



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

July 21, 2003

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

OR2003-5012

Dear Mr. Toscano:

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# 184618.

The City of Dallas (the "City") received a request for a copy of "the most recently completed appraisal the city has obtained on property owned by Deep Ellum Development, Ltd." You assert the requested information is excepted from disclosure under sections 552.104 and 552.105 of the Government Code. We reviewed the information you submitted and considered the exceptions you claim.

Initially, we note section 552.022(a)(1) of the Government Code governs the submitted information. Section 552.022 provides, in relevant part, as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). As you acknowledge, Exhibit B consists of a completed appraisal report made expressly public by section 552.022(a)(1). Therefore, the City may withhold this information only to the extent it is made confidential under other law or is otherwise protected by section 552.108 of the Government Code. Section 552.105, a discretionary exception, does not constitute other law for the purposes of section 552.022.¹ See Open Records Decision No. 564 (1990) (governmental body may waive statutory predecessor to section 552.105); see also Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the City may not withhold the submitted information under section 552.105 of the Government Code. However, we will address your arguments under section 552.104 of the Government Code. See Gov't Code § 552.104(b) (section 552.022 does not apply to information that is excepted from disclosure under section 552.104).

Section 552.104 protects from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov't Code § 552.104. The purpose of section 552.104 is to protect the government's interests when it is involved in certain commercial transactions. For example, generally, section 552.104 is invoked to except information submitted to a governmental body as part of a bid or similar proposal. See, e.g., Open Records Decision No. 463 (1987). In these situations, the exception protects the government's interests in obtaining the most favorable proposal terms possible by denying access to proposals prior to the award of a contract. When a governmental body seeks protection as a competitor, however, we have stated that it must be afforded the right to claim the “competitive advantage” aspect of section 552.104 if it meets two criteria. The governmental body must first demonstrate that it has specific marketplace interests. See Open Records Decision No. 593 at 4 (1991) (governmental body that has been granted specific statutory authority to compete in the private marketplace may demonstrate marketplace interests analogous to those of a private entity). Second, the governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *Id.* at 2. Whether release of particular information would harm the legitimate marketplace interests of a governmental body requires a showing of the possibility of some specific harm in a particular competitive situation. *Id.* at 5, 10.

¹ Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. See, e.g., Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive statutory predecessor to section 552.111); see also *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103). Therefore, discretionary exceptions do not constitute other law that makes information confidential.

In this case, you inform us that the City has issued a loan to Deep Ellum, secured by the property at issue in the requested appraisal. You explain that the City “is *contemplating* marketing this loan, along with other City loans, for sale to potential bidders.” (Emphasis added.) Further, you opine that “until the City sells its loan, the information in Exhibit B is exempt from disclosure under Section 552.104 of the Act.” You do not state that the City has a *present* intent to sell this loan. Therefore, we find that the City has not sufficiently demonstrated that it has specific marketplace interests in this instance or that release of the submitted information would harm the City in a specific competitive situation. Thus, we conclude the City may not withhold the submitted completed appraisal in Exhibit B based on section 552.104 of the Government Code. Accordingly, the City must release Exhibit B to the requestor.

However, we note Exhibit B contains copyrighted materials. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

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

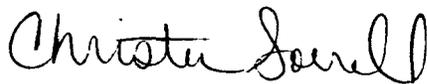
fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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 Dep't of Pub. 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,



Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/seg

Ref: ID# 184618

Enc: Submitted documents

c: Mr. John Miller
Deep Ellum Development, Ltd.
1925 San Jacinto, Suite 401
Dallas, Texas 75201
(w/o enclosures)