ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 17, 2010

Ms. Cherl K. Byles
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street, 3rd Floor
Fort Worth, Texas 76102

OR2010-19047

Dear Ms. Byles:

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# 403798 (Fort Worth PIR# W003659).

The City of Fort Worth (the "city") received a request for six categories of information pertaining to the Omni Fort Worth Hotel and Condominium Project. You state you will release some of the requested information to the requestor. You claim that portions of the submitted information are excepted from disclosure under sections 552.107, 552.111, and 552.137 of the Government Code. Although you take no position on whether the requested bid information is excepted from disclosure, you state release of this information may implicate the proprietary interests of Omni Hotels and Resorts ("Omni"). Accordingly, you have notified Omni of the request and of its right to submit arguments to this office as to why its information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received comments from Omni. We have also received comments from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

Initially, we address the requestor's assertion the city failed to meet its prescribed deadlines under the Act. Section 552.301 of the Government Code 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), a governmental body that receives a request for information that it wishes to withhold must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). Pursuant to section 552.301(d), a governmental body must provide the requestor with (1) a written statement that the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general, and (2) a copy of the governmental body's written communication to the attorney general within ten business days of receiving the request for information. *Id.* § 552.301(d). 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). We note section 552.263(e) of the Government Code provides a request for public information is considered to have been received by a governmental body on the date the governmental body receives the deposit or bond for payment of anticipated costs. *See id.* § 552.263(e). The submitted documentation indicates the requestor accepted the cost estimate and submitted the requested deposit, which the city received on October 1, 2010. Thus, pursuant to section 552.263(e), October 1, 2010 is the date the city received the request for the purposes of section 552.301. Accordingly, the city's ten-business-day deadline was October 15, 2010 and its fifteen-business-day deadline was October 22, 2010. However, although the city requested a ruling from our office within its ten-business-day deadline, the city did not state the exceptions to disclosure that apply to the information at issue until October 22, 2010. Thus, we find the city failed to comply with the requirements of section 552.301(b).

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). Although you also assert some of the submitted information is excepted under sections 552.107 and 552.111 of the Government Code, these sections are

discretionary in nature. They serve only to protect a governmental body's interests, and may be waived; as such, they do not constitute compelling reasons to withhold information for purposes of section 552.302. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions), 470 (1987) (statutory predecessor to section 552.111 is discretionary exception). Thus, no portion of the submitted information may be withheld under section 552.107 or section 552.111 of the Government Code. However, because sections 552.101, 552.117, 552.137, and third party interests can provide compelling reasons to withhold information, we will consider the applicability of these sections to the submitted information, as well as Omni's arguments under section 552.110 of the Government Code.[1]

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.[2] Section 552.101 encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). 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. *See id.* at 683. This office has found that 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) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find that portions of the information at issue are highly intimate or embarrassing and not of legitimate public concern. Thus, the city must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

Next, we note portions of the submitted information may be subject to section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address, home telephone number, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024. *See id.* § 552.117(a)(1). We note section 552.117 is also applicable

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[1]As our ruling is dispositive, we need not address the requestor's remaining arguments concerning the city's procedural obligations under the Act.

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

to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). 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). You do not explain whether the employee whose information is at issue has timely elected to keep his personal information confidential. Therefore, to the extent the employee whose information is at issue timely elected to keep his personal information confidential, the city must withhold the personal information we have marked under section 552.117(a)(1); however, the city may only withhold the marked cellular telephone number if the number is not paid for by the city. Conversely, to the extent the employee whose information is at issue did not make a timely election under section 552.024, the city may not withhold any portion of the marked information under section 552.117(a)(1).

The remaining information contains e-mail addresses subject to section 552.137 of the Government Code. Section 552.137 of the Government Code provides in relevant 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 this chapter.
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> (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.
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> (c) Subsection (a) does not apply to an e-mail address:
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> > (1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;
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> > (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 a governmental body in the course of negotiating the terms of a contract or potential contract;

> (4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public; or
>
> (5) provided to a governmental body for the purpose of providing public comment on or receiving notices related to an application for a license as defined by Section 2001.003(2) of this code, or receiving orders or decisions from a governmental body.

Id. § 552.137(a)-(c). Thus, unless an exception under subsection (c) of the statute applies, an e-mail address of a member of the public provided for the purpose of communicating electronically with a governmental body is confidential. *Id.* § 552.137(a). Upon review, we agree that portions of the submitted information contain personal e-mail addresses that must be withheld under section 552.137. Accordingly, the city must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of these e-mail addresses have affirmatively consented to their release. However, we note the remaining e-mails you have marked under section 552.137 either belong to outside city consultants who have contractual relationships with the city or were provided to the city in the course of negotiating the terms of a contract or potential contract with Omni. These e-mails are among the types that are specifically excluded under section 552.137(c). Thus, we conclude section 552.137 is not applicable to any of the remaining e-mail addresses you have marked and none of these e-mail addresses may be withheld on this basis.[3]

Next, Omni claims that its information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). A "trade secret":

> may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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

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[3]We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

> not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees . . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

> (1) the extent to which the information is known outside of [the company's] business;
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> (2) the extent to which it is known by employees and others 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 to [its] competitors;
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> (5) the amount of effort or money expended by [the company] in developing this information; and
>
> (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* ORD 232. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (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. Open Records Decision No. 402 (1983).

Section 552.110(b) protects "[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. *Id.*; *see also* Open Records Decision No. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm).

Having considered Omni's arguments, we determine that it has failed to demonstrate that any portion of its information constitutes a trade secret for purposes of section 552.110(a). *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, and qualifications and experience). Accordingly, no portion of Omni's information may be withheld pursuant to section 552.110(a).

Omni also asserts that its information constitutes commercial or financial information that, if released, would cause substantial competitive harm. Upon review, we determine that Omni has failed to demonstrate, based on a specific factual or evidentiary showing, that release of its information would cause it substantial competitive harm. *See* ORDs 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because bid specifications and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (information relating to organization and personnel, professional references, market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, no part of Omni's information may be withheld on this basis.

We note that a portion of the submitted information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

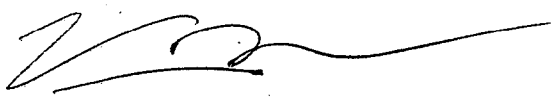
In summary, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the individual whose information is at issue timely elected to restrict access to his personal

information, the city must withhold the information we have marked under section 552.117(a)(1). However, the city may only withhold the cellular telephone number we have marked if the employee pays for the service with his own funds. The city must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the addresses have consented to their release. The remaining information must be released, but any information that is protected by copyright may only be released in accordance with copyright law.

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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 493798

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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