ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 4, 2014

Ms. Cathy Cunningham
Counsel for the City of Keller
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4201 Wingren Drive, Suite 108
Irving, Texas 75062-2763

OR2014-09519

Dear Ms. Cunningham:

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# 524720 (ORR# 78-14).

The City of Keller (the "city"), which you represent, received a request for telephone message recordings for five named individuals during a specified time period. You state the city has released some of the requested information. You argue some of the submitted information is not subject to the Act. You also claim the submitted information is excepted from disclosure under sections 552.101 and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you argue the submitted information is not subject to the Act. The Act applies to "public information," which is defined in section 552.002 of the Government Code as

> information that is written, produced, 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:
>
> (A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

(3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Gov't Code § 552.002(a). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). Information is "in connection with the transaction of official business" if it is "created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer's or employee's official capacity, or a person or entity performing official business or a government function on behalf of a governmental body, and pertains to official business of the governmental body." *Id.* § 552.002(a-l). Moreover, section 552.001 of the Act provides it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. *See id.* § 552.001(a).

The city contends some of the requested information is not subject to the Act because the individuals discussed are not employees or agents of the city. However, we note the information at issue was created and is maintained by the city. We further note the information at issue pertains to the city's official business. Accordingly, we find this information is subject to the Act and the city must release it unless the city demonstrates the information falls within an exception to public disclosure under the Act. *See id.* §§ 552.006, .021, .301, .302.

Next, the city argues some of the submitted information should be withheld because the information was supplied with the expectation of confidentiality. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

Some of the information in the compact disc you have labeled "MEDICAL" may be subject to section 552.117 of the Government Code.[1] Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). 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 employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential.

In this instance, you inform us the individual about whom each caller is speaking in the compact disc you labeled "MEDICAL" is a family member of the caller. You also inform us the first caller is an employee of the city. However, you do not inform us whether the second caller is a current or former employee or official of the city. Further, you do not inform us whether any current or former city employee or official timely requested confidentiality under section 552.024 of the Government Code. Therefore, we must rule conditionally. To the extent the callers are current or former employees or officials of the city, and to the extent the current or former city employees or officials timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the information we have noted under section 552.117(a)(1) of the Government Code. If either of these conditions are not met, the city may not withhold the information we have noted under section 552.117(a)(1).

Section 552.101 of the Government Code excepts "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 that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987).

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[1]The 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).

You raise section 552.131 of the Government Code for the information in the compact disc you have labeled "ECONOMIC DEVELOPMENT." Section 552.131 relates to economic development information and provides in part:

> (a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:
>
> > (1) a trade secret of the business prospect; or
> >
> > (2) commercial 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.
>
> (b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131(a)-(b). Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" and "commercial 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." *Id.* This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999). We note section 552.131(a) does not protect the interests of a governmental body regarding the release of information pertaining to economic development negotiations. Thus, we do not address your arguments under section 552.131(a) for the information at issue. Further, we have not received arguments from any third party explaining how the remaining responsive information contains the third party's trade secrets or its commercial or financial information. *See* Gov't Code § 552.305(d)(2)(B). Because no third party has demonstrated the information at issue qualifies as a trade secret or release of the information at issue would result in substantial competitive harm, we conclude none of the information at issue may be withheld pursuant to section 552.131(a).

Section 552.131(b) protects information about a financial or other incentive that is being offered to a business prospect by a governmental body or another person. *See id.* § 552.131(b). You claim the callers in the compact disc you have labeled "ECONOMIC NEGOTIATIONS" "discuss possible economic development discussions[.]" You also inform us "no deal has been finalized in regard to these calls[.]" However, upon review, we find you have not demonstrated how any portion of the information at issue reveals financial or other incentives that are being offered to a business prospect. Thus, we conclude the city

Upon review, we find some of the information in the compact disc you labeled "MEDICAL," which we have noted, satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. However, to the extent the city must withhold under section 552.117(a)(1) of the Government Code the identity of an individual whose information is at issue, the information we have noted relates to an individual who has been de-identified and whose privacy interest is thus protected. In that case, the city may not withhold the information pertaining to the de-identified individual under section 552.101 in conjunction with common-law privacy. However, to the extent the city may not withhold under section 552.117(a)(1) of the Government Code the identity of an individual whose information is at issue, the city must withhold the information we noted under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have not demonstrated how any of the remaining information at issue is highly intimate or embarrassing and not of legitimate public concern. Thus, the city may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the common-law informer's privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided the subject of the information does not already know the informer's identity. *See* Open Records Decision No. 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 1-2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton Rev. Ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4 (1988). However, individuals who provide information in the course of an investigation but do not make the initial report of the violation are not informants for the purposes of claiming the informer's privilege. The privilege excepts the informer's statement only to the extent necessary to protect that informer's identity. Open Records Decision No. 549 at 5 (1990).

You state portions of the information in the compact disc you have labeled "POLICE" identify complainants who reported violations of law to the city's police department (the "department"). Based upon your representations and our review, we conclude the city has demonstrated the applicability of the common-law informer's privilege to some of the information at issue, which we have noted. Therefore, the city may withhold the information we noted under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. However, you have not demonstrated how any of the remaining information at issue reveals the identity of an individual who made the initial report of a criminal violation to the department for purposes of the informer's privilege. Accordingly, the city may not withhold any of the remaining information at issue under section 552.101 on that basis.

may not withhold any of the information at issue under section 552.131(b) of the Government Code.

In summary, to the extent the callers at issue in the compact disc you marked "MEDICAL" are current or former employees or officials of the city, and to the extent the current or former city employees or officials timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the information we have noted under section 552.117(a)(1) of the Government Code. If either of these conditions are not met, then the city must withhold the information we noted in the compact disc you marked "MEDICAL" under section 552.101 of the Government Code in conjunction with common-law privacy. The city may withhold the information we noted in the compact disc you marked "POLICE" under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. The city must release the remaining submitted information.

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,

Claire Morris Sloan

Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 524720

Enc. Submitted documents

c: Requestor
(w/o enclosures)