
| CITY OF EDEN, TEXAS; JERRELL W. | § | |
| MCDONALD, in his capacity as the CITY | § | |
| CORRECTIONAL CONTRACTS | § | CONCHO COUNTY, TEXAS |
| ADMINISTRATOR for the CITY OF EDEN; | § | |
| ROSA SCHREIBER, in her capacity as CITY | § | |
| SECRETARY and RECORDS | § | |
| MANAGEMENT OFFICER for the CITY OF | § | |
| EDEN; CHARLIE RODGERS, JR., MAYOR | § | |
| of the CITY OF EDEN and the ATTORNEY | § | |
| GENERAL OF TEXAS, | § | |
| Defendants. | § | 119 th JUDICIAL DISTRICT |

AGREED FINAL JUDGMENT

On this date, the Court considered the parties' agreement to seek the entry of an agreed final judgment. Plaintiff CCA of Tennessee, Inc., d/b/a Corrections Corporation of America (CCA), and Defendants City of Eden, Texas and Jerrell W. McDonald, Rosa Schreiber, and Charlie Rodgers, Jr., all in their official capacities, (collectively, referred to as "the City") and Defendant Greg Abbott, Attorney General of Texas, appeared, by and through their respective attorneys, and announced to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code Ann. ch. 552, and based upon the facts presented by CCA and the City, the parties agree that some of the information at issue should be withheld from the requestors. The parties represent to the Court that, in compliance with Tex. Gov't Code Ann. § 552.325(c), the requestors, Allen Beinke and David Zackon, were sent reasonable notice of the parties' agreement that the City must

withhold the information at issue; that the requestors were also informed of their right to intervene in the suit to contest the withholding of this information; and that the requestors have not informed the parties of their intention to intervene. Neither has any requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. The information at issue as marked by the Attorney General for redaction in the following documents maintained by the City of Eden:

Contract 0007-1: Form A (01-01-02 to 12-13-02) and Form B (04-27-2003 to 04-27-2004);

Contract 0048-4: Form A (01-01-03 to 12-31-03) and Form B (05-01-2004 to 04-30-2005);

Form A (January 1, 2001 to December 31, 2001); and

Form B Existing (Nov 2000) SOW (04-27-2004 to 04-26-2005)

is excepted from disclosure by Tex. Gov't Code Ann. § 552.110(b).

2. The City of Eden shall withhold from the requestor the information marked by the Attorney General for redaction in the Forms A and B that are described in ¶ 1 of this Judgment.

3. If it has not already done so, the City shall disclose to the requestors the Forms A and B described in ¶ 1 of this Judgment with the information marked by the Attorney General redacted, along with any other information responsive to their requests for information.

4. All costs of court are taxed against the parties incurring the same;

5. All relief not expressly granted is denied; and

6. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendants and is a final judgment.

SIGNED this the 8 day of June, 2006.

Den Woodward
PRESIDING JUDGE

APPROVED:

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FILED
The 8 Day of JUNE,
2006 at 9:00 O'clock A. M.
Barbara K. Hoffman
Winstead Clerk, County of TX
By _____