



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

April 11, 2008

Mr. Brent A. Money
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P.O. Box 1353
Greenville, Texas 75403-1353

OR2008-04896

Dear Mr. Money:

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# 307166.

The City of Greenville (the "city"), which you represent, received a request for the city manager's e-mails during a specified time period and two categories of information pertaining to the four finalists for the city fire chief position. You state that you have released a portion of the requested information. You claim that the submitted information is exempted from disclosure under sections 552.101, 552.104, 552.108, and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses constitutional and common-law privacy. Constitutional privacy under section 552.101 protects two kinds of interests. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See Fado v. Coon*, 633 F.2d 1172 (5th Cir.1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig*

Village, Tex., 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in disclosure of the information. See ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting Ramie, 765 F.2d at 492).

Common-law privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. See *id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined that other types of information also are private under section 552.101. See generally Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private).

You contend that the ABC Evaluations and Management Profiler documents you have submitted for each of the four specified finalists are confidential under both constitutional and common-law privacy. In this instance, although certain details contained in the documents at issue reveal behavioral characteristics that could be considered highly intimate or embarrassing, we note that these documents were used to measure the candidates suitability for public employment. This office has stated that there is a legitimate public interest in the qualifications of public employees. See Open Records Decisions Nos. 542 (1990); 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees); 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees); 423 at 2 (1984) (scope of public employee privacy is narrow). Therefore, because there is a legitimate public interest in the documents at issue, we conclude that you have failed to establish that any of this information is confidential under common-law privacy.

With respect to your argument under constitutional privacy, we note that the ABC Evaluation and Management Profiler purport to evaluate characteristics of the applicants' workplace behavior and management ability as opposed to their mental or psychological health. As stated above, the public has a legitimate interest in the qualifications of public employees, and you have failed to establish that this public interest is outweighed by the privacy interest that the applicants have in the characteristics of their workplace behavior and management ability revealed by the information at issue. Open Records Decision No. 562 at 10 (1990). Therefore, you have failed to demonstrate that constitutional privacy is applicable to the submitted ABC Evaluations and Management Profilers. Accordingly, no portion of the submitted information is confidential under section 552.101 in conjunction with constitutional privacy.

Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 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 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. Furthermore, section 552.104 generally is not applicable once a competitive bidding situation has concluded and a contract has been executed. *See* Open Records Decision No. 541 (1990).

In this instance, you indicate that a final contract has been executed pertaining to the bid and contract negotiations you have submitted. Thus, upon considering your representations and reviewing the submitted documents, we find that the city may not withhold any of the submitted information under section 552.104 of the Government Code.

Next you claim that a portion of the submitted information, consisting of crime update e-mails sent to the city manager and other city staff by the city community relations manager, is excepted under section 552.108 of the Government Code. Section 552.108 provides in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

...

(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 [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov't Code § 552.108(a)(1), (b)(1). By its terms, section 552.108 applies only to a law enforcement agency or a prosecutor. In this instance the submitted e-mails are maintained by the city, which is not a law enforcement agency or prosecutor. However, a non-law-enforcement agency may withhold information under section 552.108 if the information relates to possible criminal conduct and has been or will be forwarded to an appropriate law enforcement agency for investigation. *See* Attorney General Opinion

MW- 575 (1982); *see also* Open Records Decision No. 372 (1983) (where incident involving allegedly criminal conduct is still under active investigation or prosecution, law enforcement exception may be invoked by any proper custodian of information which relates to the incident). In this instance, you fail to demonstrate that the submitted information would interfere with any law enforcement interest, nor do you provide any representation from a law enforcement entity seeking to withhold this information. Thus section 552.108 is not applicable to any of the submitted information.

Next, the city raises section 552.131(a)(2) of the Government Code for a portion of the submitted information. Section 552.131 relates to economic development information and provides in part the following:

(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:

...

(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.

Gov't Code § 552.131(a)(2). Section 552.131(a), in part, excepts 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." *Id.* This aspect of section 552.131 is co-extensive with section 552.110(b) of the Government Code. *See id.* § 552.110(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999). However, we note that the information at issue was not obtained from a third party. We further note that section 552.131(a) does not protect the interests of a governmental body. In this instance you have only submitted arguments stating that release of the information would cause substantial competitive harm to the city, and no business prospect of the city has submitted any arguments to this office explaining the applicability of section 552.131(a)(2) to the information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise or governmental body must show by specific factual evidence that release of information would cause it substantial competitive harm). Thus, we conclude that the city has not demonstrated that this information is protected commercial or financial information of a business prospect. Therefore, we find that you have not demonstrated the applicability of section 552.131(a)(2) to the submitted information.

Finally, we note that some of the e-mail communications you seek to withhold under section 552.108 contain the e-mail addresses of a member of the public that are excepted from disclosure under section 552.137 of the Government Code.¹ Section 552.137 requires a governmental body to withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See* Gov't Code § 552.137 (b). We note that section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public" but is instead the address of the individual as a government employee. *Id.* § 552.137. You do not inform us that the owners of the e-mail addresses have affirmatively consented to release. Therefore, unless the owners of the e-mail addresses at issue consent to their release, the department must withhold the e-mail addresses we have marked under section 552.137. The remaining information 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

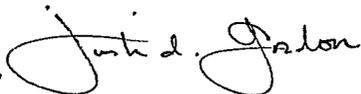
¹The Office of the Attorney General will raise a mandatory exception, such as section 552.137, on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge 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,



Justin D. Gordon
Assistant Attorney General
Open Records Division

JDG/jh

Ref: ID# 307166

Enc. Submitted documents

c: Ms. Erika Grey
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(w/o enclosures)