



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 1, 2006

Ms. Josefina J. Brostrom
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OR2006-05759

Dear Ms. Brostrom:

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# 250574.

The El Paso County Hospital District d/b/a R. E. Thomason General Hospital (the "hospital") received a request for the following information:

A list of all employees of [the hospital] including . . . employee name, employee identification number, employee department, supervisor name, date of hire, current job classification and rate of pay, job classification and pay rate history.

You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, and 552.104 of the Government Code. The hospital also provided notice to its employees of this request for information.¹ See Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released). We have received comments from some of the third parties claiming sections 552.101, 552.110, 552.113, and 552.131 as exceptions to disclosure. *Id.*

¹You inform us that the hospital employs more than 1800 employees (collectively, the "third parties").

We have considered the claimed exceptions and reviewed the submitted representative sample of information.²

Initially, we note that you did not submit information responsive to the portions of the request for "employee identification number" and "job classification and pay rate history." We assume the hospital has released this information to the requestor. If it has not, it must do so at this time to the extent that such information existed at the time the hospital received the request. *See* Gov't Code §§ 552.301(a), .302; Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances); *see also* Gov't Code § 552.022(a)(2) (name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of governmental body are public information).

We next note that the hospital raises an exception under the federal Freedom of Information Act ("FOIA"). *See* 5 U.S.C. § 552. We note, however, that FOIA is applicable to information held by an agency of the federal government. In this instance, the information at issue was created for and is maintained by the hospital, which is subject to the state laws of Texas. *See* Attorney General Opinion MW-95 (1979) (FOIA exceptions apply to federal agencies, not to state agencies); Open Records Decision Nos. 496 (1988), 124 (1976); *see also* Open Records Decision No. 561 at 7 n 3 (1990) (noting that federal authorities may apply confidentiality principles found in FOIA differently from way in which such principles are applied under Texas open records law). Accordingly, the hospital may not withhold the submitted information under FOIA.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. You contend that the submitted information is excepted under section 552.101 in conjunction with section 418.180 of the Government Code. As part of the Texas Homeland Security Act, sections 418.176 through 418.182 were added to chapter 418 of the Government Code. These provisions make certain information related to terrorism confidential. Section 418.180 provides:

Information, other than financial information, in the possession of a governmental entity is confidential if the information:

- (1) is part of a report to an agency of the United States;
- (2) relates to an act of terrorism or related criminal activity; and

²We assume that the "representative 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.

(3) is specifically required to be kept confidential:

(A) under Section 552.101 because of a federal statute or regulation;

(B) to participate in a state-federal information sharing agreement; or

(C) to obtain federal funding.

Gov't Code § 418.180. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the Texas Homeland Security Act must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies); Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). In this instance, the requested information consists of a list of hospital employees, including employee names, departments, date of hire, job classifications, and pay rate. You do not inform us that the requested information is part of a report to an agency of the United States, nor do you assert that the information is specifically required to be kept confidential as provided by section 418.180(3). *See* Gov't Code § 418.180(1), (3). Further, you fail to explain how the requested information relates to an act of terrorism or related criminal activity. *Id.* § 418.180(2). Upon review, we find that you have failed to adequately explain how any of the submitted information falls within the scope of section 418.180 of the Government Code. We therefore determine that the hospital may not withhold any of the information at issue under section 552.101 in conjunction with section 418.180 of the Texas Homeland Security Act.

You next claim that the submitted information is excepted from public disclosure under section 552.101 in conjunction with section 48.101(a) of the Business and Commerce Code. Section 48.101(a) provides as follows:

[a] person may not obtain, possess, transfer, or use personal identifying information of another person without the other person's consent and with intent to obtain a good, a service, insurance, an extension of credit, or any other thing of value in the other person's name.

Bus. & Comm. Code § 48.101(a). "Personal identifying information" is defined as "information that alone or in conjunction with other information identifies an individual[,]" and includes an individual's name. *Id.* § 48.002(1)(A). You assert that the requested information meets the definition of "personal identifying information" under section 48.002(1). *See id.* You claim that because section 552.222 of the Act prohibits a governmental body that receives a request for information from inquiring into the purpose for which the information will be used, the hospital "cannot comply" with the requirements of section 48.101(a). *See id.* § 48.002(1)(A); Gov't Code § 552.222(a), (b). We note that section 552.204 of the Government Code provides that a governmental body is not

responsible for a requestor's use of information released pursuant to the Act. *See id.* § 552.204(a). Further, section 48.101(a) does not prohibit the transfer of personal identifying information of another person unless the transfer is made with the intent to obtain a good, a service, insurance, an extension of credit, or any other thing of value in the other person's name without that person's consent. *See* Bus. & Comm. Code § 48.101(a). In this instance, the hospital's release of the information at issue would be for the purpose of complying with the Act, and not "with intent to obtain a good, a service, insurance, an extension of credit, or any other thing of value in the [employee]'s name." *See* Bus. & Comm. Code § 48.101(a). Therefore, section 48.101(a) does not prohibit the hospital from transferring the requested information. *See id.*; *see also* Gov't Code § 552.022(a)(2) (name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of governmental body are public information). Thus, we conclude that the hospital may not withhold any of the information at issue under section 552.101 of the Government Code in conjunction with section 48.101 of the Business and Commerce Code.

The hospital and some of the third parties claim that the submitted information is excepted from disclosure under sections 552.101 and 552.102 based on the individual right to privacy. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 683-85 (Tex. 1976), for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101.³ In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found.*, 540 S.W.2d at 685. The type of information considered intimate and 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.

The common law right to privacy encompasses certain types of personal financial information. This office has determined that financial information that relates only to an individual ordinarily satisfies the first element of the common law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 659 at 5 (1999) (listing types of information that attorney general has held to be protected by right to privacy), 600 at 9-12 (1992) (identifying public and private portions of certain state personnel records), 545 at 4 (1990) (financial information not excepted from public

³Section 552.101 also encompasses the doctrine of common law privacy.

disclosure by common law privacy generally includes those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 423 at 2 (1984) (explaining that because of greater legitimate public interest in disclosure of information regarding public employees, employee privacy under section 552.102 is confined to information that reveals "intimate details of a highly personal nature"). We find that you have failed to explain how any portion of the submitted information constitutes highly intimate or embarrassing information the release of which would be highly objectionable to a reasonable person. Thus, we conclude that the submitted information is not protected by common law privacy, and no portion of the information may be withheld under section 552.101 or 552.102 on this basis.

Section 552.101 also encompasses the doctrine of constitutional 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 common law doctrine of 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)). After reviewing the submitted information, we find that it does not contain information that is confidential under constitutional privacy; therefore, the hospital may not withhold any of the submitted information under section 552.101 on that ground.

You assert that the submitted salary information is excepted under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The purpose of section 552.104 is to protect a governmental body's interests when it is involved in certain commercial transactions. We have concluded that when a governmental body demonstrates that it has specific marketplace interests, it must be afforded the right to claim the "competitive advantage" aspect of section 552.104. Open Records Decision No. 593 at 4 (1991). Whether release of particular information would harm the legitimate marketplace interests of a governmental body requires a showing of the possibility of some specific harm in a particular competitive situation. *Id.* at 5, 10.

You argue that release of the information at issue could be used by the hospital's competitors "to undermine its market position relative to its competitors." However, you have not demonstrated some actual or specific harm that would result from the release of the information in a particular competitive situation. Therefore, we conclude that the hospital may not withhold salary information under section 552.104 of the Government Code.

Some of the third parties raise section 552.110 as an exception to disclosure. Section 552.110 of the Government Code protects the proprietary interests of private persons by excepting from disclosure two types of information: (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). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). Section 552.110(b) protects "[c]ommercial 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). In this instance, the information at issue was not "obtained from a person[.]" but consists of routine employee personnel information. Thus, section 552.110 is inapplicable, and the hospital may not withhold any portion of the submitted information under section 552.110. *See* Gov't Code § 552.110(a), (b).

Two of the third parties assert that the submitted information is excepted from disclosure under section 552.113 of the Government Code. Section 552.113 provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is:

...

(2) geological or geophysical information or data, including maps concerning wells, except information filed in connection with an application or proceeding before an agency[.]

Gov't Code § 552.113(a)(2). In Open Records Decision No. 627 (1994), this office concluded that section 552.113(a)(2) protects from public disclosure only commercially valuable geological and geophysical information regarding the exploration or development of natural resources. Open Records Decision No. 627 at 3-4 (1994) (overruling rationale of Open Records Decision No. 504 (1988)). Although the third parties raise section 552.113, they do not explain how any of the information at issue relates to commercially valuable geological and geophysical information regarding the exploration or development of natural resources. Therefore, no portion of the submitted information may be withheld pursuant to section 552.113.

Next, we address the third parties' argument that the submitted information is excepted from disclosure by section 552.131 of the Government Code. Section 552.131 relates to economic development information and provides in part:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and

a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

- (1) a trade secret of the business prospect; or
- (2) 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.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131. Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" and "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." *Id.* This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See* Gov't Code § 552.110(a)-(b). The third parties have failed to explain how the submitted information relates to economic development negotiations involving them and the hospital. *See* Gov't Code § 552.131. Accordingly, we conclude that the hospital may not withhold any portion of the submitted information pursuant to section 552.131(a) of the Government Code. Furthermore, we note that section 552.131(b) is designed to protect the interest of governmental bodies, not third parties. Accordingly, no portion of the submitted information is excepted under section 552.131(b) of the Government Code, and the submitted information must be released to the requestor.

Finally, we note that the requestor seeks the information at issue in electronic format. Section 552.228 of the Government Code requires that a governmental body provide a copy of the public information in the requested medium if it has the technological ability to do so without the purchase of software or hardware. *See* Gov't Code § 552.228(b)(1), (2). You do not inform us that the hospital lacks the technological capability to provide the information in that requested electronic format. Accordingly, if the hospital has the technological capability to provide the information at issue in the requested electronic format, it must do so; if the hospital does not have the technological capability, it may release the information at issue in the submitted paper format.

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); *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 Office of the Attorney General 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. 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/eb

Ref: ID# 250574

Enc. Submitted documents

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