



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 12, 2013

Mr. David F. Brown
For the Port of Houston Authority
Ewell, Bickham & Brown, L.L.P.
111 Congress Avenue, Suite 400
Austin, Texas 78701

OR2013-04137

Dear Mr. Brown:

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# 481285.

The Port of Houston Authority (the "authority"), which you represent, received a request for all e-mail correspondence sent by a named individual on a specified day. We understand the authority has redacted an e-mail address of a member of the public under section 552.137 of the Government Code.¹ You claim a portion of the submitted information is excepted from disclosure under section 552.104 of the Government Code. You also state the requested information may implicate the proprietary interests of third parties. Accordingly, you inform us, and provide documentation showing, you notified Norwegian Cruise Lines and COSCO Container Lines Americas, Inc. of the request and of their right to submit comments to this office as to why the requested information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* 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 under the Act in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

Section 552.104 of the Government Code excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't

¹We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Code § 552.104. This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). 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. *See id.* First, the governmental body must demonstrate that it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See 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 competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You assert the information you have highlighted is excepted from disclosure under section 552.104 of the Government Code. You state the authority competes with other large ports around the county for cargo. You state the information at issue is confidential, a result of a significant investment of time and resources, and used for strategic planning in order to maximize the authority's ability to attract and retain new customers. Further, you state release of the information at issue would cause harm to the authority because other ports could use this information to gain insight into the authority's plans for limited incremental shipping business and either undermine those plans or use them to gain an unfair advantage. In addition, you state competitors could reappropriate the authority's strategy planning information and thereby avoid the same research and investment costs the authority expended. Further, you state the information at issue could expose the authority's limitations, which could be exploited in negotiations with competitors over the use of the authority's facilities. Thus, you state release of the highlighted information would subject the authority to a competitive disadvantage. Based on your representations, we find you have demonstrated the authority has specific marketplace interests. *See* ORD 593 at 3. We also find you have demonstrated a specific threat of actual or potential harm to the authority's interests in a particular competitive situation. Therefore, we conclude the authority may withhold the highlighted information under section 552.104 of the Government Code.

We 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 correspondence from either of the interested third parties. Thus, neither of the interested third parties have demonstrated that they have 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. Accordingly, the authority may not withhold the

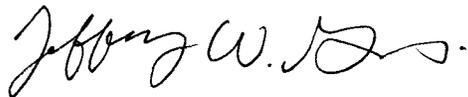
remaining information on the basis of any proprietary interests either of the interested third parties may have in the information.

In summary, the authority may withhold the information you have highlighted under section 552.104 of the Government Code. The authority must 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, toll free at (888) 672-6787.

Sincerely,



Jeffrey W. Giles
Assistant Attorney General
Open Records Division

JWG/dls

Ref: ID# 481285

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Daniel Farkas
Senior VP and General Counsel
Norwegian Cruise Lines
7665 Corporation Center Drive
Miami, Florida 33126
(w/o enclosures)

General Counsel
COSCO Container Lines Americas, Inc.
Suite 400
15600 John F. Kennedy Boulevard
Houston, Texas 77032
(w/o enclosures)