



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 28, 2010

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

OR2010-19413

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# 404128.

The Texas Department of Transportation (the "department") received a request for the names and corresponding visa categories for all foreign workers employed by any contractor or subcontractor on the Margaret Hunt Hill Bridge project (the "project") since August 1, 2010, and a copy of all certified payroll records regarding the project from the general contractor and all subcontractors. You claim some of the requested information is not subject to the Act. You also claim the submitted information is excepted from disclosure under sections 552.101 and 552.147 of the Government Code. Additionally, you state release of the submitted information may implicate the proprietary interests of several third parties.¹ Thus, pursuant to section 552.305 of the Government Code, you notified the third parties of the request and of their right to submit arguments to this office as to why their information should not be released. 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 inform us the department notified the following third parties: Williams Brothers Construction Company ("Williams"); Vstructural LLC; Dallas Lite & Barricade, Inc.; Indus Construction, L.P.; MICA Corp.; Scot Derr Painting Co.; Texas Environmental Management; Azteca Steel, Inc.; Cimolai Cosme; and Costruzioni Cimolai Armando S.P.A.

certain circumstances). We have received comments from Williams. We have considered the submitted arguments and reviewed the submitted representative sample of information.²

Initially, you state the department does not maintain any information responsive to the portion of the request seeking the names and corresponding visa categories for all foreign workers on the project since August 1, 2010, and any such information is not subject to the Act. The Act is applicable to "public information." See Gov't Code § 552.021. Section 552.002 of the Act provides that "public information" consists of information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Id. § 552.002(a). Thus, virtually all of the information that is in a governmental body's physical possession constitutes public information that is subject to the Act. *Id.* § 552.022(a)(1); see also Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). Furthermore, the Act applies to information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for a governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2). Thus, information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if a governmental body owns or has a right of access to the information. See Open Records Decision No. 462 (1987). Where a third party has prepared information on behalf of a governmental body and the governmental body has a right of access to it, the information is subject to the Act, even though it is not in the governmental body's custody. Open Records Decision No. 558 (1990).

The department explains that a portion of the requested information regarding the names and corresponding visa categories of certain foreign workers is not collected, assembled or maintained by or for the department. The department states that the contractors and subcontractors prepare and maintain this information in order to fulfill their own statutory duties under federal law. Thus, the department explains that the contractors and subcontractors do not prepare or maintain any of this information on behalf of the department. Based upon these representations, we agree that the information responsive to

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.

this portion of the request is not public information for purposes of section 552.002, and thus need not be released in response to this request.

Next, we note the requestor in this instance is State Representative Allen Vaught. Section 552.008 of the Government Code grants access to information, including confidential information, requested by individual members, agencies, or committees of the Texas Legislature, and provides as follows:

(a) This chapter does not grant authority to withhold information from individual members, agencies, or committees of the legislature to use for legislative purposes.

(b) A governmental body on request by an individual member, agency, or committee of the legislature shall provide public information, including confidential information, to the requesting member, agency, or committee for inspection or duplication in accordance with this chapter if the requesting member, agency or committee states that the public information is requested under this chapter for legislative purposes. A governmental body, by providing public information under this section that is confidential or otherwise excepted from required disclosure under law, does not waive or affect the confidentiality of the information for purposes of state or federal law or waive the right to assert exceptions to required disclosure of the information in the future. The governmental body may require the requesting individual member of the legislature, the requesting legislative agency or committee, or the members or employees of the requesting entity who will view or handle information that is received under this section and that is confidential under law to sign a confidentiality agreement that covers the information and requires that:

(1) the information not be disclosed outside the requesting entity, or within the requesting entity for purposes other than the purpose for which it was received;

(2) the information be labeled as confidential;

(3) the information be kept securely; or

(4) the number of copies made of the information or the notes taken from the information that implicate the confidential nature of the information be controlled, with all copies or notes that are not destroyed or returned to the governmental body remaining confidential and subject to the confidentiality agreement.

(b-1) A member, committee, or agency of the legislature required by a governmental body to sign a confidentiality agreement under Subsection (b) may seek a decision as provided by Subsection (b-2) about whether the information covered by the confidentiality agreement is confidential under law. A confidentiality agreement signed under Subsection (b) is void to the extent that the agreement covers information that is finally determined under Subsection (b-2) to not be confidential under law.

(b-2) The member, committee, or agency of the legislature may seek a decision from the attorney general about the matter. The attorney general by rule shall establish procedures and deadlines for receiving information necessary to decide the matter and briefs from the requestor, the governmental body, and any other interested person. The attorney general shall promptly render a decision requested under this subsection, determining whether the information covered by the confidentiality agreement is confidential under law, not later than the 45th business day after the date the attorney general received the request for a decision under this subsection. The attorney general shall issue a written decision on the matter and provide a copy of the decision to the requestor, the governmental body, and any interested person who submitted necessary information or a brief to the attorney general about the matter. The requestor or the governmental body may appeal a decision of the attorney general under this subsection to a Travis County district court. A person may appeal a decision of the attorney general under this subsection to a Travis County district court if the person claims a proprietary interest in the information affected by the decision or a privacy interest in the information that a confidentiality law or judicial decision is designed to protect.

(c) This section does not affect:

- (1) the right of an individual member, agency, or committee of the legislature to obtain information from a governmental body under other law, including under the rules of either house of the legislature;
- (2) the procedures under which the information is obtained under other law; or
- (3) the use that may be made of the information obtained under other law.

Gov't Code § 552.008. The requestor is State Representative Allen Vaught; however, the requestor does not state, and it is not otherwise clear to this office, that his request was made for legislative purposes. Accordingly, if the requestor made this request for legislative

purposes, then the department must make the submitted information available to this requestor in accordance with section 552.008. *See id.* We note that the release of this information to Representative Vaught under section 552.008 does not waive or affect the confidentiality of the information for the purposes of state or federal law or waive the department's or the third parties' rights to assert exceptions to required public disclosure of this information in the future. *See id.* But if this request for information was not made for legislative purposes, then the submitted information need not be released under section 552.008, and we will consider the submitted arguments against its public disclosure.

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).

The submitted certified payroll records pertain solely to transactions between the project's contractors and subcontractors and their respective 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.³

³As our ruling on this issue is dispositive, we do not address the remaining submitted arguments against disclosure.

In summary, if the requestor made this request for legislative purposes, then the department must make the submitted information available to Representative Vaught in accordance with section 552.008 of the Government Code. If the requestor did not make this request for legislative purposes, the department must withhold the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy.

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,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/tf

Ref: ID# 404128

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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Italy
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1607 Fort Worth Avenue
Dallas, Texas 75208
(w/o enclosures)

Indus Construction, L.P.
6060 Brookglen Drive, Suite A
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