



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 30, 2012

Mr. Carey E. Smith
General Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2012-19305

Dear Mr. Smith:

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# 472500 (HHSC Ref Nos. OR-20120911-7241, OR-20120927-7287, OR-20121101-7368, OR-20121023-7354, OR-20121112-7394, OR-20121128-7432).

The Texas Health and Human Services Commission (the "commission") received six requests from five different requestors for information related to RFP# 529-12-0005 for electronic benefit transfer services, including the bids, pricing information, and technical evaluation scores. You state the commission has released some of the information. Although you take no position with respect to the public availability of the submitted information, you state the proprietary interests of certain third parties might be implicated. Accordingly, you notified FIS, Inc., ("FIS"), J.P. Morgan Chase Bank ("Chase"), and Xerox State & Local Solutions, Inc. ("Xerox") of the request and of their right to submit arguments to this office explaining why their information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received arguments submitted by Chase. We have considered the submitted arguments and reviewed the submitted information.

First, we must address the commission's responsibilities under the Act. Section 552.301 of the Government Code prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e), a governmental body that receives a request for information it wishes to withhold under an exception to disclosure 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. Gov't Code § 552.301(e). The commission received the first request for information on September 11, 2012. You state the commission failed to provide all of the information responsive to the first request in its initial request for a ruling, and you submitted that additional information in a supplemental mailing on November 6, 2012. Consequently, we find the commission failed to comply with the requirements of section 552.301(e) with respect to this additional information.

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, 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) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). Normally, a compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). The information at issue pertains to a third party. Thus, a compelling reason exists to withhold this information. Accordingly, we will consider Chase's arguments against disclosure of this information.

Next, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received arguments from FIS or Xerox. Thus, FIS and Xerox have not demonstrated they have a protected proprietary interest in any of the submitted information. *See id.* § 552.110(a)–(b); Open Records Decision Nos. 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), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the commission may not withhold the submitted information on the basis of any proprietary interests FIS or Xerox may have in the information.

We understand Chase to assert some of the submitted resumes are protected under common-law privacy. 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. The type 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. *Id.* at 683. We note an individual's name, education, prior employment, and personal information are not ordinarily private information subject to section 552.101. *See* Open Records Decision Nos. 554 (1990), 448 (1986). Upon review, we find none of the submitted information is highly intimate or embarrassing. Accordingly, the commission may not withhold the submitted information under section 552.101 of the Government Code on that basis.

Chase raises section 552.102 of the Government Code, which excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). We note section 552.102 is applicable to information contained in personnel file of an employee of a governmental body. The submitted information is not contained in the personnel file of a government employee. Accordingly, section 552.102(a) is not applicable and the commission may not withhold any of Chase's information on that basis. As no other exceptions are raised, the submitted information must be released.¹

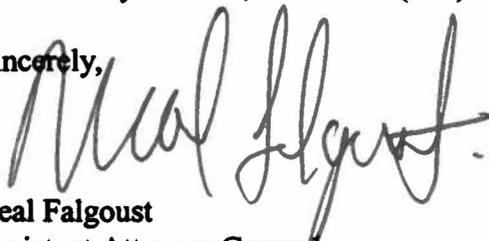
We note some of the submitted information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). However, a governmental body must allow inspection of 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.

¹The submitted information contains social security numbers. Section 552.147 of the Government Code permits a governmental body to redact the social security number of a living person without requesting a decision from this office. *See* Gov't Code § 552.147(b).

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,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/ag

Ref: ID# 472500

Enc. Submitted documents

c: Requestors
(w/o enclosures)

Ms. Ann E. Ray
Government Solutions
FIS, Inc.
11000 West Lake Park Drive
Milwaukee, Wisconsin 53224
(w/o enclosures)

Ms. Brenda Pollard
J.P. Morgan Chase
221 West 6th Street, FL 2
Austin, Texas 78701
(w/o enclosures)