



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January, 2009

Mr. Benjamin V. Lugg
San Antonio Housing Authority
P.O. Box 1300
San Antonio, Texas 78295-1300

OR2009-01401

Dear Mr. Lugg:

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# 333943.

The San Antonio Housing Authority (the "authority") received a request for a specific individual's address and information pertaining to a settlement agreement with that individual. You state that you will release some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.104 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Initially, we note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in pertinent part, as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(18) a settlement agreement to which a governmental body is a party[.]

¹ We understand that Exhibits D through F were submitted for informational purposes only.

Gov't Code § 552.022(a)(18). The submitted information consists of a settlement agreement to which the authority is a party. Therefore, as prescribed by section 552.022, the authority must release this information unless it is confidential under other law. You argue that the information at issue is excepted from disclosure under section 552.103 of the Government Code. However, this section is a discretionary exception under the Act and does not constitute "other law" for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, the authority may not withhold this information under section 552.103 of the Government Code. However, because information that is subject to section 552.022 may be withheld under section 552.104 of the Government Code, we will consider your claims for this exception. *See* Gov't Code § 552.104(b) (information protected by section 552.104 not subject to required public disclosure under section 552.022(a)). We will also address your claim under section 552.101 of the Government Code because this section constitutes other law for the purposes of section 552.022.

Section 552.101 of the Government Code excepts 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 154.073 of the Civil Practice and Remedies Code, which provides in part:

(a) Except as provided by Subsections (c), (d), (e), and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.²

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

...

²We note that subsections 154.073(c), (e), and (f) are not applicable in this instance.

(d) A final written agreement to which a governmental body, as defined by Section 552.003, Government Code, is a signatory that is reached as a result of a dispute resolution procedure conducted under this chapter is subject to or excepted from required disclosure in accordance with Chapter 552, Government Code.

Civ. Prac. & Rem. Code § 154.073(a)-(b), (d). In Open Records Decision No. 658 (1998), this office found that communications during the formal settlement process were intended to be confidential. *See* Open Records Decision No. 658 at 4; *see also* Gov't Code § 2009.054(c). You contend that the terms of the settlement agreement at issue state that the settlement agreement is contractual and confidential.³ However, we note that section 154.073 of the Civil Practice and Remedies Code applies to alternative dispute resolutions. Having considered your arguments and reviewed the information in question, we find that you have not demonstrated that the submitted settlement agreement consists of either a communication relating to the subject matter of a dispute made by a participant in an alternative dispute resolution procedure or a record made at such a procedure. *See* Civ. Prac. & Rem. Code § 154.073(a)-(b). We therefore conclude that the authority may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code.

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, including those in which the governmental body may wish to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 at 8 (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. Open Records Decision No. 541 at 4 (1990). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. First, the governmental body must demonstrate that it has specific marketplace interests. *See* Open Records Decision No. 593 at 3 (1991). Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *Id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular

³We note that a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision No. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the Act] cannot be compromised simply by the decision to enter into a contract.").

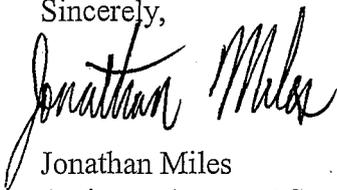
competitive situation. *Id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* ORD 514 at 2.

You inform us that the authority is currently involved in litigation concerning building defects and mold contamination against the builder and developer of several of the homes. You also inform us that "there are several other homeowners that have pending claims against [the authority] relating to the same homes in the lawsuit." You state that the "settlements will be further litigated" and "the release of any settlement will hinder future settlement negotiations." You argue that "[t]o release any part of a settlement would be disadvantageous to [the authority] and ultimately cost the agency [sic] more money in settlements." After review of your arguments, we find that you have not established that the authority has an ongoing competitive interest that would be harmed by the release of the information at issue. Therefore, the authority may not withhold the submitted information under section 552.104 of the Government Code. As you raise no further exceptions, the submitted information must be released.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/cc

Ref: ID# 333943

Enc. Submitted documents

c: Requestor
(w/o enclosures)