



April 3, 2002

Mr. Dennis P. Duffy  
General Counsel  
University of Houston System  
311 East Cullen Building, Suite 212  
Houston, Texas 77204-2028

OR2002-1626

Dear Mr. Duffy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 161737.

The University of Houston System (the "system") received a request for the following information:

1. Ground Leases for the Cambridge Oaks and Cullen Oaks properties.
2. Joint Venture and/or Partnership Agreements between Century Development and [the system].
3. Joint Venture and/or Partnership Agreements between American Campus Communities and [the system].
4. The proforma (sic) for Cullen Oaks, the newest apartment project.
5. Documents describing and/or discussing financing alternatives for Cullen Oaks.
6. Any study showing the market for student housing on campus.
7. The most recent approved budget for (a) Cambridge Oaks and (b) Cullen Oaks.

You inform this office that information responsive to items 1-3 and 6-7 of the request has been released to the requestor. You claim that the release of a portion of the requested

information, specifically, items 4-5 of the request, may implicate the privacy or proprietary rights of an interested third party, American Campus Communities, L.L.P. ("ACC"). Accordingly, you indicate that you notified the third party of the request for information pursuant to section 552.305 of the Government Code. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). You raise no exception to disclosure on behalf of the system and make no arguments regarding the proprietary nature of ACC's information.

We note that the system did not seek an open records decision from this office within the statutory ten-day period. *See* Gov't Code § 552.301. The system received the request for information on January 7, 2002. However, you did not request a decision from this office until January 28, 2002, more than ten business days after the date that you received the request. The system's delay in this matter results in the presumption that the requested information is public. *See* Gov't Code § 552.302; *see also* *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). In order to overcome the presumption that the requested information is public, a governmental body must provide compelling reasons why the information should not be disclosed. *See id.* Normally, a compelling interest is that some other source of law makes the information confidential or a demonstration that third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). ACC responded to your notice by asserting that the responsive information is proprietary information that is protected from disclosure under sections 552.104 and 552.110 of the Government Code.<sup>1</sup> Thus, we will address ACC's arguments against disclosure.

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." An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. *See* Open Records Decision Nos. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not

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<sup>1</sup>We note that the purpose of section 552.104 is to protect the interests of a governmental body in situations such as competitive bidding and requests for proposals. *See* Open Records Decision No. 592 at 8 (1991). Section 552.104 does not protect the interests of private parties that submit information, such as bids and proposals, to governmental bodies. *Id.* at 8-9.

conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure).

ACC argues that disclosure of the submitted pro forma would allow the requestor, a competitor, to utilize ACC's unique expertise and experience relative to student housing, particularly in the areas of unit mix, development costs and payment plans, in a future proposal, causing "substantial competitive harm" to ACC. Further, ACC argues that release of the documents related to financing alternatives would provide the requestor with details "as to how ACC competitively structures its development activities" including "financing alternatives and legal structures that ACC uses in its student housing projects on a national basis," and claims that such disclosure would cause "substantial competitive harm" to ACC. After reviewing the documents and the arguments presented, we conclude that ACC has demonstrated based on specific factual evidence that the release of the submitted study would cause it substantial competitive harm. Consequently, the submitted information is excepted from disclosure pursuant to section 552.110(b) of the Government Code and, thus, must be withheld from the requestor. Because we are able to make a determination under section 552.110(b), we need not address ACC's additional arguments against disclosure.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/seg

Ref: ID# 161737

Enc. Submitted documents

c: Mr. C. C. Lee, AIA  
STOA/Goleman/Bolullo Architects  
7322 Southwest Freeway, Suite 808  
Houston, Texas 77074  
(w/o enclosures)

Mr. Thomas Trubiana  
President  
American Campus Communities, L.L.C.  
701 Brazos, Suite 700  
Austin, Texas 78701  
(w/o enclosures)