



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 9, 2009

Ms. Griselda Sanchez
Assistant City Attorney
City of San Antonio
9800 Airport Boulevard
San Antonio, Texas 78216

OR2009-09452

Dear Ms. Sanchez:

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# 348795 (COSA File Nos. 09-0512 and 09-0517).

The City of San Antonio (the "city") received two requests for Clark/Byrne Construction's ("Clark") guaranteed maximum price proposal, including exhibits and four specified proposals to Clark for the baggage system supply and installation. You claim that a portion of 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 the following third parties: Clark, Vanderlande Industries Inc. ("Vanderlande"), Siemens Energy & Automation Inc., G & S Mechanical USA Inc., and Jervis Webb Company. Accordingly, you state you have notified the third parties of the city's receipt of the request for information and of their right to submit arguments to this office as to why the submitted 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 received comments from a representative of Vanderlande. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that the submitted information pertaining to Vanderlande was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2009-09362 (2009). In Open Records Letter No. 2009-09362, we ruled that the city must withhold the portions of Vanderlande's information we marked under

¹Although the city also raises sections 552.101 and 552.128 as exceptions to disclosure, you have provided no arguments explaining how these exceptions are applicable to the submitted information. Therefore, we do not address these exceptions. Gov't Code § 552.301(e)(1)(A).

section 552.110(a) of the Government Code and release Vanderlande's remaining information in accordance with copyright law. The information you have submitted pertaining to Vanderlande contains the exact same information we ruled upon in the previous decision. We conclude that, as we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, the city must continue to rely on that ruling as a previous determination and withhold or release Vanderlande's information in accordance with Open Records Letter No. 2009-09362.² 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 determination.

We note 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 Gov't Code § 552.305(d)(2)(B). As of the date of this decision, we have only received arguments from Vanderlande explaining why its information should not be released. Therefore, we find that none of the other interested parties have demonstrated that any of their submitted information is confidential or proprietary for purposes of the Act. See *id.* §§ 552.101, .110; Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999). Additionally, although the city also raises section 552.110 of the Government Code for the remaining third parties' information, section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the city's argument under section 552.110 for the remaining information. Accordingly, none of the remaining information may be withheld on the basis of any proprietary interest the non-briefing third parties may have in it. See Gov't Code § 552.110; ORDs 661 at 5-6 (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 requested information would cause that party substantial competitive harm), 552 at 5 (party must establish *prima facie* case that information is trade secret).

Next, the city asserts that the remaining information may not be disclosed because the information at issue was marked confidential or has been made confidential by agreement or assurances. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *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. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot

²As our determination is dispositive with respect to this information, we need not address the submitted arguments against disclosure of Vanderlande's information.

be compromised simply by its decision to enter into a contract.”); 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov’t Code § 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

The city 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. The purpose of section 552.104 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. 593 (1991) (construing statutory predecessor). 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 (1991), 463 (1987), 453 at 3 (1986). A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. ORD 593 at 2. In this instance, although the city raises section 552.104, it fails to provide specific arguments explaining how release of any of the requested information would harm the city’s interests in a competitive situation. Accordingly, the city may not withhold any of the requested information under section 552.104 of the Government Code.

In summary, the city must continue to withhold or release Vanderlande’s information in accordance with Open Records Letter No. 2009-09362. The remaining 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,



Laura E. Ream
Assistant Attorney General
Open Records Division

LER/dls

Ref: ID# 348795

Enc. Submitted documents

c: Requestors
(w/o enclosures)

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