



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 4, 2014

Mr. Michael F. Pezzulli  
Counsel for City of McKinney  
Pezzulli Barnes, L.L.P.  
17300 Preston Road, Suite 220  
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OR2014-13498

Dear Mr. Pezzulli:

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# 531650.

The City of McKinney (the "city"), which you represent, received a request for documents during a specified time period relating to (1) any notices issued to the city by the FBI regarding the investigation of a named individual and the city's purchase of software and computer systems; (2) documents related to any internal investigation of the city's use of outside vendors and contracts for the purchase of software and computer systems; (3) any documents relating to the hiring of Pezzulli Barnes (the "firm") to conduct an internal investigation; and (4) the final report provided to the city by the firm regarding the internal investigation. You state the city does not have some information responsive to the request.<sup>1</sup> You also state some information was released to the requestor. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. You further state you notified Innoprise Software of the request and of its right to submit arguments to this office as to why the information should not be released.

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<sup>1</sup>The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

*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 in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.

Initially, you state you sought clarification for a portion of the requested information. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). Further, you state the city would have to review 5,500 pages of documents to respond to this portion of the request. We note a governmental body has a duty to make a good-faith effort to relate a request for information to information the governmental body holds. Open Records Decision No. 561 (1990). Further, the administrative inconvenience in responding to a request for information is not grounds for refusing to comply with a request under the Act. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976). In this case, as you have submitted information responsive to this portion of the request and have raised exceptions to disclosure for this information, we will address the applicability of the claimed exceptions to this information.

Next, we address the city's procedural obligation under the Act. Section 552.301(e-1) of the Government Code requires a governmental body that submits written comments requesting a ruling to the attorney general under subsection 552.301(e)(1)(A), to send a copy of those comments to the person who requested the information from the governmental body not later than the fifteenth business day after the date of receiving the written request. Gov't Code § 552.301(e-1). Section 552.301(e-1), however, authorizes the governmental body to redact information from those written comments that discloses or contains the substance of the information requested. *Id.* We note the city redacted virtually the entirety of its arguments in support of its raised exceptions in the copy of the comments sent to the requestor. We further note portions of the city's comments neither disclose nor contain the substance of the submitted information. We, therefore, conclude the city failed to comply with section 552.301(e-1) in requesting a decision with respect to its arguments under sections 552.107 and 552.111 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to provide the requestor with information required in section 552.301 results in the legal presumption the requested information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See* Gov't Code § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (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 governmental body may demonstrate a compelling reason to withhold information by showing the information is made confidential by another source of law or affects third party interests. *See* Open Records Decision No. 630 (1994). As noted above, you raise sections 552.107 and 552.111 as exceptions to disclosure. However, these sections are discretionary exceptions that protect a governmental body's interests and may be waived. Open Records Decision Nos. 677 (2002) (governmental body may waive attorney work product privilege under section 552.111), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (governmental body may waive section 552.111). As such, sections 552.107 and 552.111 do not constitute compelling reasons to withhold information for purposes of section 552.302, and the city may not withhold the responsive information under those exceptions. However, because sections 552.101, 552.117, 552.136, and 552.137 of the Government Code and third party interests can provide compelling reasons to withhold information, we will consider their applicability to the submitted information.<sup>2</sup>

We note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Innoprise Software on why the submitted information should not be released. Therefore, we have no basis to conclude Innoprise Software has protected proprietary interests in the submitted information. *See id.* § 552.110; 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 city may not withhold any of the submitted information on the basis of any proprietary interests Innoprise Software may have in it.

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.*, 540 S.W.2d at 685. 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*

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<sup>2</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

*Foundation. Id.* at 683. This office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Additionally, this office has found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. *See* Open Records Decision No. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, protected under common-law privacy). Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the city must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117 of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *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 piece of information is protected by section 552.117 must be determined at the time the request for it is made. *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 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. Thus, to the extent the information we marked consists of the home address, telephone number, emergency contact information, social security number, or family member information of current or former employees who timely requested confidentiality under section 552.024, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. However, the city must only withhold any marked cellular telephone numbers to the extent the cellular telephone service is not paid for by the governmental body. If the individuals at issue did not make timely elections under section 552.024, the city may not withhold the marked information under section 552.117(a)(1) of the Government Code.

Section 552.136 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). Section 552.136(a) defines "access device" as "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 . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds

other than a transfer originated solely by paper instrument.” *Id.* § 552.136(a). Upon review, we find the city must withhold the frequent flyer account numbers we have marked under section 552.136 of the Government Code.

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” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). We note section 552.137 does not apply to an e-mail address provided to a governmental body by a person or his agent who has a contractual relationship or who seeks a contractual relationship with the governmental body. *See id.* § 552.137(c). Because we are unable to determine whether the e-mail addresses we have marked are excluded by subsection (c), we must rule conditionally. Therefore, to the extent the marked e-mail addresses belong to members of the public who have not affirmatively consented to their release, the city must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code. However, to the extent the marked e-mail addresses belong to agents of companies with contractual relationships or who seek to contract with the city, the e-mail addresses may not be withheld under section 552.137.

In summary, the city must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the information we marked consists of the home address, telephone number, emergency contact information, social security number, or family member information of current or former employees who timely requested confidentiality under section 552.024, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the city must only withhold any marked cellular telephone numbers to the extent the cellular telephone service is not paid for by the governmental body. The city must withhold the frequent flyer account numbers we have marked under section 552.136 of the Government Code. To the extent the e-mail addresses we have marked belong to members of the public who have not affirmatively consented to their release, the city must withhold the personal e-mail addresses under section 552.137 of the Government Code. The city must release the remaining 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](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,



Lauren Dahlstein  
Assistant Attorney General  
Open Records Division

LMD/som

Ref: ID# 531650

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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