



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

May 4, 2010

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2010-06382

Dear Ms. Alexander:

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# 377947.

The Texas Department of Transportation (the "department") received a request for ten categories of information pertaining to three named vendors during a specified time period.¹ You claim the submitted certified payroll records are excepted from disclosure under sections 552.101 and 552.147 of the Government Code. You also state release of the requested information may implicate the proprietary interests of Easter Construction, Inc. ("Easter"). Thus, pursuant to section 552.305 of the Government Code, you notified Easter of the request and of its right to submit arguments to this office as to why its information should not be released.² Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under in

¹You state, and have provided documentation showing, the department sought and received clarification from the requestor regarding the request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

²As of the date of this letter, we have not received any comments from Easter.

certain circumstances). We have considered your claimed exceptions and reviewed the submitted information.

Initially, we note you have submitted information responsive to only one category of the request for only one of the named vendors. To the extent information responsive to the remainder of the request existed on the date the department received this request, we assume you have released it. If you have not released any such information, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

We further note most of the submitted certified payroll records do not pertain to the time period specified in the request for information. Thus, this information, which we have marked, is not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

Next, we must address the department's obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). Pursuant to section 552.301(e) of the Government Code, the governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). In this instance, you state the department received the original request for information on December 23, 2009, and the clarified request for information on December 29, 2009. You did not, however, request a ruling from this office or submit a copy of the information requested until February 26, 2010. Thus, we find the department failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes

the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because sections 552.101 and 552.147 of the Government Code, as well as third party interests, can provide compelling reasons to withhold information, we will consider whether or not any of the submitted information is excepted from disclosure under the Act.

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 the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. Prior decisions of this office have determined personal financial information not related to a transaction between an individual and a governmental body generally meets the first prong of the common-law privacy test. *See generally* Open Records Decision No. 600 (1992). However, whether financial information is subject to a legitimate public interest and, therefore, not protected by common-law privacy must be determined on a case-by-case basis. *See* Open Records Decision No. 373 (1983).

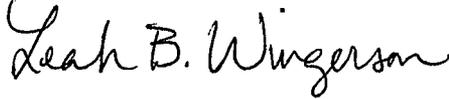
Upon review, the submitted certified payroll records pertain solely to transactions between Easter and its employees. The department informs this office federal law provides, as a requisite to the receipt of federal funding for construction projects exceeding two thousand dollars, that state transportation agencies must include certain provisions in the agencies' contracts with contractors. In this instance, you represent one such provision requires the department to receive and retain its contractors' payroll records so the Federal Highway Administration, the Department of Labor, the General Accounting Office, or other agency can audit those records to ensure the contractors' compliance with applicable federal wage regulations. *See* 23 C.F.R. § 635.118. You additionally inform this office the department has not itself used the payroll records for any public purpose, other than receiving and retaining them for review by a federal agency. Therefore, based on these facts, we conclude there is no legitimate public interest in release of the submitted certified payroll records at this time, and the department must withhold these records in their entirety under section 552.101 of the Government Code in conjunction with common-law privacy. As our ruling is dispositive, we need not address your remaining argument against disclosure.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php,

or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 377947

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Easter Construction Inc.
372 Private Road 4733
Castroville, Texas 78009
(w/o enclosures)