



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 21, 2008

Mr. Bradford E. Bullock
McKamie Law
13750 San Pedro Suite 640
San Antonio, Texas 78232

OR2008-14389

Dear Mr. Bullock:

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# 325308.

The City of Boerne (the "city"), which you represent, received a request for 26 categories of information relating to communications with four named city officials during a specified time interval.¹ You inform us that the city has released some of the requested information. You claim that other responsive information is excepted from disclosure under sections 552.101, 552.104, 552.105, 552.106, 552.107, 552.110, 552.111, and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted. We also have considered the comments that we received from the requestor.²

We first note that some of the submitted information was created subsequent to the city's receipt of this request for information. The Act does not require a governmental body to release information that did not exist when it received a request or create responsive

¹You inform us that the city asked the requestor to narrow or clarify the request and received a response. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

information.³ Thus, the information that did not exist when the city received this request is not responsive to the request. This decision does not address the public availability of the non-responsive information that we have marked, and the city need not release that information to the requestor.

We next note, and you acknowledge, that the city did not comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that must be followed in asking this office to decide whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301(a). Section 552.301(b) provides that the governmental body must ask for the attorney general's decision and claim its exceptions to disclosure no later than the tenth business day after the date of its receipt of the written request for information. *See id.* § 552.301(b). Section 552.301(e) requires the governmental body to submit to this office, no later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *See id.* § 552.301(e)(1)(A)-(D). If a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

You inform us that the city received this request for information on May 19, 2008 and that the requestor responded to the city's request to narrow or clarify the request on June 6, 2008. The city's request for this decision was submitted by U.S. Mail meter-marked August 14, 2008. Therefore, because the city did not comply with section 552.301 in requesting this decision, the submitted information is presumed to be public under section 552.302. You contend that the city was unable to comply with section 552.301 because of the size and scope of this request for information. You also contend that the request was "intentionally massive in scope, and intended as a form of retaliation against the city." We note that a governmental body may not decline to comply with the requirements of the Act on the ground of administrative inconvenience. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976). We also note that a requestor's motives are irrelevant to the question of whether requested information may be withheld from disclosure. *See* Gov't Code § 552.222(a)-(b); Open Records Decision No. 542 at 4 (1990).

The statutory presumption under section 552.302 that information is public can generally be overcome when the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). The city claims

³*See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

exceptions to disclosure under sections 552.104, 552.105, 552.106, 552.107, 552.111, and 552.131(b) of the Government Code, which are discretionary exceptions that protect a governmental body's interests and may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 592 at 8 (1991) (statutory predecessor to Gov't Code § 552.104 subject to waiver), 564 (1990) (statutory predecessor to Gov't Code § 552.105 subject to waiver), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 subject to waiver). In failing to comply with section 552.301, the city has waived sections 552.104, 552.105, 552.106, 552.107, 552.111, and 552.131(b) of the Government Code and may not withhold any of the submitted information under any of those exceptions. Sections 552.101, 552.110, and 552.131(a) of the Government Code, which the city also claims, can provide compelling reasons for non-disclosure. Therefore, we will determine whether the city must withhold any of the submitted information under sections 552.101, 552.110, and 552.131(a).

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. This exception encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with section 154.073 of the Civil Practice and Remedies Code, which provides in part:

(a) Except as provided by Subsections (c), (d), (e), and (f) a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.⁴

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

...

(d) A final written agreement to which a governmental body, as defined by Section 552.003, Government Code, is a signatory that is reached as a result of a dispute resolution procedure conducted under this chapter is subject to or excepted from required disclosure in accordance with Chapter 552, Government Code.

⁴We note that subsections 154.073(c), (e), and (f) are not applicable in this instance.

Civ. Prac. & Rem. Code § 154.073(a)-(b), (d). In Open Records Decision No. 658 (1998), this office found that communications during the formal settlement process were intended to be confidential. *See* Open Records Decision No. 658 at 4: *see also* Gov't Code § 2009.054(c). You contend that the information in Exhibit E includes a confidential settlement proposal. Having considered your arguments and reviewed the information in question, we find that you have not demonstrated that it consists of either a communication relating to the subject matter of a dispute made by a participant in an alternative dispute resolution procedure or a record made at such a procedure. *See* Civ. Prac. & Rem. Code § 154.073(a)-(b). We therefore conclude that the city may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code.

You also contend that the information you describe as a settlement proposal is confidential under Texas Rule of Evidence 408. In order for information to be confidential under section 552.101 of the Government Code in conjunction with another provision of law, the other law must explicitly require confidentiality. A confidentiality requirement will not be inferred from a provision's structure. *See* ORD 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure); *see also* Open Records Decision No. 478 at 2 (1987) (statutory confidentiality requires express language making information confidential), 465 at 4-5 (1987). Texas Rule of Evidence 408 governs the admissibility of information developed through compromise negotiations. *See* TEX. R. EVID. 408. Because rule 408 does not explicitly provide that information is confidential, we conclude that the city may not withhold any of the submitted information under section 552.101 in conjunction with Texas Rule of Evidence 408.

Section 552.101 also encompasses common-law privacy, which 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 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 information in Exhibit I is protected by common-law privacy. We have marked medical and other information in Exhibit I that is intimate or embarrassing and not a matter of legitimate public interest. The city must withhold that information under section 552.101 in conjunction with common-law privacy.

The city also raises section 552.110 of the Government Code, which protects the proprietary interests of private parties with respect to two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (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 § 552.110(a)-(b).

The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, which holds a “trade secret” to be

any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). If a governmental body takes no position on the application of the “trade secrets” aspect of section 552.110 to the information at issue, this office will accept a private person’s claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.⁵ *See Open Records Decision No. 552 at 5 (1990)*. However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See Open Records Decision No. 402 (1983)*.

Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See Open Records Decision No. 661 at 5-6 (1999)* (business

⁵The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company’s] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980)*.

enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

You generally contend that section 552.110 is applicable to information in Exhibit E. You have not demonstrated, however, that any of the information in question constitutes a trade secret of a private party or that release of any of the information would cause a private party substantial competitive harm. We therefore conclude that the city may not withhold any of the submitted information under section 552.110 of the Government Code.

Next, we address your claim under section 552.131 of the Government Code. Section 552.131(a) 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.

Gov't Code § 552.131(a). 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.* Thus, the protection provided by section 552.131(a) is co-extensive with that of section 552.110. *See id.* § 552.110(a)-(b); ORD 552 at 5, 661 at 5-6.

You contend that information in Exhibit G is related to economic development negotiations and discussions. You have not demonstrated, however, that any of the information in question constitutes a trade secret of a business prospect or that release of any of the information would cause substantial competitive harm to the person from whom the information was obtained. We therefore conclude that the city may not withhold any of the submitted information under section 552.131 of the Government Code.

We note that the city may be required to withhold some of the submitted information under section 552.117 of the Government Code.⁶ Section 552.117(a)(1) excepts from disclosure

⁶Unlike other exceptions to disclosure under the Act, this office will raise section 552.117 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989)*. Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. We have marked information that the city must withhold under section 552.117(a)(1) to the extent that the information is related to a current or former city official or employee who timely requested confidentiality for the marked information under section 552.024.

We also note that the submitted information includes personal e-mail addresses that fall within the scope of section 552.137 of the Government Code.⁷ This exception provides in part:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act].

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to

⁷Section 552.137 also is a mandatory exception and may not be waived. Gov't Code §§ 552.007, .352; ORD 674 at 3 n.4.

a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

Gov't Code § 552.137. Section 552.137 excepts from disclosure certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the owner of an e-mail address has affirmatively consented to its public disclosure. The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked personal e-mail addresses that the city must withhold under section 552.137, unless the owner of an e-mail address has affirmatively consented to its public disclosure.

In summary: (1) the city must withhold the information that we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (2) the city must withhold the information that we have marked under section 552.117(a)(1) of the Government Code to the extent that the information is related to a current or former city official or employee who timely requested confidentiality for the marked information under section 552.024 of the Government Code; and (3) the city must withhold the marked e-mail addresses under section 552.137 of the Government Code, unless the owner of an e-mail address has affirmatively consented to its disclosure. The rest of the responsive 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). If the governmental body does not file suit over 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

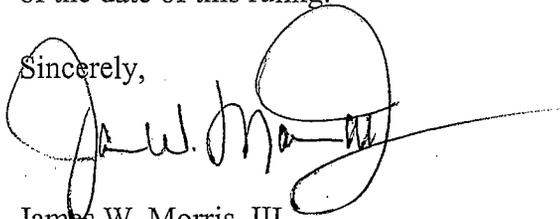
will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to 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 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,

A handwritten signature in black ink, appearing to read "James W. Morris, III", with a long horizontal line extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/jh

Ref: ID# 325308

Enc: Submitted documents

c: Mr. Daniel Ochoa III
2 Architects
624 North Main Street Suite 202
Boerne, Texas 78006
(w/o enclosures)