



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 19, 2005

Ms. YuShan Chang
Assistant City Attorney
City of Houston
P.O. Box 1562
Houston, Texas 77251-1562

OR2005-09497

Dear Ms. Chang:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 234446.

The City of Houston (the "city") received a request for information pertaining to six registered bidders, including names, addresses, and telephone numbers. You claim that the requested information is excepted from disclosure under sections 552.104 and 552.137 of the Government Code. You also assert that the request for information may implicate the proprietary interests of Public Surplus, L.L.C. ("Public Surplus"). You have notified Public Surplus of the city's receipt 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) (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). Public Surplus has responded to the notice and argues that the requested information is excepted under section 552.101 of the Government Code. We have considered the arguments submitted by the city and Public Surplus and have reviewed the

submitted information.¹ We have also considered comments received from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address Public Surplus's claim that the submitted information, which consists of winning bidders' names, addresses, telephone numbers, e-mail addresses, and usernames, is subject to a confidentiality agreement. Information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987). Consequently, unless the submitted information falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

The city claims that the submitted information is excepted from disclosure under section 552.104. Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. *See* Open Records Decision No. 541 at 4 (1990). Generally, section 552.104 does not except information relating to competitive bidding situations once a bid has been awarded and a contract has been executed. *See id.*

In Attorney General Opinion No. MW-591 (1982), this office held that the predecessor to section 552.104 protected the identities of those who nominated tracts to be leased by the School Land Board even if they had not yet bid for the mineral rights to those tracts, because past practice established that the nominators would almost certainly bid for these rights. In Open Records Decision No. 453 (1986), this office concluded that the predecessor to section 552.104 did not except from disclosure the General Land Office's list of those who received bid packets for an offer of land to be sold by competitive bidding, where no qualified bids were received and the land was to be offered again in the near future. This conclusion was based on a finding that the General Land Office had not shown that there was

¹We note that the city has only submitted information pertaining to two of the six registered bidders. You have not indicated that the remaining requested information does not exist or that you have released it to the requestor. Therefore, to the extent any remaining information responsive to this request existed on the date that the city received the instant request, we assume that the city has released it to the requestor. If the city has not released any such information, the city must release it to the requestor at this time. *See* Gov't Code §§ 552.301(a), .302; Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

a substantial likelihood that those who received bid packets for the first land sale would bid when the land was reoffered for sale. *Id.* at 3.

You inform us that the city auctions off surplus items online through a website provided by Public Surplus. You explain that the information at issue is taken from the website that is only accessible by the city, and not the general public. You assert that release of the submitted information “would jeopardize the integrity of this process by enabling bidders to contact other bidders so that they can collude with them, influence their bidding price, or interfere with their bids.” Furthermore, you assert that since “there is always a [c]ity item being auctioned on the web site, release of [the submitted information] would give an advantage to bidders in current and future auctions” and this would “compromis[e] the ability of the [c]ity to receive the best price for its surplus items.” You also argue that the city will lose bidders if they know their personal information may be disclosed.

After careful review of your arguments, however, we find that you have not established that the city has an ongoing competitive interest that would be harmed by release of the information at issue. Further, we find that, as you have not demonstrated that the individuals whose information is at issue will actually bid during any future auctions, your assertion that release of the requested information might give a competitor an unfair advantage in bidding on future online surplus items is entirely too speculative. Accordingly, we conclude that you have not demonstrated that public release of the information at issue would cause specific harm to the city’s interests in a particular competitive bidding situation. Therefore, the city may not withhold the information at issue from public disclosure under section 552.104 of the Government Code. *See* Open Records Decision Nos. 453 (1986), 46 (1974) (knowledge of identity of numerous potential bidders for requested commodity class is not information which, if released, would give advantage to competitors or bidders).

Next, Public Surplus claims that the submitted information is excepted from disclosure under section 552.101. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception protects information that is considered to be confidential under other law. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). Neither the city nor Public Surplus has asserted any law, and this office is unaware of any law, under which any of the submitted information is considered to be confidential for purposes of section 552.101. Therefore, the city may not withhold any of the submitted information under section 552.101.

Finally, the city claims that some of the submitted information is excepted under section 552.137. Section 552.137 of the Government Code 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* Gov’t

Code § 552.137(a)-(c). The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You inform us that the city has not received consent to release this information. Therefore, in accordance with section 552.137, the city must withhold the e-mail addresses you have marked.

In summary, the city must withhold the e-mail addresses you have marked. The remaining submitted information must be released to the requestor.

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).

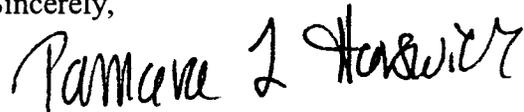
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,

A handwritten signature in black ink that reads "Tamara L. Harswick". The signature is written in a cursive, flowing style.

Tamara L. Harswick
Assistant Attorney General
Open Records Division

TLH/sdk

Ref: ID# 234446

Enc. Submitted documents

c: Mr. Larry Shaefer
Communications Surplus
115 North Walker Street
Angleton, Texas 77515
(w/o enclosures)

Mr. Eric Heaps
Director of Agency Relations
Public Surplus, LLC
P.O. Box 50676
Provo, Utah 84605-0676
(w/o enclosures)