



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 25, 2007

Ms. Laura Garza Jimenez  
County Attorney  
Nueces County  
901 Leopard, Room 207  
Corpus Christi, Texas 78401-3680

OR2007-03296A

Dear Ms. Jimenez:

This office issued Open Records Letter No. 2007-03296 (2007) on March 26, 2007. We have examined this ruling and determined that we made an error in determining that all information pertaining to Teal Construction Company and Marshall Co. Ltd. was subject to this office's decision in Open Records Letter No. 2006-06293 (2006), which addressed a request for certain portions of Marshall Co. Ltd.'s and Teal Construction Company's proposals. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on March 26, 2007. *See generally* Gov't Code 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the "Act")).

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# 274537.

The Nueces County Judge (the "county") received two requests for the responses to RFP 2691-06, as well as a request for RFP 2691-06, specified items of information relating to RFP 2691-06, RFP 2624-05, and all responses to RFP 2624-05. The county states that it will release some information to the requestors, but claims that some of the submitted

information is excepted from disclosure under section 552.136.<sup>1</sup> Further, the county takes no position with regard to the remaining requested information, but claims that it may contain proprietary information subject to exception under the Act. Accordingly, the county states, and provides documentation showing, that it has notified Fulton\*Coastcon Construction (“Fulton”), Fulton Coastcon Hunt Construction (“Hunt”), Zachry Construction Corporation (“Zachry”), Marshall Co. Ltd. (“Marshall”), and Teal Construction Company (“Teal”) of the request for information and of their right to submit arguments to this office as to why the requested information 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 correspondence from Zachry and Marshall. We have reviewed the submitted arguments as well as the submitted information. We have also considered the comment submitted by one of the requestors. *See* Gov’t Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, the county and Marshall both inform this office that some of the requested information is the subject of Open Records Letter No. 2006-06293. Open Records Letter No. 2006-06293 concluded that the marked information relating to Zachry’s and Marshall’s responses to RFP 2624-05 must be withheld under section 552.110(b) of the Government Code. Open Records Letter No. 2006-06293 also determined that Teal failed to demonstrate that any of its information at issue in that ruling was proprietary for purposes of the Act. With regard to the requested information that is identical to the information previously requested and ruled upon by this office in that prior ruling, we conclude that, as we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, you must continue to rely on Open Records Letter No. 2006-06293 as a previous determination. *See* Open Records Decision No. 673 (2001) (so long as law, facts, 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).

Section 552.305 of the Government Code permits an interested third party to submit to this office within ten days of receiving notification of the request reasons why requested information should not be released. *See* Gov’t Code § 552.305; *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances). Because Fulton, Hunt, and Teal did not submit arguments in response to the section 552.305 notice, we have no basis to conclude that these companies’ information is excepted from disclosure because of their proprietary interests.

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<sup>1</sup>We note that in its letter dated January 31, 2007, the county withdrew its claims under sections 552.101, 552.103, and 552.104 of the Government Code.

*See* Open Records Decision Nos. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). Accordingly, the county may not withhold any portion of the submitted information based on the proprietary interests of these third parties.

Zachry contends that its response to RFP 2691-06 is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from public disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). This exception protects the competitive interests of governmental bodies, not the proprietary interests of private parties such as Zachry. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). Thus, because the county does not claim this exception, none of the submitted information is excepted from disclosure under section 552.104 of the Government Code.

Zachry next asserts that its response to RFP 2691-06 is excepted from disclosure under section 552.110(b) of the Government Code. Marshall asserts that the Contractor’s Qualification Statement, Financial Statement, and Cost Estimate Sample contained in its response to RFP 2624-05, are also excepted from disclosure under this section. Section 552.110(b) protects “[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[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.* § 552.110(b); Open Records Decision No. 661 (1999).

After reviewing Zachry’s response and arguments, we determine that the disclosure of some of the information in its response would cause substantial competitive harm. Therefore, the county must withhold the information that we have marked in Zachry’s response under section 552.110(b). However, we determine that as to the remaining information in the response, Zachry has failed to provide specific factual evidence demonstrating that release of this information would result in substantial competitive harm to the company. Accordingly, no part of the remaining information in Zachry’s response may be withheld on this basis.

After reviewing Marshall’s arguments for the information it claims to be excepted from disclosure under section 552.110(b), we determine that the disclosure of some of this information would cause substantial competitive harm. Therefore, the county must withhold the information that we have marked under section 552.110(b). However, we determine that as to the remaining information at issue, Marshall has failed to provide specific factual evidence demonstrating that release of this information would result in substantial

competitive harm to the company. Accordingly, no part of the remaining information may be withheld on this basis.

Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. An access device number is one that may be used to “(1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* The county must withhold the insurance policy numbers that it has marked and that we have marked.

In summary, the county must withhold and release the requested information that is subject to the previous determination in Open Records Letter No. 2006-06293. The county must withhold the information that we have marked under section 552.110(b). The county must withhold the marked insurance policy numbers under section 552.136. The remaining information must be released.

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).

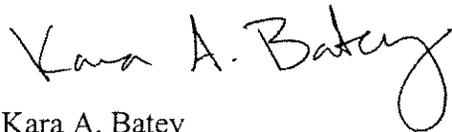
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



Kara A. Batey  
Assistant Attorney General  
Open Records Division

KAB/sdk

Ref: ID# 274537

Enc. Submitted documents

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