



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 1, 2009

Ms. Pauline E. Higgins  
Senior Vice President and General Counsel  
Metropolitan Transit Authority of Harris County  
P.O. Box 61429  
Houston, Texas 77208-1429

OR2009-16928

Dear Ms. Higgins:

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# 362759 (MTA 2009-0293).

Metropolitan Transit Authority of Harris County ("Metro") received a request for four categories of information pertaining to a specified contract. You state you have released information responsive to the first and second categories of the request. You further state that there is no information responsive to the fourth category of the request.<sup>1</sup> You claim that release of the submitted information may implicate the proprietary interests of Granite Construction Company ("Granite"), Parsons Corporation ("Parsons"), Kiewit Corporation ("Kiewit"), and Stacy and Witbeck, Inc. ("Stacy"). Pursuant to section 552.305(d) of the Government Code, you have notified these third parties of the request and of their opportunity to submit comments to this office. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); 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 in certain circumstances). We

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<sup>1</sup>We note the Act does not require a governmental body to release information that did not exist at the time the request for information was received or create new information in response to request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

have received arguments from Parsons, Kiewit, and Stacy. We have also considered comments submitted by the requestor and the Texas Construction Association. *See* Gov't Code § 552.304 (providing that an interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

We note 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) 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, Granite has not submitted any comments to this office explaining how release of the submitted information would affect its proprietary interests. Therefore, Granite has not provided us with any basis to conclude it has a protected proprietary interest in any of the submitted information. *See id.* § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, it actually faces competition and substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Therefore, Metro may not withhold any of the submitted information on the basis of any proprietary interest Granite may have in the information.

Parsons, Kiewit, and Stacy assert their submitted information may not be disclosed because it 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. *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); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot 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 section 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

Parsons, Kiewit, and Stacy raise section 552.110 of the Government Code for all of their financial assurance information.<sup>2</sup> This section protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(b) protects “[c]ommercial or financial information for

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<sup>2</sup>Although Kiewit and Stacy also raise section 552.101 of the Government Code, these companies have provided no arguments explaining how this exception is applicable to the submitted information. Therefore, we assume that Kiewit and Stacy no longer assert this section.

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 to disclosure 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. *Id.* § 552.110(b); *see also* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Parsons, Kiewit, and Stacy assert the submitted information constitutes commercial or financial information that, if released, would cause the companies substantial competitive harm. After reviewing the three companies’ arguments, we agree they have shown how release of their financial assurance information would result in substantial competitive injury to the three companies. Thus, pursuant to section 552.110(b) of the Government Code, Metro must withhold the submitted financial assurance information of Parsons, Kiewit, and Stacy.<sup>3</sup> The remaining 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](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, toll free, at (888) 672-6787.

Sincerely,



Paige Lay  
Assistant Attorney General  
Open Records Division

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<sup>3</sup>As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

Ref: ID# 362759

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)

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