



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 13, 2020

Mr. Nathan Brown
Assistant City Attorney
City of New Braunfels
550 Landa Street
New Braunfels, Texas 78130

OR2020-13534

Dear Mr. Brown:

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# 827967 (ORR 2020-142).

The City of New Braunfels (the "city") received a request for information related to sales tax rebates. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. Additionally, you state release of the submitted information may implicate the proprietary interests of Buc-ee's, Ltd. ("Buc-ee's") and HEB, Inc. ("HEB"). Accordingly, you state, and provide documentation showing, you notified the interested third parties of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Buc-ee's. We have reviewed the submitted information and considered the submitted arguments.

Initially, 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 HEB explaining why the submitted information should not be released. Therefore, we have no basis to conclude HEB has a protected proprietary interest 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 the submitted information on the basis of any proprietary interest HEB may have in the information.

Section 552.101 of the Government Code exempts 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). The city and Buc-ee’s contend some of the submitted information is subject to section 111.006 of the Tax Code. 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 city, and the city may not withhold the submitted information on this basis.

Section 552.101 of the Government Code also encompasses 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. Tax Code § 151.027(a). Section 151.027(b) provides for the confidentiality of information obtained during the course of an examination of a taxpayer’s books. *Id.* § 151.027(b). The city and Buc-ee’s contend some of the submitted information is subject to section 151.027 of the Tax Code. However, section 151.027 applies only to information furnished to and reviewed by the comptroller during its investigation of a taxpayer. *Id.* § 151.027; *see* ORD 520 (section 151.027 applies only to information in comptroller’s custody, not to information in another governmental body’s possession). Thus, section 151.027 applies only to the comptroller, and not the city. *See*

Tax Code § 151.027; ORD 520. Accordingly, as the information at issue is not in the custody of the comptroller, we find it is not subject to section 151.027, and the city may not withhold the information under section 552.101 of the Government Code on that basis.

Section 552.110(c) of the Government Code excepts from disclosure “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[.]” Gov’t Code § 552.110(c). Buc-ee’s argues some of its information consists of commercial or financial information subject to section 552.110(c). Upon review, we find Buc-ee’s has demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the city must withhold the information we marked under section 552.110(c) of the Government Code.¹ However, we find Buc-ee’s has failed to provide specific factual evidence demonstrating the remaining information at issue constitutes commercial or financial information, the release of which would result in substantial competitive harm. Therefore, the city may not withhold any of the remaining information at issue under section 552.110(c) of the Government Code.

Section 552.110(b) of the Government Code states “information is [excepted from required disclosure] if it is demonstrated based on specific factual evidence that the information is a trade secret.” *See id.* § 552.110(b). Section 552.110(a) defines a trade secret as all forms and types of information if:

- (1) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and
- (2) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

Id. § 552.110(a). Buc-ee’s argues the remaining information at issue consists of trade secrets subject to section 552.110(b). Upon review, we find Buc-ee’s has failed to provide specific factual evidence demonstrating any portion of the remaining information at issue is a trade secret. Therefore, the city may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

In summary, the city must withhold the information we marked under section 552.110(c) 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.

¹ As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Sean McCormick
Attorney
Open Records Division

SMC/mo

Ref: ID# 827967

Enc. Submitted documents

c: Requestor
(w/o enclosures)

2 Third Parties
(w/o enclosure)