

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



July 30, 2002

Mr. Jesús Toscano, Jr.
Administrative Assistant City Attorney
City of Dallas
1500 Marilla, Room 7DN
Dallas, Texas 75201

OR2002-4173

Dear Mr. Toscano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 165727.

The City of Dallas (the “city”) received three written requests for all materials submitted to the city by the Palladium Company, L.L.C. (“Palladium”) in connection with an application for tax increment district funding. You state that some responsive information has been released to the requestors. You contend, however, that the remaining information coming within the scope of the request is excepted from required public disclosure pursuant to section 552.131 of the Government Code. Additionally, you have requested a decision from this office pursuant to section 552.305 of the Government Code, which allows governmental bodies to rely on third parties having a privacy or property interest in the information to submit their own arguments as to why the requested information is excepted from public disclosure. This office has received briefing from Palladium as well as from one of the requestors. *See* Gov’t Code § 552.304 (authorizing members of the public to submit comments on public nature of requested information).

As a threshold issue, we must first address Palladium’s contention that the requested information is not subject to the provisions of the Public Information Act. Palladium explains:

The City and Palladium are currently negotiating the use of tax increment financing to fund certain public improvements within the Project. In connection with these negotiations, certain City council members have requested that Palladium provide [the information at issue]. Due to the confidential and proprietary nature of the Data and the fact that disclosure thereof would cause substantial competitive harm to Palladium . . . Palladium

refused to provide the Data to the City. However, Palladium did agree to provide the Data to an independent third party for review and analysis on the condition that the Data remain confidential.

Accordingly, pursuant to the terms of that certain Consultant Contract for the Review, Evaluation, Study and Analysis of the Palladium Proforma (the "KPMG Contract") . . . the City engaged KPMG to review and submit a report to the City verifying and evaluating certain aspects of the Data. Palladium provided the Data to KPMG pursuant to that certain Confidentiality and Non-Disclosure Agreement (the "Confidentiality Agreement") In order to protect the Data from public disclosure, Palladium has not provided a copy of the Data to the City, and KPMG is prohibited from providing the Data to the city pursuant to the Confidentiality Agreement.

Palladium contends that the requested information is not subject to the Public Information Act because the information is not held by the city.

Section 552.002(a) of the Government Code defines the meaning of "public information" as follows:

In this chapter, "public information" means information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information *or has a right of access to it*. [Emphasis added.]

Consequently, it is immaterial that the city does not have actual possession of the records at issue at the time of the records requests if the city had a right of access to the information.

In Open Records Decision No. 585 (1991), this office discussed a contract between the City of West University Place and a private search firm where the terms of the contract provided that the ownership and control of a list of applicants for city manager that the search firm had generated remained with the private search firm. This office concluded:

A board in charge of the affairs of a municipality may appoint agents to discharge ministerial duties, but it may not delegate to others the discharge of duties that call for the exercise of discretion. Horne Zoological Arena Co. v. City of Dallas, 45 S.W.2d 714, 715 (Tex.Civ.App.--Waco 1931, no writ).

A contract that purports to grant such a right is ultra vires and unenforceable.¹ Moore v. City of Beaumont, 195 S.W.2d 968, 978 (Tex.Civ.App.--Beaumont 1946), *aff'd* 202 S.W.2d 448 (Tex.1947). Consequently, to the extent that the contract between the city of West University Place and the private corporation could be interpreted to give the corporation authority to exercise discretion on behalf of the city in regard to the selection of a city manager, it would be unenforceable. Because the city cannot delegate the exercise of discretion, it follows that the city cannot forfeit its right of access to the information necessary to exercise its discretion.

Open Records Decision 585 at 2 (footnote in original). For similar reasons, we conclude here that the city's decision to enter into the Palladium Project is a discretionary act and, consequently, the city may not forfeit its right to information necessary to the exercise of its discretion. *See also* Open Records Decision No. 518 (1989). The requested information held by KPMG is therefore "public information" for purposes of section 552.002(a)(2).

We next note that information is not confidential under the Public Information Act simply because the party that submitted the information anticipates or requests that it be kept confidential. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied* 430 U.S. 931 (1977). In other words, a governmental body cannot, through a contract, overrule or repeal provisions of the Public Information Act. Attorney General Opinion JM-672 (1987). Consequently, unless the requested information falls within an exception to disclosure, it must be released, notwithstanding any contract between Palladium and KPMG specifying otherwise.

We now address both your and Palladium's contentions regarding the applicability of section 552.131 of the Government Code, which reads in pertinent part as follows:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

¹*See Crosby v. P.L. Marquess & Co.*, 226 S.W.2d 461 (Tex.Civ.App.--Beaumont 1950, writ ref'd n.r.e.) (school district's contract with appraisal company held valid since company's work was not to be done to exclusion of district's tax assessor and collector); Moore v. City of Beaumont, *supra* (determination that city land was unneeded and should be sold involved exercise of discretion and could not be delegated); Horne Zoological Arena Co. v. City of Dallas, *supra* (because selection of zoo animals involves exercise of discretion, park board could not delegate selection of animals to parks director).

(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.

Gov't Code § 552.131(a). Section 552.131(a) excepts from public disclosure only “trade secrets” and “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.” In this regard, section 552.131 is co-extensive with section 552.110 of the Government Code. Because Palladium also contends that the information at issue is excepted from required public disclosure pursuant to section 552.110(b), we will address the applicability of these two exceptions together.

Section 552.110(b) of the Government Code protects the property interests of private persons by excepting from disclosure “[c]ommercial 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.” The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. *See* Open Records Decision No. 661 (1999); *see also National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). In this instance, Palladium has demonstrated how the release of most of the information it seeks to withhold would result in substantial competitive injury. We therefore conclude that the city must withhold from Schedule F all information under Tabs 1, 2, 4, 5, 7-12, 14-30, and 34-39 pursuant to sections 552.110(b) and 552.131 of the Government Code.² The remaining portions of Schedule F must be released to the requestors.

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

²In reaching our conclusion here, we assume that the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision No. 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.

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).

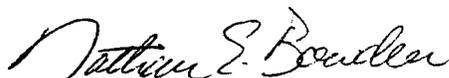
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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).

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 Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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.

Sincerely,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/RWP/sdk

Ref: ID# 165727

Enc: Submitted documents

c: Mr. Joseph W. Geary
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CAUSE NO. GN202727

RELATED URBAN DEVELOPMENT,
L.L.C., f/k/a THE PALLADIUM
COMPANY, L.L.C.
Plaintiff,

V.

GREG ABBOTT, ATTORNEY
GENERAL OF TEXAS,
Defendant.

§ IN THE DISTRICT COURT OF
§
§
§
§
§ TRAVIS COUNTY, TEXAS
§
§
§
§ 345th JUDICIAL DISTRICT

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for entry of an agreed final judgment. Plaintiff Related Urban Development, L.L.C. ("Related Urban" or "Plaintiff") and Defendant Greg Abbott, the Attorney General of Texas, appeared, by and through their respective attorneys, and announced to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code ch. 552.

In compliance with the Tex. Gov't Code § 552.325(c), the requesters, Joseph W. Geary ("Geary"), and Michael Whiteley of the Dallas Business Journal ("DBJ"), were sent reasonable notice of this setting and of the parties' agreement that the City of Dallas and the Plaintiff may withhold some of the information at issue. The requesters were also informed of their right to intervene in the suit to contest the withholding of this information. The requesters have not informed the parties of their intention to intervene; neither have they filed a motion to intervene or appeared today.

FILED

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Wanda T. [Signature]

CLERK
TRAVIS COUNTY, TEXAS

The City of Dallas, though not a party to this lawsuit, consents, as indicated by the signature of its authorized representative below, to the settlement agreement and to this order, and to be bound and comply with them.

After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. The information at issue, specifically, the three-page document, referred to as the Tab 13 document, consisting of the Victory Map, dated October 22, 2001, is Related Urban's proprietary information and is excepted from disclosure under the PIA, Tex. Gov't Code § 552.110.

2. The City of Dallas ("City"), not a party to this case, must withhold from disclosure the information enumerated in paragraph 1 of this Judgment.

3. The remaining information not enumerated in paragraph 1 of this Judgment, that the Attorney General determined was subject to disclosure in Open Records Letter No. 2002-4173, is not excepted from disclosure under the PIA and must be released by the City to the requesters within 10 days after receipt of this order, if the information has not already been released.

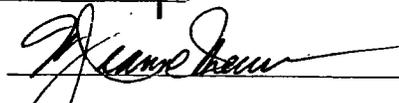
4. All costs of court are taxed against the parties incurring the same;

5. All relief not expressly granted is denied; and

6. This Agreed Final Judgment finally disposes of all claims between Plaintiff and

Defendant and is a final judgment.

SIGNED this the 19th day of February, 2004.



PRESIDING JUDGE

AGREED:



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