



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 19, 2018

Mr. Jon Thatcher
City Attorney
City of Forney
P.O. Box 826
Forney, Texas 75126

OR2018-23249

Dear Mr. Thatcher:

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# 727856.

The City of Forney (the "city") received a request for all employment applications and resumes for the city manager position. We understand you to argue the requested information is not subject to the Act. Additionally, although you take no position as to whether the requested information is excepted under the Act, you state release of this information may implicate the proprietary interests of Strategic Government Resources ("SGR"). Accordingly, you state, and provide documentation showing, you notified SGR of the request for information and of its right to submit arguments to this office as to why the information at issue 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 considered the submitted arguments.

Initially, we understand you to assert the requested information is not subject to the Act because the city does not possess, maintain, or have access to the requested information. The Act is applicable only to "public information." *See* Gov't Code §§ 552.002, .021. Section 552.002(a) defines "public information" 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;
- (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.

Id. § 552.002(a). 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-1). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and thus is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). Thus, the Act encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. *Id.* § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). Where a third party has prepared information on behalf of a governmental body and the governmental body has a right of access to it, the information is subject to the Act, even though it is not in the governmental body's custody. Open Records Decision No. 558 (1990).

You assert the city does not currently have any of the responsive information in its possession and only the information of any named finalists will become the property of the city under the agreement. We understand you to assert the requested information is maintained by SGR with which the city contracted to complete an executive recruitment search for a city manager. You claim only the information of any named finalists will become the property of the city under the agreement, and in support, have provided to this office a copy of the agreement with SGR entered into on September 21, 2017. We note SGR received a fee for conducting the recruitment search. Thus, we find public money was spent for the purpose of writing, producing, collecting, assembling, or maintaining the information. *See id.* § 552.002(a)(2)(C). Furthermore, the information pertains to the transaction of

official city business. Accordingly, the information at issue constitutes “public information” as defined by section 552.002(a) and is subject to the Act.

We must now address the city’s obligations under the Act. Section 552.301(e) describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. *See* Gov’t Code § 552.301. 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). The city received the request for information on June 20, 2018. However, as of the date of this letter, the city has not submitted for our review a copy or representative sample of the information requested. Consequently, we find the city 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 procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *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). Although the city also raises third-party interests, which can provide compelling reasons for non-disclosure, because you have not submitted the requested information for our review, we have no basis for finding any of the information subject to this exception. Furthermore, we have not received comments from SGR explaining how release of the requested information would affect its proprietary interests. *See* Gov’t Code § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence 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). Therefore, the city must release the requested information pursuant to section 552.302 of the Government Code. If you believe the information may not lawfully be released, you must challenge this ruling in court pursuant to section 552.324 of the Government Code.

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,



Kelly McWethy
Assistant Attorney General
Open Records Division

KSM/mo

Ref: ID# 727856

Enc. Submitted documents

c: Requestor
(w/o enclosures)