



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 9, 2013

Ms. Janna Ivey Lindig
County Attorney
Bandera County
P.O. Box 656
Bandera, Texas 78003

OR2013-13849

Dear Ms. Lindig:

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# 495859.

Bandera County (the "county") received a request for the identity of a delinquent hotel occupancy taxpayer and the amount of the delinquency. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also received and considered comments from the taxpayer whose information is at issue (the "taxpayer"). *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released).

Initially, we note the purpose of the Act is to prescribe conditions under which members of the general public can obtain information from a governmental body. *See* Attorney General Opinion JM-119 (1983) (statutory predecessor). An official of a governmental body who, in an official capacity, requests information held by the governmental body is not acting as a member of the public in doing so. *Id.* Thus, exceptions to public disclosure under the Act do not control the official's right of access to information maintained by the governmental body. *See id.* at 3 (member of community college district board of trustees, acting in official capacity, has an inherent right of access to information maintained by district).

In this instance, the requestor is the county commissioner for Precinct 1. It is unclear from our review whether the requestor is requesting the information in his personal capacity as a member of the public or in his official capacity as county commissioner. Accordingly, we rule conditionally on this matter. Therefore, in the event the requestor is acting in his official capacity, we find the present request is not a request by a member of the public under the Act, and we determine that the county may not withhold the requested information from the requestor pursuant to the Act's exceptions to required public disclosure.¹ *See id.*; *see also id.* JC-120 at 5 (1999) (governmental body may adopt procedure for review of certified agenda or tape recording of closed meeting, but may not absolutely prohibit review by member, even if member did not attend meeting). In the event, however, the requestor is making the present request in his personal capacity as a member of the public, we will address the arguments against disclosure.

We must address the county's procedural obligations under section 552.301 of the Government Code when requesting a decision from this office under the Act. 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) 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). You state the current request is a re-urging of a request made on May 20, 2013, but subsequently withdrawn. You have included in your submission to this office a copy of the original request, dated May 20, 2013. However, as of the date of this letter, you have not submitted to this office a copy of the written request for information currently at issue. Consequently, we find the county failed to comply with 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 results in the legal presumption that 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, 381-82 (Tex. App.—Austin 1990, no writ); 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. *See* Open Records Decision No. 150

¹We note the release of the requested information to this requestor, acting in his official capacity, would not constitute a release of the information to the general public, and the county would not waive any potential exceptions to disclosure of the information under the Act. *See* Open Records Decision No. 666 at 4 (2000) (municipality's disclosure to municipally-appointed citizen advisory board would not constitute release to public as contemplated under Gov't Code § 552.007).

at 2 (1977). You raise section 552.101 of the Government Code for the submitted information, and also assert third party interests are at stake. Additionally, we note portions of the submitted information are subject to section 552.136 of the Government Code.² Because sections 552.101 and 552.136 and third party interests can provide compelling reasons to withhold information, we will consider whether the submitted information is excepted from disclosure under the Act.

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 information made confidential by other statutes, including section 111.006 of the Tax Code. Section 111.006 of the Tax Code provides as follows:

(a) The following matter is confidential and may not be used publicly, opened to public inspection, or disclosed except as permitted under Subsection (b) of this section:

(1) a federal tax return or federal tax return information required to have been submitted to [the Texas Comptroller of Public Accounts (the “comptroller’s office”)] with a state tax return or report; and

(2) all information secured, derived, or obtained by the comptroller or the attorney general during the course of an examination of the taxpayer’s books, records, papers, officers, or employees, including an examination of the business affairs, operations, source of income, profits, losses, or expenditures of the taxpayer.

Tax Code § 111.006(a)(1), (a)(2). Section 111.006 applies to the comptroller’s office and makes confidential information submitted to the comptroller’s office or information that the comptroller’s office obtained during the course of an examination conducted under chapter 111. *Cf.* Open Records Decision No. 520 (1989) (section 151.027 of the Tax Code, which has language similar to section 111.006, applies only to records and information in the custody of the comptroller’s office and not to information in another governmental body’s possession). Thus, this section is not applicable to information held by the county and the county may not withhold the submitted information on this basis.

The taxpayer contends the requested information is confidential under section 552.101 in conjunction with section 151.027 of the Tax Code. Section 151.027(a) provides confidentiality for information collected under the Limited Sales, Excise, and Use Tax Act.

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Section 151.027(b) provides for the confidentiality of information obtained during the course of an examination of a taxpayer's books. Section 151.027 applies only to information furnished to and reviewed by the comptroller's office during its investigation of a taxpayer. Tax Code § 151.027; *see* Open Records Decision No. 520 (1989) (section 151.027 of the Tax Code applies only to records and information in the custody of the comptroller's office and not to information in another governmental body's possession). Therefore, section 151.027 applies only to the comptroller's office, not the county. *See* Tax Code § 151.027; ORD 520. In this instance, as noted above, the submitted information is not in the custody of the comptroller's office. Thus, this information is not subject to section 151.027 of the Tax Code, and may not be withheld on that basis.

The taxpayer asserts the submitted information should be withheld pursuant to section 552.110(b) of the Government Code. Section 552.110(b) excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

The taxpayer claims the submitted information constitutes commercial information that, if released, would cause the taxpayer substantial competitive harm. In advancing her arguments, we understand the taxpayer to rely, in part, on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body's ability to obtain necessary information in the future. *National Parks*, 498 F.2d 765. However, section 552.110(b) has been amended since the issuance of *National Parks*. Section 552.110(b) now expressly states the standard for excepting from disclosure confidential information. The current statute does not incorporate this aspect of the *National Parks* test; it now requires only a specific factual demonstration that release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. *See* ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). Thus, the ability of a governmental body to obtain information from private parties is no longer a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only the taxpayer's interest in her information.

Upon review, we find the taxpayer has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of her information would cause her

substantial competitive harm. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because bid specifications and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, and qualifications and experience). Thus, the county may not withhold any of this information under section 552.110(b) of the Government Code on the taxpayer's behalf.

Section 552.136(b) of the Government Code provides, "[n]otwithstanding any other provision of [the Act], 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(b); *see id.* § 552.136(a) (defining "access device"). Therefore, the county must withhold the taxpayer account numbers we have marked under section 552.136 of the Government Code.

In summary, the county must withhold the taxpayer account numbers we have marked under section 552.136 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Tim Neal
Assistant Attorney General
Open Records Division

TN/dls

Ref: ID# 495859

Enc. Submitted documents

c: Requestor
(w/o enclosures)