



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 4, 2012

Mr. Benjamin V. Lugg
Counsel for the San Antonio Housing Authority
818 South Flores Street
San Antonio, Texas 78204

OR2012-13927

Dear Mr. Lugg:

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# 464102.

The San Antonio Housing Authority (the "authority") received a request for the winning bid package for RFP No. 1201-958-78-3715. You state the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.105, 552.106, 552.107, 552.110, 552.111, 552.112, 552.113, 552.116, 552.117, 552.125, 552.128, 552.130, 552.131, 552.136, 552.137, 552.143, 552.146, 552.147, 552.149, and 552.153 of the Government Code.¹ Further, you state the requested information may implicate the proprietary interests of Orion Real Estate Services, Inc. ("Orion"). Accordingly, you inform us, and provide documentation showing, you notified Orion of the request and of the company's right to submit comments to this office as to why the requested information should not be released to the requestor. *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 under the Act in certain circumstances). We have received comments from an attorney for Orion. We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address the authority's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public

¹We note that although you also raise sections 552.021 and 552.301 of the Government Code, these are not exceptions to disclosure under the Act. *See* Gov't Code §§ 552.021 (providing public information is available during normal business hours), .301 (providing procedural requirements for requesting ruling).

disclosure. *See* Gov't Code § 552.301. Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records 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). You state the authority received the request for information on June 21, 2012. However, as of the date of this letter, you have not submitted written comments explaining why the stated exceptions apply. Accordingly, we conclude the authority failed to comply with the procedural requirements mandated by section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 of the Government Code 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. *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). 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). Sections 552.103, 552.104, 552.105, 552.106, 552.107, 552.111, 552.112, 552.116, 552.125, 552.131, and 552.146 of the Government Code are discretionary exceptions to disclosure that protect a governmental body's interest and may be waived. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766, 776 (Tex. App.—Austin 1999, pet. denied) (section 552.112 is a discretionary exception that may be waived), *abrogated on other grounds by In re Bass*, 113 S.W.3d 735 (Tex. 2003); *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions including section 552.111), 592 (1991) (stating that governmental body may waive section 552.104), 564 (1990) (statutory predecessor to section 552.105 subject to waiver). Thus, in failing to comply with section 552.301, the authority has waived its arguments under these sections and may not withhold the submitted information on those bases. However, because third party interests and the remaining exceptions you raise can provide compelling reasons to withhold information, we consider whether any of the submitted information may be excepted under the Act.

Orion raises section 552.101 of the Government Code in conjunction with common-law privacy to withhold some of its submitted information. Section 552.101 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 common-law privacy. For information to be protected from public disclosure by the common-law right of privacy, the information must meet the criteria set out by the Texas Supreme Court in

Industrial Foundation v. Texas Industrial Accident Board, 540 S.W.2d 668 (Tex. 1976). In *Industrial Foundation*, the Texas Supreme Court stated information is excepted from disclosure if the information (1) contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *See id.* at 681-82. This office has found personal financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy. *See* Open Records Decision No. 545 (1990) (mortgage payments, assets, bills, and credit history).

In Open Records Decision No. 373 (1983), this office determined financial information submitted by applicants for federally-funded housing rehabilitation loans and grants was “information deemed confidential” by a common-law right of privacy. The financial information at issue in Open Records Decision No. 373 included sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits, retirement and state assistance benefits, and credit history. Similarly, we thus conclude financial information relating to a public housing resident or an applicant for housing assistance satisfies the first requirement of common-law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities.

The second requirement of the common-law privacy test requires the information not be of legitimate concern to the public. *Indus. Found.*, 540 S.W.2d at 668. While the public generally has some interest in knowing whether public funds expended for housing assistance are being given to qualified applicants, we believe ordinarily this interest will not be sufficient to justify the invasion of the applicant’s privacy that would result from disclosure of information concerning his or her financial status. *See* ORD 373 (although any record maintained by governmental body is arguably of legitimate public interest, if only relation of individual to governmental body is as applicant for housing rehabilitation grant, second requirement of common-law privacy test not met). In particular cases, a requestor may demonstrate the existence of a public interest that will overcome the second requirement of the common-law privacy test. However, whether there is a public interest in this information sufficient to justify its disclosure must be decided on a case-by-case basis. *See* Open Records Decision Nos. 523 (1989), 373.

Open Records Decision Nos. 373 and 523 draw a distinction between the confidential “background financial information furnished to a public body about an individual” and “the basic facts regarding a particular financial transaction between the individual and the public body.” Open Records Decision Nos. 523, 385 (1983). Subsequent decisions of this office analyze questions about the confidentiality of background financial information consistently with Open Records Decision No. 373. *See* Open Records Decision Nos. 600 (1992) (personal financial information not relating to the financial transaction between an individual and a governmental body is protected), 545 (employee’s participation in deferred compensation plan private), 523, 481 (1987) (individual financial information concerning applicant for public employment is closed), 480 (1987) (names of students receiving loans

and amounts received from Texas Guaranteed Student Loan Corporation are public); *see also* Attorney General Opinions H-1070 (1977), H-15 (1973) (laws requiring financial disclosure by public officials and candidates for office do not invade their privacy rights). *But see* Open Records Decision Nos. 602 at 5 (1992) (records related to salaries of those employees for whom the city pays a portion are subject to the Act). We note, however, this office has concluded the names and present addresses of current or former residents of a public housing development are not protected from disclosure under the common-law right to privacy. *See* Open Records Decision No. 318 (1982). Likewise, the amounts paid by a housing authority on behalf of eligible tenants are not protected from disclosure under privacy interests. *See* Open Records Decision No. 268 (1981); *see also* Open Records Decision Nos. 600 at 9-10, 545, 489 (1987), 480.

We note the submitted information contains business ownership percentages. This personal financial information is highly intimate or embarrassing and of no legitimate public interest. *See* ORDs 600, 545, 523, 373. Accordingly, the authority must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find none of the remaining information is highly intimate or embarrassing and of no legitimate public concern. Therefore, the authority may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

The authority raises section 552.110 of the Government Code for the submitted information. We note, however, section 552.110 is designed to protect the interests of third parties, such as Orion, not the interests of a governmental body. Thus, we do not address the authority's claim under section 552.110 of the Government Code.

Orion also raises section 552.110 of the Government Code. Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. Gov't Code § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts, which holds a trade secret to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him 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 not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] 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 776 (Tex. 1958). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.² This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See Open Records Decision No. 552 at 5 (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)*.

Upon review, we find Orion has established a *prima facie* case that some of its customer information, which we have marked, constitutes trade secret information for purposes of section 552.110(a). Accordingly, the authority must withhold the information we have marked under section 552.110(a) of the Government Code. We note, however, that Orion has made the remaining customer information it seeks to withhold publicly available on its website. Because Orion has published this information, it has failed to demonstrate this information is a trade secret. Therefore, the authority may not withhold any of Orion's remaining customer information pursuant to section 552.110(a) of the Government Code. We also find Orion has failed to demonstrate how any portion of the remaining information meets the definition of a trade secret, nor has the company demonstrated the necessary factors to establish a trade secret claim. *See ORDs. 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim), 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110)*. Therefore, the authority may not withhold any of the remaining information pursuant to section 552.110(a) of the Government Code.

The authority raises section 552.137 of the Government Code for the submitted information. 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,"

²The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other 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 [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (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 Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980)*.

unless the owner of the e-mail address consents to its release or the e-mail address falls within the scope of section 552.137(c). *See* Gov't Code § 552.137(a)-(c). We note this exception is not applicable to an e-mail address "contained in a response to a request for bids or proposals [.]” *Id.* § 552.137(c)(3). Thus, as the submitted information is contained in a response to a request for proposals, the authority may not withhold any of the e-mail addresses contained in the submitted information under section 552.137 of the Government Code.

Lastly, the authority raises sections 552.113, 552.117, 552.128, 552.130, 552.136, 552.143, 552.147, 552.149, and 552.153 of the Government Code. However, the authority did not submit any information subject to these exceptions. Thus, the authority may not withhold any of the submitted information under these exceptions. *See id.* §§ 552.113 (commercially valuable geological and geophysical information regarding exploration or development of natural resources is confidential), .117 (certain addresses, telephone numbers, social security numbers, and personal family information of certain governmental employees are confidential), .128 (information submitted in connection with application for certification as historically underutilized or disadvantaged business is confidential), .130 (certain motor vehicle record information is confidential), .136 (credit card, debit card, and other access device numbers are confidential), .143 (certain information provided by private investment fund is confidential), .147 (social security numbers of living persons are excepted under the Act), .149 (certain information received from a private entity by the comptroller or chief appraiser of an appraisal district is confidential), .153 (name of applicant for certain positions with the Teacher Retirement System of Texas is excepted under the Act and information relating to a proposal for qualifying project under Chapter 2267 is excepted under the Act). Section 552.301(e)(1)(A) requires a governmental agency to submit the requested information or a representative sample of such information and the arguments for the information it seeks to withhold. *Id.* § 552.301(a)(1)(A). Thus, the authority should only submit assertions for information that it actually submits to this office seeking to withhold. Accordingly, the authority may not withhold any of the remaining information under these provisions.

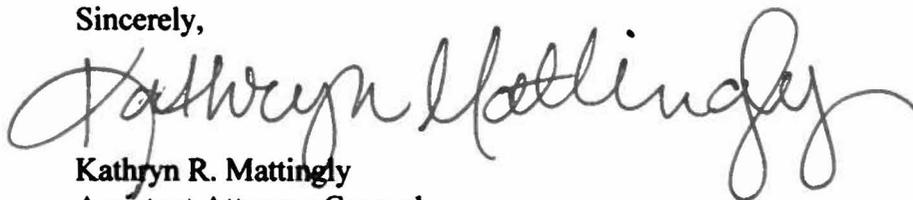
We note some of the information at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). 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.

In summary, the authority must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and section 552.110(a) of the Government Code. The remaining information must be released; however, any information subject to 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,



Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/bhf

Ref: ID# 464102

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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