Office of the Attorney General · State of Texas
JOHN CORNYN

December 4, 2000

Ms. Barbara Jo Fratila
Assistant General Counsel
Port of Houston Authority
P.O. Box 2562
Houston, Texas 77252-2562

OR2000-4592

Dear Ms. Fratila:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID # 141760.

The Port of Houston Authority (the "authority") received a request for information relating to the Care Terminal. The authority believes that some of the information that is responsive to item nos. 2 and 5 of the request implicates the privacy or property interests of third parties. Pursuant to section 552.305 of the Government Code, the authority notified the third parties whose interests may be affected of their right to submit arguments to this office as to why the information in question should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances). The authority also submitted the information in question to this office. The authority takes no position as to whether the information in question is excepted from disclosure. This office received comments submitted by the Jackson Kearney Group on behalf of Coastal Cargo Company of Texas, Inc. ("Coastal Cargo"). We received no comments from Coastal Stevedoring Corporation, Intermarine, Incorporated, Maritrend, Inc., or Scott Marine Services, Inc. As the authority takes no position with regard to the requested information that relates to these four entities, that information must be released. We have reviewed the information relating to Coastal Cargo and have considered the arguments submitted on behalf of Coastal Cargo.[1]

[1]The comments submitted on behalf of Coastal Cargo list and enclose copies of 16 documents that the company claims should be withheld from disclosure. We note that the documents numbered 5, 9, 12, 13, 14, and 16 by Coastal Cargo do not appear to be among the responsive records that were submitted to this office by the authority in connection with its request for this decision. This decision addresses only those documents enumerated by Coastal Cargo that the authority submitted to this office.

Initially, we must consider the authority's failure to comply with section 552.301 of the Government Code in requesting our decision. Section 552.301 prescribes the procedures that a governmental body must follow in asking for an attorney general decision as to whether requested information may be withheld from the public. Section 552.301(b) provides that "[a] governmental body must ask for the attorney general's decision and state the exceptions that apply . . . not later than the 10th business day after the date of receiving the written [information] request." Section 552.302 of the Government Code provides that if a governmental body fails to comply with section 552.301 in requesting an attorney general decision, the requested information is presumed to be subject to public disclosure and must be released unless there is a compelling reason to withhold any of that information from the public.

In this instance, the authority failed to ask for an attorney general decision in compliance with section 552.301(b) of the Government Code. Therefore, the requested information is presumed to be subject to disclosure and must be released, unless there is a compelling reason to withhold any of that information from the public. Gov't Code § 552.302; *see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 380-81 (Tex. App.--Austin 1990, no writ). As a general rule, the statutory presumption of openness under section 552.302 can be rebutted by showing that the information at issue is deemed to be confidential under some other source of law or that the interests of third parties are at stake. *See* Open Records Decision No. 630 at 3 (1994). Thus, a demonstration that information is excepted from disclosure under section 552.110 of the Government Code may overcome the presumption under section 552.302 that the information must be released. *Id.*

Section 552.110 protects the proprietary interests of private parties that submit information to governmental bodies by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial 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. *See* Gov't Code § 552.110(a), (b). In this instance, Coastal Cargo raises section 552.110(b). Under section 552.110(b), the private entity must make a specific factual or evidentiary showing, and not conclusory or generalized allegations, that substantial competitive injury likely would result from the release of the information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (addressing required showing); *see also National Parks & Conservation Ass'n v. Morton,* 498 F.2d 765 (D.C. Cir. 1974).

Coastal Cargo "objects to the request [for information] as the seeking by a direct competitor of commercial and financial information the disclosure of which would place [Coastal Cargo] at a competitive disadvantage and cause it substantial financial harm." Coastal Cargo asserts that, "[a]s indicated in Coastal Cargo's 13 October 1997 letter [to the authority], the stevedoring/marine terminal market in Houston is intensively competitive. Any information about an operator's financial or performance obligations or results which finds it [sic] way into the possession of competitors can mean not mere disadvantage but literal doom."

Coastal Cargo also contends that it "will be placed at a significant competitive disadvantage if the commercial and financial records pertaining to its activities at Care Terminal are made available to its business competitors." We have carefully considered Coastal Cargo's arguments. We also have thoroughly examined the responsive records submitted by the authority that Coastal Cargo believes should be withheld from disclosure under section 552.110(b). We conclude, however, that Coastal Cargo has not made a specific factual or evidentiary demonstration that substantial competitive injury likely would result from the release of those records. *See* ORD 661 at 6 (1999) (business enterprise must show by specific factual evidence that the release of requested information would cause it substantial competitive harm). Therefore, we conclude that the requested information relating to Coastal Cargo is not excepted from disclosure under section 552.110(b) and must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.–Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Scholoss at the General Services Commission at 512/475-2497.

Sincerely,

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/er

Ref: ID# 141760

Encl: Submitted documents

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