ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 18, 2014

Mr. Jeffrey W. Giles
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2014-04581

Dear Mr. Giles:

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# 515684 (City GC No. 21029).

The City of Houston (the "city") received a request for four categories of information pertaining to NERA Economic Consulting ("NERA") regarding a specified study. You state the city is releasing some of the requested information to the requestor. You claim some of the requested information is not subject to the Act. You also claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. You also state release of this information may implicate the proprietary interests of NERA. Accordingly, you have notified NERA of the request and of its right to submit arguments to this office as to why its information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); 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 received comments from NERA. We have also received comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit

comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted representative sample of information.[1]

The city and NERA argue some of the requested information is not subject to the Act. The Act is applicable to "public information." *See id.* § 552.021. Section 552.002 defines "public information" as

> information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:
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> (1) by a governmental body;
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> (2) for a governmental body and the governmental body:
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> (A) owns the information;
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> (B) has a right of access to the information; or
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> (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
>
> (3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Id. § 552.002(a). Thus, virtually all information in a governmental body's physical possession constitutes public information subject to the Act. *Id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). Furthermore, the Act applies to information a governmental body does not physically possess if the information is collected, assembled, or maintained for a governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2). Thus, information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if a governmental body owns or has a right of access to the information. *See* Open Records Decision No. 462 (1987).

The city states it does not maintain some of the requested information. The city states the information at issue is maintained by NERA, a private consulting firm contracted by the city

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[1]We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

to perform a specified study. The city states, and NERA confirms, the city does not own or have a right of access to any of the information at issue. In support, the city has provided the consulting agreement between the city and NERA to our office. The agreement provides that "[NERA] shall retain all right in its own intellectual capital, including, without limitation, its methodologies and methods of analysis, ideas, concepts, expressions, mathematical or statistical models, tools, techniques, and skills, whether developed prior to or during this Agreement ("Intellectual Capital") and the same shall not be deemed works made for hire. The City shall not restrict in any way [NERA's] rights to [NERA's] Intellectual Capital." NERA further states that the information in its possession "consists of supporting data, workpapers and survey methodology - none of which has ever been disclosed to the city, or which has been made public." Thus, based on these representations and our review, we determine the city does not own or have a right of access to any responsive information maintained by NERA, and such information is not public information for purposes of section 552.002 of the Government Code. Therefore, such information need not be provided in response to this request.[2]

Next, you state some of the remaining requested information may have been the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2013-07884 (2013). In that ruling, we determined the city (1) may withhold certain information under section 552.107(1) of the Government Code; (2) must withhold the tax return information we marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code; (3) must withhold the insurance policy numbers we marked under section 552.136 of the Government Code; and (4) must release the remaining information at issue. We have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, to the extent the remaining requested information is identical to the information previously requested and ruled upon by this office, we conclude the city must rely on Open Records Letter No. 2013-07884 as a previous determination and withhold or release the identical information in accordance with that ruling. *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). To the extent the remaining requested information was not previously ruled on, we will consider your submitted arguments.

Next, we must address the city's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). Pursuant to section 552.301(e), a governmental

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[2]As our ruling is dispositive, we need not address NERA's remaining argument for this information.

body must submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). In this instance you state the city received the request for information on December 3, 2013. The copy of the request you have provided to our office is stamped as received on December 3, 2013. However, the requestor has submitted to this office a copy of the tracking information for his request, which was mailed via certified mail. The information submitted by the requestor shows his request was received by the city on December 2, 2013, not December 3, 2013. Although the city states, and provides documentation demonstrating, the request at issue was not processed by the city's mail office until December 3, 2013, we find the request was received on December 2, 2013. Accordingly, the ten business day deadline for requesting a ruling from this office was December 16, 2013, and the fifteen business day deadline was December 23, 2013. The city requested a ruling from this office on December 17, 2013, and submitted the information required by section 552.301(e) on December 26, 2013. Consequently, we find the city 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 submit to this office the information required in section 552.301 results in the legal presumption the requested information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See 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*, 191 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); *see also* Open Records Decision No. 630 (1994). Generally, a governmental body may demonstrate a compelling reason to withhold information by showing the information is made confidential by another source of law or affects third party interests. *See* ORD 630. Although you raise sections 552.107 and 552.111 of the Government Code, these exceptions are discretionary in nature. They serve only to protect a governmental body's interests and may be waived; as such, they do not constitute compelling reasons to withhold information for purposes of section 552.302. *See* Open Records Decision Nos. 676 at 12 (2002) (claim of attorney-client privilege under section 552.107 does not provide compelling reason to withhold information under section 552.302 if it does not implicate third-party rights), 663 at 5 (1999) (governmental body may waive sections 552.107 and 552.111), 470 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions in general). Accordingly, no portion of the requested information may be withheld under sections 552.107 and 552.111 of the Government Code. However, because third-party

interests can provide a compelling reason for non-disclosure, we will consider whether any of the information at issue may be withheld on behalf of NERA.

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). We have received correspondence from NERA, which states it does not object to the release of the submitted information. Accordingly, the city may not withhold any of the submitted information on the basis of any proprietary interest NERA may have in it. *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.

In summary, the responsive information in the possession of NERA is not subject to the Act and need not be released to the requestor. To the extent the submitted information is identical to the information previously requested and ruled upon, the city may continue to rely on Open Records Letter No. 2013-07884 as a previous determination, and withhold or release the previously ruled upon information in accordance with it. 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.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,

Britni Fabian

Britni Fabian
Assistant Attorney General
Open Records Division

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Ref: ID# 515684

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Jordan Rosenfeld
Senior Litigation Counsel
Marsh & McLennan Companies, Inc.
1166 Avenue of the Americas
New York, New York 10036
(w/o enclosures)