



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 4, 2012

Mr. Gary B. Lawson  
Strasburger & Price, L.L.P.  
901 Main Street, Suite 4400  
Dallas, Texas 75202-3794

OR2012-13949

Dear Mr. Lawson:

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# 463759.

The Dallas Police and Fire Pension System (the "system"), which you represent, received a request for six categories of information related to two named individuals and Knudson Luxury Housing.<sup>1</sup> The system has made some of the requested information available to the requestor. You either claim or indicate some of the submitted information is excepted from disclosure under sections 552.101, 552.104, 552.105, 552.107, 552.110, 552.116, 552.136, 552.137, and 552.143 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we must address the system's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. Gov't

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<sup>1</sup>You inform us the system is the sole owner of KLH IV, LP, which owns the property at issue, and of Western Housing LLP, the general partner of KLH IV, LP.

<sup>2</sup>We assume 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 those records contain substantially different types of information than that submitted to this office.

Code § 552.301(b). Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld. *Id.* § 552.301(e)(1)(A). The system received the request for information on June 11, 2012. Thus, the system's ten-business-day deadline under section 552.301(b) was June 25, 2012, and its fifteen-business-day deadline under section 552.301(e) was July 2, 2012. You timely asserted and provided arguments for sections 552.101, 552.105, 552.110 of the Government Code and indicate the system will redact e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>3</sup> You submitted responsive information on July 2, 2012, and marked some of this information under sections 552.104, 552.107, 552.116, 552.136, and 552.143 of the Government Code. However, the system did not raise any of these exceptions with this office on or before June 25, 2012. *See* Gov't Code § 552.301(b). In addition, as of the date of this letter, the system has provided no arguments explaining the applicability of these exceptions to the information at issue. *See id.* § 552.301(e)(1)(A). Thus, we conclude the system failed to comply with the procedural requirements mandated by section 552.301 regarding these exceptions.

Generally, a governmental body's failure to timely raise, or provide arguments in support of, an exception to disclosure in accordance with section 552.301 results in the waiver of the claimed exception. *See generally id.* § 552.302. Sections 552.104, 552.107, and 552.116 are discretionary in nature; they serve only to protect a governmental body's interests and may be waived. *See* Open Records Decision Nos. 676 at 12 (2002) (attorney-client privilege under section 552.107 or Texas Rule of Evidence 503 constitutes compelling reason to withhold information under section 552.302 only if information's release would harm third party), 522 (1989) (discretionary exceptions in general). Thus, the system has waived these sections and may not withhold any of the information at issue on those bases. Although section 552.143 is a mandatory exception that cannot be waived by the system's failures under section 552.301, you have provided no arguments explaining its applicability to the information you marked on that ground; thus, we have no basis for finding this marked information confidential under section 552.143 and the system may not withhold it from release on that ground. *See* Gov't Code § 552.301(e)(1)(A). Section 552.136 is also a mandatory exception that cannot be waived, and we note it is applicable to some of the submitted information. Therefore, we will consider whether any of the information at issue is excepted from release under section 552.136.

We next note the submitted information contains completed reports and contracts that are subject to section 552.022 of the Government Code. Section 552.022(a) provides in relevant part the following:

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<sup>3</sup>Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold specified 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.

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). Although you assert the information subject to section 552.022 is excepted from disclosure under section 552.105, section 552.105 is a discretionary exception to disclosure that protects the governmental body's interests and does not make information confidential under the Act. *See id.* § 552.007; Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally); *cf.* Open Records Decision No. 564 at 2 (1990) (statutory predecessor to section 552.105 "was designed to protect a governmental body's planning and negotiating position with respect to particular transactions"). Therefore, the system may not withhold the information subject to section 552.022 under section 552.105. However, you assert some of this information is subject to sections 552.101 and 552.110, which does make information confidential under the Act. Therefore, we will consider the applicability of these sections to the information subject to section 552.022. We also consider the applicability of these sections, as well as the remaining exceptions raised, for the information not subject to section 552.022.

You assert some of the submitted information is excepted from disclosure under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses the doctrine of common-law privacy, which 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Prior decisions of this office have found financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy but there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). For example, information related to an individual's mortgage payments, assets, bills, and credit history is generally protected by the common-law right to privacy. *See* Open Records Decision Nos. 545, 523 (1989); *see also* ORD 600 (personal financial information includes choice of particular insurance carrier). However, the names, addresses, and telephone numbers of members of the public are generally not highly intimate or embarrassing. *See*

Open Records Decision Nos. 551 at 3 (1990) (disclosure of person's name, address, or telephone number not invasion of privacy), 455 at 7 (1987) (home addresses, telephone numbers, dates of birth not protected under privacy). In addition, the doctrine of common-law privacy protects the privacy interests of individuals, not of corporations or other types of business organizations. See Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); see also *U.S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App—Houston [14th Dist.] 1989)), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990)) (corporation has no right to privacy).

The submitted documents contain personal financial information that the public does not have a legitimate interest in. See Open Records Decision Nos. 620 (1993), 600. We have marked the information that the system must withhold under section 552.101 in conjunction with common-law privacy. Upon review, however, we find the remaining information is not confidential under common-law privacy, and the system may not withhold it under section 552.101 on that ground.

Section 552.101 also encompasses the doctrine of constitutional privacy. 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 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; see *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985). After review of the submitted information, we find it does not contain information that is confidential under constitutional privacy. Therefore, the system may not withhold it under section 552.101 on that ground.

You assert some of the remaining information is excepted from disclosure under section 552.105 of the Government Code, which excepts from disclosure information related to the following:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. This provision is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. See Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information that is excepted from disclosure under

section 552.105 that pertains to such negotiations may be excepted from disclosure so long as the transaction relating to that information is not complete. *See* ORD 310. A governmental body may withhold information “which, if released, would impair or tend to impair [its] ‘planning and negotiating position in regard to particular transactions.’” *Open Records Decision Nos. 357 at 3, 222 (1979)*. The question of whether specific information, if publicly released, would impair a governmental body’s planning and negotiating position with regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body’s good-faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564.

You assert the names of renters of luxury homes in the submitted information are excepted from disclosure under section 552.105 because their release “would chill these persons and other future possible renters from being interested in renting from any entity related to the [s]ystem and would thereby destroy the value of the property to the [s]ystem by putting it at a grave competitive disadvantage to other property owners with which these properties competes [sic].” However, upon review, we find the system has not established the applicability of section 552.105 to the information at issue. Accordingly, the system may not withhold any of the remaining information you have marked under section 552.105.

You assert some of the submitted information is excepted from disclosure under section 552.110 of the Government Code. However, this section protects only the interests of the third parties that have provided information to a governmental body, and not those of the governmental body itself. Therefore, we do not address your arguments under section 552.110 and the system may not withhold any of the information you have marked on that ground.

Section 552.117 of the Government Code may be applicable to some of the submitted information.<sup>4</sup> Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov’t Code § 552.117(a)(1). Section 552.117 also encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cellular phone service. *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 item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body’s receipt of the request for the information. *See* *Open Records Decision No. 530 at 5 (1989)*. Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former official or employee who made

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<sup>4</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* *Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987)*; *see, e.g., Open Records Decision No. 470 at 2 (1987)* (because release of confidential information could impair rights of third parties and because improper release constitutes a misdemeanor, attorney general will raise predecessor statute of section 552.101 on behalf of governmental bodies).

a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Therefore, the system must withhold the cellular telephone number we have marked under section 552.117(a)(1) if the employee at issue made a timely election to keep the information confidential and if it was not provided to the employee at issue at public expense.

Section 552.136 of the Government Code provides in part the following:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device 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.

(b) Notwithstanding 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 Code § 552.136(a)-(b). We note this office has determined an insurance policy number is an access device number for purposes of section 552.136. Open Records Decision No. 684 at 9 (2009). The system must withhold the information we have marked under section 552.136. However, you have not explained how the remaining information you seek to withhold under section 552.136 consist of access device numbers used to obtain money, goods, services, or any item of value, or used to initiate the transfer of funds. *See id.* §§ 552.136(a), 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). Therefore, you have failed to demonstrate the applicability of section 552.136 to the remaining information at issue, and the system may not withhold them on that ground.

You indicate some of the remaining information is excepted from disclosure under section 552.137 of the Government Code, which provides in relevant part as follows:

(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.

(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.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(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). We have marked e-mail addresses of members of the public in the submitted documents. These e-mail addresses do not appear to be of a type specifically excluded by section 552.137(c), and you do not inform us a member of the public has affirmatively consented to their release. Therefore, the system must withhold the information we have marked under section 552.137 of the Government Code. However, the remaining information you seek to withhold under section 552.137 either does not consist of e-mail addresses of members of the public, or it consists of e-mail addresses that are subject to section 552.137(c). *See id.* § 552.137(a). Thus, we conclude the system has not established the remaining information at issue is excepted from disclosure under section 552.137.

Finally, we note some of the materials 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.

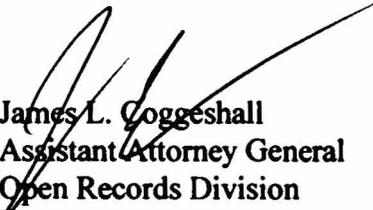
To conclude, the system must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and under sections 552.136 and 552.137 of the Government Code. The system must withhold

the cellular telephone numbers we have marked under section 552.117(a)(1) of the Government Code if the employee at issue made a timely election to keep the information confidential and if it was not provided to the employee at issue at public expense. The system must release the remaining information, but may only release any copyrighted information in accordance with copyright law.<sup>5</sup>

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](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,



James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/tch

Ref: ID# 463759

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>5</sup>We note the submitted information contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.