



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 14, 2009

Mr. Brandon Cook
Legal Assistant
City of Galveston
City Attorney's Office
P.O. Box 779
Galveston, Texas 77553-0779

OR2009-17623

Dear Mr. Cook:

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# 364234 (ORR 09-446).

The City of Galveston (the "city") received a request for information related to the "buyout program" for four specified addresses. You inform us that the city has released some responsive information. Although the city raises no exceptions against disclosure of the submitted information, you explain that this information may contain third parties' proprietary information subject to exception under the Act. Accordingly, you have notified four third parties of this request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See Gov't Code* § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have reviewed the submitted information and considered comments received from one of the notified third parties.

Initially, we note that, pursuant to section 552.301(b) of the Government Code, a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. You inform us that the city received the request for information on September 22, 2009; however, your request for a ruling from this office is postmarked October 7, 2009. *See Gov't Code* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we find you have failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released; the governmental body can overcome this presumption only by demonstrating a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—Amarillo 2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). A compelling reason generally exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Accordingly, we will consider whether the interests of the notified third parties provide a compelling reason to withhold any portion of the submitted information.

We next note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, we have not received any correspondence from three of the notified third parties. Thus, none of these third parties has demonstrated that it has a protected proprietary interest in any of the submitted information. *See id.* § 552.110(a)-(b); 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 (1990). Therefore, the city may not withhold any of the submitted information on the basis of any proprietary interest these three third parties may have in it. The fourth notified third party has submitted comments and argues that information related to her property is excepted from disclosure under federal law and sections 552.105 and 552.110 of the Government Code.

We next note that some of the submitted information consists of completed property appraisal reports made for the city. These reports are subject to section 552.022(a)(1) of the Government Code, which provides that

[t]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). Accordingly, the city may withhold the information subject to section 552.022(a)(1) only if it is "expressly confidential under other law[.]" Although the third party raises section 552.105 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body's interests, and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 564 (1990) (statutory predecessor to section 552.105 subject to waiver). As such, section 552.105 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the city may not withhold the third party's appraisal report under section 552.105. Because the Privacy Act of 1974, section 552a of Title 5 of the United States Code, and section 552.110(b) of the Government Code can make information confidential, we will consider the third party's arguments under these statutes for her information subject to section 552.022(a)(1). We will also consider all of the third party's arguments against disclosure of her remaining information at issue, which is not subject to section 552.022(a)(1).

The third party argues that her information is excepted from disclosure under the Privacy Act of 1974 because the referenced "buyout program" is directed by the Federal Emergency Management Agency. However, the Privacy Act of 1974 applies only when a covered federal agency receives a request for the information; it does not apply when a state or local governmental body receives a request for the information. *See* 6 U.S.C. § 133(a)(1); *see also* Attorney General Opinion MW-95 (1979) (federal Privacy Act of 1974 does not apply to records held by state or local governmental bodies in Texas). Therefore, in this instance, none of the submitted information is excepted from disclosure under the federal Privacy Act of 1974.

We next consider the third party's arguments under section 552.105 for her information that is not subject to section 552.022(a)(1). Section 552.105 excepts from disclosure information relating to

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. We note that section 552.105 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 564 at 2 (1990) (statutory predecessor to section 552.105 designed to protect governmental body's planning and negotiating position with respect to particular transactions), 357 at 3 (1982), 310 at 2 (1982) (statutory predecessor to section 552.105 protects information relating to the location, appraisals, and purchase price of property to be purchased by governmental body for public purpose); *see also* ORD 522. As the city does not raise

section 552.105, we find this section does not apply to any of the submitted information. *See* ORD 564 (governmental body may waive statutory predecessor to section 552.105).

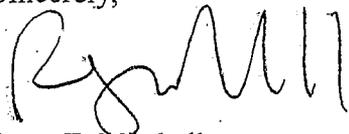
Section 552.110(b) of the Government Code protects the proprietary interests of private parties with respect to “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.” Gov’t Code § 552.110(b). Section 552.110(b) 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* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm). After reviewing the submitted information and the third party’s arguments, we conclude that the third party has made only conclusory allegations that release of the submitted information would cause her substantial competitive injury and has provided no specific factual or evidentiary showing to support such allegations. Thus, we find that she has failed to establish the applicability of section 552.110(b) to any portion of the submitted information. Accordingly, the city may not withhold any portion of the submitted information under section 552.110(b).

As no further exceptions against disclosure are raised, the city must release the submitted 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, toll free, at (888) 672-6787.

Sincerely,



Ryan T. Mitchell
Assistant Attorney General
Open Records Division

RTM/fl

Ref: ID# 364234

Enc. Submitted documents

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