



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 3, 2008

Mr. Joseph J. Gorfida, Jr.
Nichols, Jackson, Dillard, Hager & Smith, LLP
1800 Lincoln Plaza
500 North Akard
Dallas, Texas 75201

OR2008-16467

Dear Mr. Gorfida:

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# 329082.

The City of Sachse (the "city"), which you represent, received a request for several categories of information pertaining to the collection, remittance, or rebate of sales or use taxes over a specified period of time.¹ You state that some of the requested information has been released to the requestor. You claim that portions of the submitted information are excepted from disclosure under sections 552.101 and 552.136 of the Government Code. In addition, you state the requested information may contain proprietary information subject to exception under the Act. Accordingly, you notified Ryan and Company, Inc. ("Ryan") and Inspired Development, LLC ("Inspired") of this request for information and of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). A

¹You state that the requestor has withdrawn the portion of the request seeking "correspondences, memorandums, and/or emails" by email correspondence sent to the city dated September 15, 2008.

representative from Ryan has submitted comments on behalf of Ryan and Inspired. We have considered the arguments and reviewed the submitted representative sample of information.²

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. Section 552.101 encompasses information made confidential by other statutes, including sections 151.027 and 111.006 of the Tax Code. Both the city and Ryan contend that the submitted sales tax reports and schedules are confidential under section 552.101 in conjunction with section 151.027 of the Tax Code. Section 151.027(a) provides confidentiality for information collected under the Limited Sales, Excise, and Use Tax Act. Section 151.027(b) provides for the confidentiality of information obtained during the course of an examination of a taxpayer's books. Section 151.027 only applies to information furnished to and reviewed by the Texas Comptroller ("the comptroller") during its investigation of a taxpayer. Tax Code § 151.027.

Section 111.006 of the Tax Code provides as follows:

(a) The following matter is confidential and may not be used publicly, opened to public inspection, or disclosed except as permitted under Subsection (b) of this section:

(1) a federal tax return or federal tax return information required to have been submitted to the comptroller with a state tax return or report; and

(2) all information secured, derived, or obtained by the comptroller or the attorney general during the course of an examination of the taxpayer's books, records, papers, officers, or employees, including an examination of the business affairs, operations, source of income, profits, losses, or expenditures of the taxpayer.

Tax Code § 111.006(a)(1), (a)(2). Section 111.006 applies to the comptroller's office and makes confidential information submitted to the comptroller or information that the comptroller obtained during the course of an examination conducted under chapter 111. *Cf.* Open Records Decision No. 520 (1989) (section 151.027 of the Tax Code, which has language similar to section 111.006, applies only to records and information in the comptroller's custody and not to information in another governmental body's possession).

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.

However, the submitted information was provided to the city pursuant to an economic development agreement; therefore, it is not in the custody of the comptroller. Thus, the submitted information is not subject to either section 151.027 or 111.006 of the Tax Code, and may not be withheld under either section.

Ryan and Inspired assert that portions of the submitted information should be withheld pursuant to section 552.110(b) of the Government Code. Section 552.110(b) excepts from disclosure “[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). This exception to disclosure 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 enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Upon review of the submitted arguments and the information at issue, we find that Ryan and Inspired have made a specific factual or evidentiary showing that the release of their customer information would cause them substantial competitive harm. Therefore, the city must withhold the identifying customer information under section 552.110(b) of the Government Code.

Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136 (b). The city must withhold the account number we have marked under section 552.136 of the Government Code.

Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c).³ Gov’t Code § 552.137(a)-(c). 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. The marked e-mail addresses are not of a type specifically excluded by section 552.137(c) of the Government Code. Therefore, the city must withhold the e-mail addresses we have marked in accordance with section 552.137 unless the city has received consent for their release.

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

In summary, the city must withhold information that identifies Ryan's and Inspired's customers under section 552.110(b) of the Government Code. The city must also withhold the account number we have marked under section 552.136 of the Government Code and the e-mail addresses we have marked in accordance with section 552.137 unless the city has received consent for their release. The remaining information must be released to the requestor.

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,



Matt Entsminger
Assistant Attorney General
Open Records Division

MRE/jb

Ref: ID# 329082

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. John Christian
Ryan
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Austin, Texas 78701
(w/o enclosures)