



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

March 17, 2003

Mr. Brad Norton
Assistant City Attorney
City of Austin - Law Department
P.O. Box 1546
Austin, Texas 78767-1546

OR2003-1814

Dear Mr. Norton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178006.

The City of Austin (the "city") received a request for 1) the signed contract between the city and Texas Disposal Systems Landfill, Inc. ("TDSL"), including any attachments; 2) a certain request for proposals ("RFP"), including amendments or addendums; and 3) the offer in response to the RFP. You state that you have released information responsive to request items one and two. You claim that some of the information responsive to request item three may be subject to section 552.110 of the Government Code. Additionally, you claim that the release of the information may implicate the proprietary rights of TDSL, and so pursuant to section 552.305(d), you notified TDSL of the city's receipt of the request and of TDSL's right to submit arguments to this office as to why its information should not be released to the requestor. *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 under Public Information Act in certain circumstances). TDSL asserts that the submitted information is excepted from disclosure under section 552.131 of the Government Code. We have reviewed the submitted information and considered all arguments.

We first note that some of the submitted information is designated as confidential. However, information is not confidential under the Public Information Act (the "Act") simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). 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 No. 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.”). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any agreement specifying otherwise.

The city claims the submitted information is excepted from disclosure under section 552.110. However, the city has provided no arguments in support of its claim. Furthermore, TDSL does not contend that its information is excepted from disclosure under section 552.110. Thus, we have no basis to conclude that the submitted documents are excepted from disclosure under section 552.110. *See* Gov’t Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, the submitted information may not be withheld on the basis of section 552.110.

We now address TDSL’s arguments under section 552.131 of the Government Code. Section 552.131 provides as follows:

(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].

(c) After an agreement is made with the business prospect, this section does not except from [required public disclosure] information about a financial or other incentive being offered to the business prospect:

- (1) by the governmental body; or
- (2) by another person, if the financial or other incentive may directly or indirectly result in the expenditure of public funds by a governmental body or a reduction in revenue received by a governmental body from any source.

Gov't Code § 552.131. Section 552.131(a) protects only "trade secrets" 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." To this extent, section 552.131 is co-extensive with section 552.110 of the Government Code, which excepts from disclosure "a trade secret obtained from a person" 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[.]" *See* Gov't Code § 552.110(a), (b); *see also* Open Records Decision Nos. 552 at 2-5 (1990) (trade secrets), 661 at 5-6 (1999) (commercial or financial information). 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.

TDSL does not state that the submitted information relates to economic negotiations between the city and a business prospect that the city desires to have locate, stay, or expand within the city. Moreover, TDSL has not demonstrated that any of the submitted information constitutes either a trade secret obtained from a business prospect or commercial or financial information, the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.131(a). Finally, TDSL has not identified any information that relates to any financial or other incentive that the city or another person is offering to a business prospect. *See id.* § 552.131(b). Therefore, TDSL has not demonstrated that any of the submitted information is excepted from disclosure under section 552.131, and it must be released to the requestor in its entirety.

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).

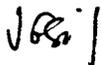
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dep't of Pub. 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,



V.G. Schimmel
Assistant Attorney General
Open Records Division

VGS/sdk

Ref: ID# 178006

Enc: Submitted documents

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