



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 23, 2013

Ms. Kerri Lewis
Texas Real Estate Commission
P.O. Box 12188
Austin, Texas 78711-2188

OR2013-11010A

Dear Ms. Lewis:

This office issued Open Records Letter No. 2013-11010 (2013) on June 27, 2013. Since that time, we have received new information that affects the facts on which this ruling was based. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on June 27, 2013. *See generally* Gov't Code § 552.011 (providing that Office of the Attorney General may issue a decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the "Act")). This ruling was assigned ID# 498762 (Commission ORR ID# 20130327.1).

The Texas Real Estate Commission (the "commission") received a request for the most recent annual report for TWG Home Warranty Services, Inc. ("TWG") or financial information pertaining to TWG. You state the commission has released some of the requested information. You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. Additionally, although the commission takes no position with respect to the remaining requested information, you believe its release may implicate the interests of TWG. Accordingly, you state, and provide documentation demonstrating, the commission notified TWG of the request for information and of its right to submit arguments stating why its information should not be released. *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 statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have reviewed the submitted information.

Initially, we note some of the submitted information is not responsive to the present request for information because it was created after the present request for information was received.¹ This ruling does not address the public availability of any information that is not responsive to the request, and the commission need not release such information in response to this request.

Next, you contend the requested annual report was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2010-00109 (2010) and 2010-04623 (2010). Although you seek to withhold responsive information within the requested annual report pursuant to these prior rulings, we note the annual report sought in the present request for information is not the same exact information as the annual reports at issue in the prior rulings. Thus, the commission may not rely on our previous rulings as previous determinations for the information at issue in the present request. *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 the same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We will consider your argument under section 552.101 of the Government for this information.

We must address the commission's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of the receipt of the request: (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *See* Gov't Code § 552.301(e)(1). You state the commission received the request for information on March 27, 2013, and subsequently sought and received a clarification of the request on April 8, 2013. Thus, the commission's fifteen-business-day deadline was April 29, 2013. *See City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date the request is clarified or narrowed). Although you submitted some of the information

¹The Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. *See Economic 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), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

at issue by this deadline, you did not submit the information for which you raise section 552.101 of the Government Code until July 11, 2013. Consequently, we find the commission failed to comply with the requirements of section 552.301 as to the responsive information it submitted July 11, 2013.

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 information is public and must be released unless the governmental body overcomes this presumption by demonstrating a compelling reason to withhold the information. *Id.* § 552.302; *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, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). A compelling reason generally exists when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Because section 552.101 can provide a compelling reason to withhold information, we will consider the applicability of this exception to this responsive information.

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, this office has not received comments from TWG explaining why its information should not be released to the requestor. Thus, we have no basis to conclude the release of any portion of the submitted information would implicate the third party's interests. *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, we conclude the commission may not withhold any of the responsive information on the basis of any interest TWG may have in the information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information made confidential by other statutes, such as chapter 1303 of the Occupations Code. Subchapter E of chapter 1303 governs the general powers and duties of residential service companies. Section 1303.202 pertains to annual reports residential service companies must file and reads in relevant part:

- (a) Not later than April 1 of each year, each residential service company shall file with the commission a report covering the preceding calendar year.

(b) The report must:

...

(3) include:

(A) a financial statement of the residential service company, including its balance sheet and receipts and disbursements for the preceding year, certified by an independent public accountant;

(B) any material change to the information submitted under Section 1303.103;

(C) the number of residential service contracts entered into during the year, the number of contract holders as of the end of the year, and the number of contracts terminating during the year; and

(D) any other information that:

(i) relates to the performance and solvency of the residential service company; and

(ii) is necessary for the commission to perform its duties under [chapter 1303].

(c) Information provided by a residential service company under Subsection (b)(3)(D) is:

(1) confidential; and

(2) for the exclusive use of the commission.

Occ. Code § 1303.202(a), (b)(3), (c). You state the commission's annual report form requests significant information beyond that required by sections 1303.202(b)(3)(A)-(C). You state the information you have indicated relates to the performance and solvency of the residential service company at issue and is necessary for the commission to perform its duties under chapter 1303. Based on your representations, we agree the information submitted in an annual report pursuant to section 1303.202(b)(3)(D) is confidential under section 1303.202(c). Accordingly, the commission must withhold the responsive information you have marked and state was submitted in the annual reports by the residential

company under section 552.101 in conjunction with section 1303.202(c). As no further exceptions are raised, the commission must release the remaining responsive 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/tch

Ref: ID# 498762

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Michael F. Frosch
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Chicago, Illinois 60604
(w/o enclosures)