



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 19, 2010

Mr. Donald P. Iles
City Manager
City of Hemphill
P.O. Box 788
Hemphill, Texas 75948

OR2010-17574

Dear Mr. Iles:

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# 400874.

The City of Hemphill (the "city") received a request for a current roster of residential and commercial electricity customers. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

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. You claim the submitted customer names are excepted from disclosure under section 552.101 because the public release of the information is inconsistent with the mandate in part 681 of title 16 of the Code of Federal Regulations (the "Red Flags Rules"). *See* 16 C.F.R. pt. 681 (2009); *see also* 15 U.S.C. § 1681m(e)(1)(A), (B) (requiring federal banking agencies, National Credit Union Administration, and Federal Trade Commission (the "commission") to establish guidelines regarding identity theft with respect to account holders and to prescribe regulations requiring financial institutions and creditors to establish reasonable policies and procedures for implementing those guidelines). Section 681.1 requires financial institutions and creditors that are subject to the commission's enforcement of the Fair Credit Reporting Act and that offer or maintain "covered accounts" to develop

and implement a written identity theft prevention program.¹ 16 C.F.R. § 681.1(a), (d)(1). The purpose of such a program is to “to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account.” *See id.* pt. 681, App. A (providing guidelines for financial institutions and creditors to formulate and maintain programs satisfying requirements of section 681.1). For purposes of the Red Flags Rules, a “creditor” has the same meaning as in section 1681a(r)(5) of title 15 of the United States Code and includes a utility company. *Id.* § 681.1(b)(5); *see also* 15 U.S.C. §§ 1681a(r)(5) (“creditor” has same meanings as in 15 U.S.C. § 1691a), 1691a(e) (defining “creditor” as any person who regularly extends, renews, or continues credit). A “covered account” means an account which “a financial institution or creditor offers or maintains, primarily for personal, family, or household purposes, that involves or is designed to permit multiple payments or transactions, such as a credit card account, mortgage loan, automobile loan, margin account, cell phone account, utility account, checking account, or savings account[.]” 16 C.F.R. § 681.1(b)(3)(i).

You state the city has adopted by ordinance an identity theft prevention program pursuant to the Red Flags Rules. You explain the ordinance governs the procedures and strategies for the prevention of identity theft for the city’s utility accounts in compliance with federal law. This ordinance, a copy of which you have provided this office, defines “identifying information” as “any name or number that may be used, alone or in conjunction with any other information, to identify a specific person,” including an individual’s name. However, you have not directed our attention to any provision in the program or the Red Flags Rules that makes confidential the information at issue. *See* Gov’t Code § 552.101 (excepting information made confidential by law). Furthermore, you have not explained how section 681.1 provides the city with the authority to make any information confidential by ordinance. A governmental body may not promulgate a rule that designates information as being confidential, so as to bring the information within the scope of section 552.101 of the Government Code, unless the governmental body has been given specific statutory authority to do so. *See* Open Records Decision Nos. 594 at 2-3 (1991) (city ordinance cannot operate to make information confidential when not excepted by Act), 263 (1981) (city ordinance may not conflict with Act); *see City of Brookside Village v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982) (local ordinance conflicting with or inconsistent with state legislation not permissible); *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976) (agency rule may not make information confidential in circumvention of Act). After considering your arguments and reviewing the city’s program and the information at issue, we conclude you have not demonstrated how the Red Flags Rules or the program makes the submitted information confidential. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall

¹Although you cite to section 681.2 of title 16 of the Code of Federal Regulations, we note section 681.1 is the correct section for the substance of your argument.

not be released to public). Therefore, we conclude the city may not withhold any information under section 552.101 of the Government Code in conjunction with either the Red Flags Rules or the city's identity theft prevention program.

We also understand the city to raise common-law and constitutional privacy, which are also encompassed by section 552.101 of the Government Code. Common-law privacy protects information that (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. *See Indus. Found.*, 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently; and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected under constitutional privacy is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985)).

Upon review, we find that none of the information at issue is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the city may not withhold any portion of the submitted information under section 552.101 on the basis of common-law privacy. Furthermore, we conclude that none of the information at issue comes within one of the constitutional zones of privacy or involves the most intimate aspects of human affairs. Therefore, no portion of the submitted information may be withheld under section 552.101 on the basis of constitutional privacy.

We note the submitted utility account numbers are subject to section 552.136 of the Government Code.² Section 552.136 provides 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." Gov't

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Code § 552.136(b). An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value, or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument, and includes an account number. *Id.* § 552.136(a). We note city utility account numbers are access device numbers for purposes of section 552.136. Accordingly, the city must withhold the customer utility account numbers we have marked under section 552.136 of the Government Code.

In summary, the city must withhold the utility account numbers we have marked under section 552.136 of the Government Code. The remaining 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, 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,



Tamara H. Holland
Assistant Attorney General
Open Records Division

THH/em

Ref: ID# 400874

Enc. Submitted documents

c: Requestor
(w/o enclosures)