



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 19, 2015

Ms. Nneka Kanu
Assistant City Attorney
City of Houston
Legal Department
P.O. Box 368
Houston, Texas 77001-0368

OR2015-09748

Dear Ms. Kanu:

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# 564155 (Houston GC No. 22159).

The City of Houston (the "city") received a request for the city's disadvantaged business enterprise ("DBE") file on Aero Service Partners, L.L.C., Aero Service Group, Inc., or any associated company. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code.¹ Additionally, you state release of the submitted information may implicate the proprietary interests of Aero Service Group, Inc. Accordingly, you state, and provide documentation showing, you notified Aero Service Group, Inc., of the request for information and of its right to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments on behalf of Aero Service Group, Inc. and Aero Service Partners, L.L.C. (collectively, "Aero"). We have considered the submitted arguments and reviewed the submitted information.

¹We note the city did not comply with section 552.301 of the Government Code in raising section 552.101 of the Government Code. *See* Gov't Code § 552.301(e). Nevertheless, because the exception the city claims can provide a compelling reason to overcome the presumption of openness, we will consider the city's claimed exception for the submitted information. *See id.* §§ 552.007, .302, .352.

Section 552.128 of the Government Code provides the following:

(a) Information submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program is excepted from the requirements of Section 552.021, except as provided by this section.

(b) Notwithstanding Section 552.007 and except as provided by Subsection (c), the information may be disclosed only:

(1) to a state or local governmental entity in this state, and the state or local governmental entity may use the information only:

(A) for purposes related to verifying an applicant's status as a historically underutilized or disadvantaged business; or

(B) for the purpose of conducting a study of a public purchasing program established under state law for historically underutilized or disadvantaged businesses; or

(2) with the express written permission of the applicant or the applicant's agent.

(c) Information submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on a bidders list, including information that may also have been submitted in connection with an application for certification as a historically underutilized or disadvantaged business, is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

Gov't Code § 552.128. Aero asserts that the submitted information was submitted to the city in connection with an application for certification as a DBE under the city's DBE program and the Texas Unified Certification Program. Aero states, and we agree, that the requestor is not a governmental entity and that the city does not have express written permission from the applicant or the applicant's agent to release the information. Finally, Aero states the information was not submitted to the city in connection with a specific bid or bidder's list or in connection with a specific proposed contractual relationship. Based on these representations and our review, we find the city must withhold the information we have marked under section 552.128 of the Government Code. We note, however, that section 552.128 applies only to "[i]nformation *submitted by* a potential vendor or contractor[.]" *Id.* § 552.128(a) (emphasis added). The remaining documents consist of

correspondence from the city to Aero or documents that were not submitted to the city by Aero. Accordingly, these documents were not submitted by the company for certification and may not be withheld under section 552.128 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This section encompasses information protected by other statutes. The city and Aero raise section 26.109(a)(2) of title 49 of the Code of Federal Regulations.² Title 49, part 26 of the Code of Federal Regulations governs the participation of disadvantaged business enterprises in the United States Department of Transportation (“DOT”) financial assistance programs, and provides in part the following:

(a) Availability of records.

...

(2) Notwithstanding any provision of Federal or state law, you must not release any information that may reasonably be construed as confidential business information to any third party without the written consent of the firm that submitted the information. This includes applications for DBE certification and supporting information. However, you must transmit this information to DOT in any certification appeal proceeding under § 26.89 of this part or to any other state to which the individual’s firm has applied for certification under § 26.85 of this part.

49 C.F.R. § 26.109(a)(2). Part 26 applies to recipients of certain federal-aid highway funds, federal transit funds, and airport funds. *See id.* § 26.3(a). Section 26.5 states that “You refers to a recipient, unless a statement in the text of this part or the context requires otherwise[.]” *See id.* § 26.5. The city states it receives federal funds from DOT. Upon review, we agree that section 26.109 makes confidential certain business information, including applications for DBE certification and supporting information held by the city. Therefore, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 26.109(a)(2) of title 49 of the Code of Federal Regulations. However, no portion of the remaining information constitutes confidential business information, applications for DBE certification, or supporting information. Therefore, the city may not withhold any portion of the remaining information pursuant to section 26.109(a)(2) of title 49 of the Code of Federal Regulations.

²Section 552.101 of the Government Code encompasses information that other statutes make confidential. A federal statute or an administrative regulation enacted pursuant to statutory authority can provide statutory confidentiality for purposes of section 552.101. *See* Open Records Decision No. 476 (1987) (addressing statutory predecessor).

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence 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, substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 at 5 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, release of requested information would cause that party substantial competitive harm).

Aero argues some of its information consists of commercial information, the release of which would cause the company substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Aero has not demonstrated the release of the remaining information would result in substantial competitive injury. *See* ORD 661. Therefore, none of Aero’s remaining information may be withheld under section 552.110(b) of the Government Code.

In summary, the city must withhold the information we have marked under section 552.128 of the Government Code. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 26.109(a)(2) of title 49 of the Code of Federal Regulations. The city 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.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,



Cristian Rosas-Grillet
Assistant Attorney General
Open Records Division

CRG/cbz

Ref: ID# 564155

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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