



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 9, 2010

Ms. Angela M. DeLuca  
Assistant City Attorney  
City of Bryan  
P.O. Box 1000  
Bryan, Texas 77805

OR2010-17022

Dear Ms. DeLuca:

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# 399568.

The City of Bryan (the "city") received a request for records communicated between the city's city council (the "council") and city manager between May 5, 2010 and August 23, 2010 and any study or salary analysis comparing Bryan Texas Utilities ("BTU") to other utility companies. You state some responsive information has been released. You claim portions of the information submitted in Exhibits C, D, and E are excepted from disclosure under sections 552.101, 552.117, and 552.133 of the Government Code. Although you take no position on the public availability of the information submitted in Exhibit F, you state release of this information may implicate the proprietary interests of Parc Senior Communities, LLLP ("PSC"). You have notified PSC of the city's receipt of the request for information and of the company's right to submit arguments to this office as to why the information at issue should not be released. *See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances).* We have considered the exceptions you claim and reviewed the submitted information, portions of which consist of representative samples.<sup>1</sup> We have also considered comments submitted by the PSC.

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<sup>1</sup>We assume the representative samples of records submitted to this office are 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.

Initially, PSC claims Exhibit F is not responsive to the request for information. Exhibit F consists of an e-mail chain and attached document related to proposed new construction in the city. There is no indication this information was sent to the city council, and it does not pertain to any comparison of BTU to other utility companies. Thus, we agree with PSC that Exhibit F is not responsive to this request. This decision does not address the public availability of the non-responsive information, and Exhibit F, which we marked, need not be released.<sup>2</sup>

Next, we note you have not submitted any study or salary analysis comparing BTU to other utility companies. To the extent information responsive to this portion of the request existed on the date the city received the request, we assume it has been released. If not, then you must release it 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).

You claim Exhibit C is excepted under section 552.133 of the Government Code. Section 552.133 excepts from disclosure a public power utility's information related to a competitive matter, and provides:

Information or records are excepted from the requirements of Section 552.021 if the information or records are reasonably related to a competitive matter, as defined in this section. Excepted information or records include the text of any resolution of the public power utility governing body determining which issues, activities, or matters constitute competitive matters. Information or records of a municipally owned utility that are reasonably related to a competitive matter are not subject to disclosure under this chapter, whether or not, under the Utilities Code, the municipally owned utility has adopted customer choice or serves in a multiply certificated service area. This section does not limit the right of a public power utility governing body to withhold from disclosure information deemed to be within the scope of any other exception provided for in this chapter, subject to the provisions of this chapter.

Gov't Code § 552.133(b). Section 552.133(a)(3) defines a "competitive matter" as a matter the public power utility governing body in good faith determines by vote to be related to the public power utility's competitive activity, and the release of which would give an advantage to competitors or prospective competitors. *See id.* § 552.133(a)(3). However, section 552.133(a)(3) also provides thirteen categories of information that may not be deemed competitive matters. The attorney general may conclude that section 552.133 is inapplicable to the requested information only if, based on the information provided, the attorney general determines the public power utility governing body has not acted in good

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<sup>2</sup>As our ruling is dispositive for this information, we need not address PSC's remaining arguments against its disclosure.

faith in determining that the issue, matter, or activity is a competitive matter or the information requested is not reasonably related to a competitive matter. *Id.* § 552.133(c).

You state the information in Exhibit C pertains to BTU, which is a city-owned public power utility for purposes of section 552.133. In addition, you inform us, and provide documentation showing, the council, as governing body of BTU, passed a resolution by vote pursuant to section 552.133 in which the council defined the information considered to be within the scope of the term "competitive matter." You assert the records in Exhibit C come within the scope of the resolution. The information at issue is not among the thirteen categories of information section 552.133(a)(3) expressly excludes from the definition of competitive matter. Furthermore, we have no evidence the council failed to act in good faith. *See id.* Consequently, we determine the information submitted in Exhibit C relates to a competitive matter in accordance with the submitted resolution. Therefore, the city must withhold Exhibit C pursuant to section 552.133 of the Government Code.

You next raise section 552.101 of the Government Code for the information submitted in Exhibit E. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses the doctrine of common-law right of 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.

This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (information pertaining to illness from severe emotional and job-related stress protected by common-law privacy), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). However, this office has stated in numerous decisions that information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and, therefore, is generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees), 423 at 2 (1984) (scope of public employee privacy is narrow).

Exhibit E consists of e-mails in which a city employee informs co-workers of certain medical issues. Upon review, we have marked the portions these e-mails that reveal medical information that is of no legitimate public interest. The city must withhold this marked information under section 552.101 in conjunction with common-law privacy. However, the

remaining information in Exhibit E pertains directly to the work conduct of the employee at issue, and therefore is of legitimate public interest. Thus, this remaining information in Exhibit E may not be withheld under section 552.101 on the basis of common-law privacy.

You claim portions of Exhibit D are excepted under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Additionally, section 552.117 encompasses personal cellular telephone numbers, provided the cellular telephone service is paid for by the employee with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117 exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The city may only withhold information under section 552.117(a)(1) on behalf of employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made.

Upon review, we have marked the portions of Exhibit D that may be subject to section 552.117. You state the employee whose information is at issue in Exhibit D elected to keep information reflecting whether or not she has family members confidential before the city received the request for information. Therefore, based on your representations and our review, the city must withhold the information we have marked in Exhibit D under section 552.117. We additionally note Exhibit E contains the cellular telephone number of a council member. You do not inform this office whether this individual elected to keep his home telephone numbers confidential prior to the city's receipt of this request. Therefore, the city must withhold the cellular telephone number we marked in Exhibit E under section 552.117(a)(1) only if the service for the number was paid for with the council member's own funds and he timely requested confidentiality for this number. If this council member did not timely request confidentiality or the cellular service is not paid for with personal funds, this number must be released.

Some of the remaining information in Exhibit D consists of a private e-mail address that may be subject to section 552.137 of the Government Code.<sup>3</sup> 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). *See* Gov't Code § 552.137(a)-(c). The e-mail address we marked does not appear to be

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

excepted under subsection (c). Accordingly, unless the owner of this e-mail address has consented to its release, the city must withhold the e-mail address we marked in Exhibit D under section 552.137.<sup>4</sup>

In summary, the city must withhold Exhibit C under section 552.133 of the Government Code. The city must withhold the portions of Exhibit E we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the information we marked in Exhibit D under section 552.117(a)(1) of the Government Code, and must withhold the cellular telephone number we marked in Exhibit E under that section if the service for the number was paid for with the council member's own funds and he timely requested confidentiality for this number. The city must also withhold the e-mail address we marked in Exhibit D under section 552.137 of the Government Code unless the owner of this e-mail address has consented to its release. The remaining responsive information must be released.

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](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,



Bob Davis  
Assistant Attorney General  
Open Records Division

RSD/tp

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<sup>4</sup>We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Ref: ID# 399568

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. Andrew Slavin  
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(w/o enclosures)