



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 7, 2005

Ms. Susan G. Conway
Graves, Dougherty, Hearon & Moody, P.C.
P.O. Box 98
Austin, Texas 78767

OR2005-06014

Dear Ms. Conway:

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# 226530.

The Texas Mutual Insurance Company (the "company"), which you represent, received a request for (1) the Texas Mutual annual reports from 1992 to 2003, (2) the salaries, including any and all bonuses, payments and other compensation, of each company board member and all company executives and officers, and (3) all internal or outside audits of the company from 2000 to the present. You state that the company is releasing the requested annual reports, outside audit information, and information on the compensation paid to the company's board of directors. However, you claim that the submitted executive compensation and internal audit information is excepted from disclosure under sections 552.101, 552.104, 552.110, and 552.139 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative samples of information.¹ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

The company asserts that the compensation information is confidential under section 2(d) of article 5.76-3 of the Insurance Code. Section 552.101 of the Government Code excepts

¹ We assume that the sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision” and encompasses information made confidential by other statutes. *See* Gov’t Code § 552.101. Section 2(d) of article 5.76-3 provides:

Except as otherwise provided by this subsection, the company is subject to the open meetings law, Chapter 551, Government Code, and the open records law, Chapter 552, Government Code. The board may hold closed meetings to consider and refuse to release information relating to claims, rates, the company’s underwriting guidelines, and other information that would give advantage to competitors or bidders.

Ins. Code art. 5.76-3 § (2)(d). The statute expressly states the company is subject to the Act. *See id.* As an entity subject to the Act, the company’s information is generally subject to required public disclosure under the Act in the same manner as a governmental body’s information. *See id.* Generally, the Act requires the disclosure of salary information of employees and officers of governmental bodies. *See* Gov’t Code § 552.022(a)(2) (providing for required public disclosure of name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of governmental body); *id.* § 552.022(a)(3) (providing for release of information in contract relating to receipt or expenditure of public or other funds by governmental body); *see also* Open Records Decision Nos. 455 at 9 (1987) (job applicants’ salary information not private), 444 at 3 (1986), 423 at 2 (1984) (scope of public employee privacy is narrow).

In this instance, you argue the compensation information at issue reflects business judgments of the company regarding the levels of compensation appropriate and required to attract and retain the company’s executive management employees. However, the statute protects information “relating to claims, rates, the company’s underwriting guidelines, and other information that would give advantage to competitors and bidders.” *See id.* The compensation information at issue does not relate to claims, rates, or the company’s underwriting guidelines. Furthermore, the “competition” at issue in the statute is competition for workers’ compensation insurance customers, not competition for company employees. *See id.* § 2(a)-(c). While we recognize the usefulness of compensation information in the recruitment of company employees, you have failed to demonstrate how access to this compensation information would provide an advantage to another insurance company in competing for customers. Thus, we conclude that the requested information pertaining to executive compensation is not within the scope of the statute.

You also claim that section 2(d) of article 5.76-3 protects the internal audit information at issue because it relates to claims, rates, and the company’s underwriting guidelines. Upon review, we note this audit information relates to the company’s internal operations and procedures. You have not explained, nor are we able to discern, how this information relates to claims, rates, or the company’s underwriting guidelines. You further argue that disclosure of this internal audit information would give a competitive advantage to the company’s competitors. While the submitted audit information relates to the company’s internal

operations and procedures, it merely provides broad, nonspecific overviews of the audits at issue. You have not explained how release of this information would provide a competitive advantage to others competing for workers' compensation insurance customers. Furthermore, we note an audit made of, for or by a governmental body is generally subject to required public disclosure under the Act. Gov't Code § 552.022(a)(1). Having considered your arguments and reviewed the representative audit information, we conclude that the company has failed to demonstrate that release of the requested internal audit information would provide an advantage to competitors or bidders. Therefore, the company may not withhold the audit information pursuant to section 2(d) of article 5.76-3 of the Insurance Code.

Section 552.101 also encompasses the doctrines of common law and constitutional privacy. You assert the compensation information at issue is confidential under common law and constitutional 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 Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). This office has determined that there is a legitimate public interest in the salary of an employee of an entity subject to the Act. See generally Gov't Code § 552.022(a)(2) (salary of employee of governmental body is public information unless expressly confidential under other law); Open Records Decision Nos. 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 423 at 2 (1984) (scope of public employee privacy is narrow), 342 (1982) (qualifications of public employee, including experience, licenses and certificates, professional awards and recognitions, tenure, salary, educational level, membership in professional organizations, and previous employment are available to the public). Therefore, the requested compensation information is not confidential under common law privacy.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the doctrine of common law privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Because the salary of a company employee is neither within the zones of privacy nor concerns the most intimate aspects of human affairs, the compensation information at issue is not confidential under the doctrine of constitutional law privacy.

You also claim the requested information is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104. 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 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 have demonstrated that the company has specific marketplace interests in the workers’ compensation insurance market and may be considered a “competitor” for purposes of section 552.104. *See* ORD 593. However, in this instance, you have not sufficiently demonstrated that release of the requested information would result in any actual or specific harm to the company’s marketplace interests while competing for workers’ compensation insurance customers. Therefore, the requested compensation and audit information may not be withheld under section 552.104.

You further argue that the company’s requested compensation and audit information is excepted from disclosure pursuant to section 552.110 of the Government Code as trade secrets and commercial or financial information the release of which would cause the company harm. Section 552.110(a) provides that “a trade secret obtained from a person and privileged or confidential by statute or judicial decision is excepted [from required public disclosure under the Act].” Gov’t Code § 552.110(a); *see Hyde Corp. V. Huffines*, 314 S.W.2d 763 (Tex.1958) (adopting definition of trade secret from section 757 of the Restatement of Torts). Section 552.110(b) excepts from required public disclosure commercial or financial information the release of which would cause a person substantial competitive harm. Gov’t Code § 552.110(b). However, section 552.110 is an exception that protects only the interests of third parties, as distinguished from exceptions which are intended to protect the interests of governmental bodies. *See* Open Records Decision No. 319 (1982) (statutory predecessor to section 552.110 designed to protect third party interests that have been recognized by the courts). In this instance, the company is in the posture of a governmental body responding to an open records request, not a corporate entity asserting a third-party interest in the requested information. As such, the company may not avail itself of the protections of section 552.110.

We note the submitted compensation information also contains social security numbers. Section 552.147 of the Government Code² provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act.³ Therefore, the company must withhold the social security numbers contained in the submitted compensation information under section 552.147.⁴

Finally, you claim that some of the internal audit information at issue is excepted pursuant to section 552.139 of the Government Code, which provides as follows:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; and

(2) any other assessment of the extent to which data processing operations, a computer, or a computer program, network, system, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body’s or contractor’s electronically stored information is vulnerable to alteration, damage, or erasure.

Gov’t Code § 552.139. You claim “certain of the internal audits . . . contain analyses of vulnerabilities in [the company’s] computer network or assessments of the extent to which [the company’s] data processing operations, computers, computer programs, networks, systems and software are vulnerable to unauthorized access or harm.” However, based on our review of the submitted audit information you seek to withhold under section 552.139, we find that only some of it contains information that is protected by this exception. We have marked the audit information that must be withheld under section 552.139.

² Added by Act of May 23, 2005, 79th Leg., R.S., S.B. 1485, § 1, sec. 552.147(a) (to be codified at Tex. Gov’t Code § 552.147).

³ The Office of the Attorney General will raise a mandatory exception like section 552.147 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁴ We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act.

In summary, the social security numbers in the requested compensation information must be withheld under section 552.147 of the Government Code. We have marked the audit information that must be withheld pursuant to section 552.139 of the Government Code. The remaining information at issue must 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, 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 appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. 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,



Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/jev

Ref: ID# 226530

Enc. Submitted documents

c: Mr. Keven Krause
Dallas Morning News
Denton County Bureau
131 West Main Street
Lewisville, Texas 75067
(w/o enclosures)

Ms. Mary Nichols
Senior Vice President and General Counsel
Texas Mutual Insurance Company
6210 East Highway 290
Austin, Texas 78723-1098
(w/o enclosures)