



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 19, 2011

Mr. Slater Elza
Underwood Attorneys at Law
P. O. Box 9158
Amarillo, Texas 79105-9158

OR2011-10310

Dear Mr. Elza:

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# 424229.

Downtown Amarillo, Inc. ("DAI"), which you represent, received a request for all resumes and applications submitted for a specified Executive Director position. You ask whether the requested information is subject to the Act, and whether portions of the submitted information are responsive to the request. Although you take no position on whether the submitted information is excepted under the Act, you state DAI notified the applicants whose information is at issue of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from an attorney on behalf of one of those applicants. We have considered the submitted arguments and reviewed the submitted information.

First, we address your assertion that the submitted information is not subject to the Act. The Act is applicable only to "public information." *See id.* § 552.021. Section 552.002 of the Act defines public information as 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). Virtually all information that is in a governmental body's physical possession constitutes public information that is subject to the Act. *Id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). You claim the submitted information should not now be subject to the Act because DAI did not know it was subject to the Act when it received the information at issue. You state that, had DAI known it was subject to the Act, it would have notified the applicants of this fact. However, as you acknowledge, this office has determined DAI is a governmental body subject to the Act. Consequently, any information DAI possessed at the time the request for information was received that pertains to DAI's official business is subject to the Act. You also contend the portions of the information that were collected and maintained by a third party search firm are not subject to the Act because such information was not actually collected by or provided to DAI. However, the Act also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). You acknowledge the third party search firm contracted with DAI as part of DAI's search for applicants for the specified position. This office has determined that if a governmental entity employs an agent to carry out a task that otherwise would have been performed by the entity itself, information relating to that task that has been assembled or maintained by the agent is subject to section 552.002. Open Records Decision No. 518 at 3 (1989) (addressing statutory predecessor to section 552.002); *see* Open Records Decision No. 585 at 3 (1991) (information prepared by private entity at request or under direction of governmental body subject to disclosure). Thus, we find the information acquired by the search firm was collected for DAI and DAI had a right of access to it. Therefore, we conclude the information collected and maintained by DAI's search firm is subject to the Act. Accordingly, all the submitted information is subject to the Act.

Next, you contend the information you highlighted in yellow is not responsive to the request for information. We understand from your arguments this information is not considered by DAI to be part of an applicant's resume or application. Thus, based on your representations and our review, we agree the information you highlighted is not responsive to the request for information. This decision does not address the public availability of the non-responsive information, and DAI need not release such information in response to the request.

We next note DAI did not fully comply with its procedural obligations under the Act. 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* Gov't Code § 552.301(e). In this instance, you state DAI received the request for information on May 2, 2011. Thus, DAI's fifteen-business-day deadline was May 23, 2011. Although some information was submitted to this office prior to that date, other responsive information was mailed in an envelope postmarked on May 31, 2011. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail). Thus, we find DAI failed to fully comply with section 552.301(e) in requesting a decision from this office.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption the information is public and must be released. Information presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *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 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. In this instance, we have received comments from an attorney representing one applicant whose information is at issue. The attorney objects to release of his client's information on the basis of sections 552.101, 552.117, and 552.137 of the Government Code. We additionally note a portion of the submitted information is subject to section 552.130 of the Government Code.¹ Because the interests of a third party and sections 552.101, 552.117, 552.130, and 552.137 can provide compelling reasons to withhold information, we consider the submitted arguments.

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. This exception encompasses common-law privacy and excepts from disclosure private facts about an individual. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). Information is excepted from required public disclosure by a common-law right of privacy if the information (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. *Id.* at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. In this case, the attorney who submitted comments has not explained how the information pertaining to his client is highly intimate or embarrassing and of no legitimate

¹The 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).

public interest. Additionally, we note the information at issue is submitted in the context of an application for employment as an executive with DAI. This office has determined the background and qualifications of an applicant for government employment are generally a matter of legitimate public interest. *See* Open Records Decision Nos. 562 at 10 (1990), 470 at 4 (1987), 444 (1986), 423 at 2 (1984). We therefore conclude DAI may not withhold any of the submitted information under section 552.101 in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code exempts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Section 552.117 applies only to records the governmental body is holding in an employment capacity. Accordingly, we find section 552.117 does not apply to information pertaining to individuals who are not current or former employees or officials of DAI. *Cf.* Open Records Decision No. 455 at 2 (1987) (statutory predecessor to section 552.117 not applicable to employment applicants). With the exception of the individual who was hired as a result of this applicant search, whose information we have marked, we have no indication any individuals whose information is at issue are current or former employees of DAI. DAI must withhold the information we marked pertaining to the hired applicant under section 552.117(a)(1) of the Government Code if she timely elected confidentiality for the information. However, section 552.117 is not applicable to the remaining applicants' information and none of the remaining information may be withheld on that basis.

Section 552.137 of the Government Code exempts 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). Gov't Code § 552.137(a)-(c). We note section 552.137(a) does not apply to the e-mail address provided by a person who has a contractual relationship with the governmental body or by the contractor's agent. *Id.* § 552.137(c)(1). DAI must withhold the e-mail addresses we have marked under section 552.137, unless their owners consent to their release.²

We note a portion of the remaining information is subject to section 552.130 of the Government Code. Section 552.130 provides in relevant part:

²We have marked a representative sample of the e-mail addresses that must be withheld under section 552.137 of the Government Code, unless the owners consent to their release. We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information without the necessity of requesting an attorney general decision, including an e-mail address of a member of the public under section 552.137 of the Government Code.

(a) Information is excepted from the requirements of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country; [or]
- (2) a motor vehicle title or registration issued by an agency of this state or another state or country[.]

Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov't Code § 552.130(a)(1)-(2)). Upon review, we have marked the motor vehicle record information in the submitted records, which DAI must withhold under section 552.130 of the Government Code.

In summary, DAI must withhold the information we marked pertaining to the hired applicant under section 552.117(a)(1) of the Government Code if she timely elected confidentiality for the information pursuant to section 552.024 of the Government Code. Unless their owners consent to their release, DAI also must withhold the private e-mail addresses in the submitted information under section 552.137 of the Government Code. DAI must withhold the information we marked under section 552.130 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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/eb

Ref: ID# 424229

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. J. Andrew Hagy
11052 Treyburn Drive
Glen Allen, Virginia 23059
(w/o enclosures)

Mr. Bob Trescott
907 Harbert Street
Tallahassee, Florida 32303
(w/o enclosures)

Ms. Cathrine A. Shelby
2203 South Ong Street
Amarillo, Texas 79109
(w/o enclosures)

Mr. Kirk Folkner
2704 Teckla
Amarillo, Texas 79106
(w/o enclosures)

Ms. Melissa Daily
801 South Fillmore Street
Amarillo, Texas 79101
(w/o enclosures)

Mr. John E. Fonner
7950 Festive Court, #2
Cincinnati, Ohio 45236
(w/o enclosures)

Mr. Joe Alarcon
2503 Tuscan Hills Lane
Las Cruces, New Mexico 88011
(w/o enclosures)

Mr. Robert Brescia
2025 Lakepointe Drive, Apt. 13A
Lewisville, Texas 75057
(w/o enclosures)