



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 17, 2009

Ms. Katherine R. Fite
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2009-08356

Dear Ms. Fite:

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# 345123.

The Office of the Governor (the "governor") received a request for eight categories of information relating to the contract between the Texas Enterprise Fund ("TEF") and Countrywide Financial Corporation, now Bank of America ("Countrywide"). You state that the governor has released some of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code.¹ You also indicate that the release of the submitted information may implicate the proprietary interests of Countrywide. Accordingly, you state you have notified Countrywide of the governor's receipt of the request for information and its right to submit arguments to this office as to why the information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.

You inform us that portions of the submitted information were the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2009-06107 (2009) and 2009-08319 (2009). In Open Records Letter Nos. 2009-06107 and 2009-08319, we ruled that the governor must release Countrywide's information

¹Although you also generally raise the remaining exceptions under the Act, you have provided no arguments regarding the applicability of these sections. Since you have not submitted arguments concerning these exceptions, we assume that you no longer urge them. *See* Gov't Code §§ 552.301(b), (e), .302.

submitted by the Governor as responsive to those requests. You state that portions of the submitted information consist of the same information we ruled upon in those previous decisions. We conclude that, as we have no indication that the law, facts, and circumstances on which the prior rulings were based have changed, the governor must continue to rely on those rulings as previous determinations and release the information we previously ruled upon in accordance with Open Records Letter Nos. 2009-06107 and 2009-08319. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, we will address the submitted arguments for the remaining information not subject to the previous determinations.

The governor asserts that the remaining information is confidential because it is marked confidential and it was obtained from Countrywide with the assurance that it would remain confidential. However, information is not made 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); *see also* Open Records Decision Nos. 479 (1987) (information is not confidential under the Act simply because party submitting it anticipates or requests that it be kept confidential), 203 (1978) (mere expectation of confidentiality by individual supplying information does not properly invoke section 552.110). Consequently, the remaining information may not be withheld unless it falls within an exception to disclosure.

The governor raises section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The protections of section 552.104 serve two purposes. One purpose is to protect the interests of a governmental body by preventing one competitor or bidder from gaining an unfair advantage over others in the context of a pending competitive bidding process. *See* Open Records Decision No. 541 (1990). The other purpose is to protect the legitimate marketplace interests of a governmental body when acting as a competitor in the marketplace. *See* Open Records Decision No. 593 (1991). In both instances, the governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2, 463 (1987), 453 at 3 (1986). A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *See* ORD 593 at 2.

In this case, we find you have not established that the governor has specific marketplace interests with respect to information pertaining to a selected company's receipt of funds from the TEF. We therefore find the information at issue is not excepted under section 552.104 on that basis. Furthermore, we note that at the time the governor received the present request, Countrywide had already been selected and had received funds from the TEF. Thus, we find that there was not a competitive situation pertinent to the records at issue occurring at the time of the request, and we determine that the governor may not withhold any of the information at issue under section 552.104 of the Government Code.

Although the governor argues that the remaining information is excepted under section 552.110 of the Government Code, that exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the governor's arguments under section 552.110. We note that an interested third party is allowed ten business days after the date of its receipt of the 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 it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received any arguments from Countrywide. We thus have no basis for concluding that any portion of the remaining information constitutes Countrywide's proprietary information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the governor may not withhold any of the remaining information based on the proprietary interests of Countrywide. As no further arguments are made against the disclosure of the remaining information, it must be released to the requestor.

In summary, the governor must continue to rely to Open Records Letter Nos. 2009-06107 and 2009-08319 and release the same information in accordance with those rulings. The governor must also release the remaining information.

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,



Laura E. Ream
Assistant Attorney General
Open Records Division

LER/dls

Ref: ID# 345123

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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