

The ruling you have requested has been modified pursuant to a court order. The court judgment has been attached to this document.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 11, 2007

Mr. Thomas L. Hanna
Thomas L. Hanna, P.C.
P.O. Box 1384
Nederland, Texas 77627

OR2007-04043

Dear Mr. Hanna:

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# 275584.

The Jefferson County Appraisal District (the "district"), which you represent, received a request for certain commercial sales data for a specified time interval.¹ You state that some of the requested information has been released. You have submitted information that the district seeks to withhold under sections 552.101 and 552.110 of the Government Code. You also assert that some of the submitted information falls within the scope of section 552.027 of the Government Code. We have considered your arguments and have reviewed the submitted information.

You also inform us that the Beaumont Board of Realtors, Inc., and the Port Neches-Port Arthur-Nederland Board of Realtors, Inc., were notified of your request for this ruling. *See Gov't Code § 552.304* (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released). As of the date of this decision, we have received no correspondence from either of those parties. Therefore, neither the Beaumont Board of Realtors, Inc. nor the Port Neches-Port Arthur-Nederland Board of Realtors, Inc. has provided us with any basis to conclude that either party

¹You state that the district requested and obtained clarification of this request. *See Gov't Code § 552.222(b)* (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

has a protected proprietary interest in any of the submitted information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 661 at 5-6 (1999) (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).

You contend that section 552.027 of the Government Code is applicable to some of the submitted information. Section 552.027(a) provides that “[a] governmental body is not required under this chapter to allow the inspection of or to provide a copy of information in a commercial book or publication purchased or acquired by the governmental body for research purposes if the book or publication is commercially available to the public.” Gov’t Code § 552.027(a). Section 552.027 is designed to alleviate the burden of providing copies of commercially available books, publications, and resource materials maintained by governmental bodies, such as telephone directories, dictionaries, encyclopedias, statutes, and periodicals. The legislative history of this provision notes that section 552.027 should exclude from the definition of public information

books and other materials that are also available as research tools elsewhere *to any member of the public*. Thus, although public library books are available for public use, the library staff will not be required to do research or make copies of books for members of the public.

INTERIM REPORT TO THE 74TH LEGISLATURE OF THE HOUSE STATE AFFAIRS COMM., 74th Leg., R.S., SUBCOMMITTEE ON OPEN RECORDS REVISIONS 9 (1994) (emphasis added). Thus, section 552.027 excludes commercially available research material from the definition of “public information.”

You state that some of the submitted information was obtained from local multiple listing services (“MLS”). You contend that the MLS information is commercially available to the public and as such is subject to section 552.027. We note, however, that access to a local MLS is generally limited to licensed real estate brokers and appraisers. When access to information is limited to certain licensed individuals, such information cannot be said to be available “to any member of the public.” *Id.* Therefore, we are unable to conclude that section 552.027 is applicable to any information that the district obtained from multiple listing services. Nevertheless, to the extent that the MLS information is, in fact, available to any member of the public, we agree that any such information falls within the scope of section 552.027 and need not be released. To the extent, however, that access to the MLS information is limited to particular individuals, the information is not subject to section 552.027 and must be released unless it falls within an exception to public disclosure. *See* Gov’t Code §§ 552.002, .006, .021, .301(a), .302.

Next, we address your claimed exceptions to disclosure. Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This exception encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with section 22.27 of the Tax Code, which 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). You inform us that the district is an “appraisal office” for purposes of section 22.27. We understand you to state that the submitted documents contain commercial sales information that was obtained by the district, under promises of confidentiality, either from property owners or from an MLS. You contend that information obtained from a property owner or from an MLS under a promise of confidentiality is confidential under section 22.27.

Having considered your arguments, we conclude that to the extent that the submitted information was voluntarily disclosed to the district by a property owner in connection with an appraisal of property, after a promise of confidentiality, any such information is confidential under section 22.27(a) of the Tax Code. The district must withhold any such information under section 552.101 of the Government Code. However, any submitted information that was not voluntarily disclosed to the district by property owners in connection with an appraisal of property, after a promise of confidentiality, is not confidential under section 22.27(a) and may not be withheld on that basis under section 552.101. We note that information obtained from an MLS does not constitute “information the owner of property provides to the appraisal office in connection with the appraisal of the property.” Tax Code § 22.27(a). Therefore, because it does not fall within the scope of section 22.27(a), none of the submitted MLS information is confidential under section 22.27(a), and the district may not withhold any of that information under section 552.101.

You also raise section 552.101 in conjunction with section 25.195 of the Tax Code, which provides in part that “[a] property owner or the owner’s designated agent is entitled to inspect and copy the appraisal records relating to the property of the property owner,” together with supporting data, schedules, and other information, after the chief appraiser has submitted the appraisal records to the appraisal review board. Tax Code § 25.195(a); *see also* Open Records Decision No. 500 (1988) (reconciling Tax Code §§ 22.27 and 25.195). You have not explained how or why section 25.195 would make any of the submitted information confidential for the purposes of section 552.101 of the Government Code. *See* Gov’t Code § 552.301(e)(1)(A) (governmental body must demonstrate why stated exceptions to disclosure apply); Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 525 at 4 (1989) (information cannot be withheld from public disclosure by negative implication simply because statute designates other specific information as public information). Therefore, the district may not withhold any of the submitted information under section 552.101 on the basis of section 25.195 of the Tax Code.

Next, we address your claim under section 552.110 of the Government Code. Section 552.110(b) excepts from disclosure “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.” Gov’t Code § 552.110(b). This exception requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See* Open Records Decision No. 661 at 5-6 (1999). You contend that public release of information obtained from the multiple listing services would cause direct competitive harm to the services. You also assert that release would threaten the district’s access to such information.

In invoking the district’s interests in the MLS information, you rely on the test announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency. *See Nat’l Parks*, 498 F.2d 765; *see also Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871 (D.C. Cir. 1992) (commercial information exempt from disclosure if it is voluntarily submitted to government and is of a kind that provider would not customarily make available to public). Although this office once applied the *National Parks* standard under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held that *National Parks* was not a judicial decision within the meaning of former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App. – Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. *See* Open Records Decision No. 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). The ability of a

governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will address only your invocation of the interests of the multiple listing services. Having considered your arguments, we conclude that you have not made a specific factual or evidentiary showing that release of the MLS information would result in substantial competitive harm to the multiple listing services. We therefore conclude that the district may not withhold any of the submitted information under section 552.110 of the Government Code.

In summary: (1) to the extent that the submitted MLS information is in fact commercially available to any member of the public, any such information falls within the scope of section 552.027 of the Government Code and need not be released; and (2) to the extent that the submitted information was voluntarily disclosed to the district by a property owner in connection with an appraisal of property, after a promise of confidentiality, any such information is confidential under section 22.27(a) of the Tax Code and must be withheld from disclosure under section 552.101 of the Government Code. The district must release any information that is not encompassed by section 552.027 or confidential under section 22.27(a).

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).

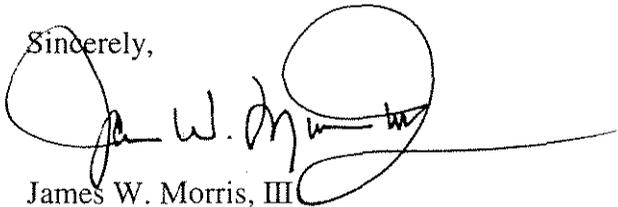
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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, appearing to read "James W. Morris, III". The signature is stylized with large loops and a long horizontal stroke extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/jb

Ref: ID# 275584

Enc: Submitted documents

c: Ms. Abbigail Pendergraft
Executive Assistant
O'Connor & Associates
2200 North Loop West, Suite 200
Houston, Texas 77018
(w/o enclosures)

CAUSE NO. D-1-GN-07-001151

JEFFERSON COUNTY APPRAISAL DISTRICT,
Plaintiff,

V.

ATTORNEY GENERAL OF THE STATE OF TEXAS,
Defendant.

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IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS
TRAVIS COUNTY, TEXAS
345th JUDICIAL DISTRICT

Filed in The District Court of Travis County, Texas
JUN 08 2009 TH
11:53 AM
At
Amelia Rodriguez-Hendoza, Clerk

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiff Jefferson County Appraisal District and Defendant Greg Abbott, Attorney General of Texas, appeared, by and through their respective attorneys, and announced to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code Ann. ch. 552 (West 2004 & Supp. 2006). The parties represent to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the requestor, Abigail Pendergraft, was sent reasonable notice of this setting and of the parties' agreement that the District may withhold the information at issue; that the requestor was also informed of her right to intervene in the suit to contest the withholding of this information; and that the requestor has not informed the parties of her intention to intervene. Neither has the requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. The information at issue, specifically, an electronic copy of any commercial sales that are maintained by the District with confirmed sales prices from January 1, 2002 to January 29, 2007, that the District obtained from a private entity, is excepted from disclosure under Tex. Gov't Code § 552.148(a);

2. The District may withhold from the requestor the information at issue;

3. All costs of court are taxed against the parties incurring the same;

4. All relief not expressly granted is denied; and

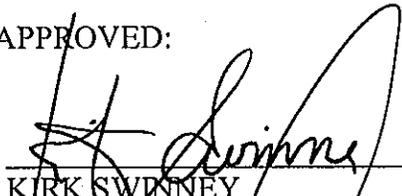
5. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendant and is a final judgment.

SIGNED this the 8 day of June, 2009

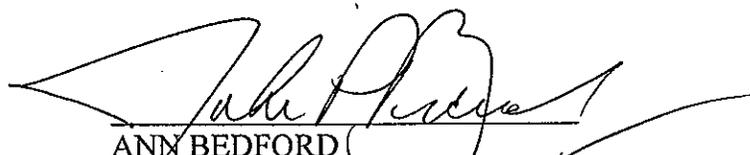


PRESIDING JUDGE

APPROVED:



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