ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 7, 2006

Mr. Vince Maloney
Chief Appraiser
Matagorda County Appraisal District
2225 Avenue G
Bay City, Texas 77414

Mr. Peter Low
Law Office of Peter William Low
3305 Northland Drive, Suite 500
Austin, Texas 78731

OR2006-10387

Dear Mr. Maloney and Mr. Low:

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# 257552.

The Matagorda County Appraisal District (the "district") received a request for a "copy of the 2006 sales in [the district]." You claim that the requested information is excepted from disclosure under section of the 552.101 Government Code. You also assert that the district must withhold the remaining requested information pursuant to an agreement with the Matagorda County Board of Realtors Multiple Listing Service (the "MLS"). Further, you indicate that the responsive information is the proprietary information of MLS. Pursuant to section 552.305 of the Government Code, you are required to notify MLS of the request and of its right to submit arguments to this office as to why the information 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 under

the Act in certain circumstances). We have considered your arguments and reviewed the submitted representative sample of information.[1]

Initially, we must address the district's obligations under the Act. Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). The district received the request on June 2, 2006. Accordingly, the district was required to request a decision from us by June 16, 2006. However, you did not request a ruling from this office until June 17, 2006. Consequently, we find that the district failed to comply with the procedural requirements of section 552.301.

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 the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing that the information is made confidential by another source of law or affects third party interests. *See* Open Records Decision No. 630 (1994). Because section 552.101 of the Government Code can provide a compelling reason to withhold information and third party interests are at stake, we will address the arguments concerning against disclosure.

We next note that an interested third party is allowed ten business days after the date of its receipt of a governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, the MLS has not submitted comments to this office explaining why any portion of the submitted information should not be released to the requestor. Thus, the MLS has provided us with no basis to conclude that the release of any portion of the submitted information would implicate its proprietary interests. *See id.* § 552.110; Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 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

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[1]We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

requested information would cause that party substantial competitive harm). Accordingly, we conclude that the district may not withhold any portion of the submitted information based on the proprietary interests of MLS.

You assert that the requested information should be withheld from public release because "[a]s an associate member of the MLS, the [d]istrict is subject to a confidentiality clause that is standard to all subscribers of MLS" and that "[t]his clause prohibits the release of the MLS to non-subscribers." You state and provide documentation showing that MLS bylaws require members to maintain the confidentiality of MLS information. We note however, that 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 information at issue falls within an exception to disclosure, it must be released, notwithstanding any agreement or statement specifying otherwise. *See* Gov't Code § 552.302.

You also claim that the submitted information is excepted from public disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information made confidential by other statutes. Gov't Code § 552.101. Section 22.27 of the Tax Code provides in part:

> (a) Rendition statements, real and personal property reports, attachments to those statements and reports, and other information the owner of property provides to the appraisal office in connection with the appraisal of the property, including income and expense information related to a property filed with an appraisal office and information voluntarily disclosed to an appraisal office or the comptroller about real or personal property sales prices after a promise it will be held confidential, are confidential and not open to public inspection. The statements and reports and the information they contain about specific real or personal property or a specific real or personal property owner and information voluntarily disclosed to an appraisal office about real or personal property sales prices after a promise it will be held confidential may not be disclosed to anyone other than an employee of the appraisal office who appraises property except as authorized by Subsection (b) of this section.

Tax Code § 22.27(a). We understand that the district is an "appraisal office" for purposes of section 22.27. You seek to withhold information obtained from the MLS under section 22.27 of the Tax Code. You state that "[t]he second sentence of [section] 22.27(a) plainly extends the privilege of confidentiality to anyone who provides information and obtains a promise from the appraisal office that the material will be held confidential[.]" We

note, however, that section 22.27(a) protects "information the owner of property provides to the appraisal office in connection with the appraisal of the property[.]" *Id.* § 22.27(a). Thus, as you have not demonstrated that information obtained from the MLS falls within the scope of section 22.27(a), the district may not withhold any information obtained from the MLS under section 552.101 of the Government Code. *Cf.* Open Records Decision No. 550 at 7 (1990) (Tax Code § 22.27 not applicable to information compiled by private market research firm and provided to appraisal district). As you raise no other exceptions, the submitted information must be released to the requestor.

We note, however, that some of the remaining information includes notice of copyright protection. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of materials that are subject to copyright protection unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990). Accordingly, in releasing the submitted information the district must release copyrighted information only in accordance with copyright law.

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,

L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/dh

Ref: ID# 257552

Enc. Submitted documents

c: Ms. Abigail Pendergraft
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(w/o enclosures)