



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 19, 2007

Ms. Nancy O. Williams
Senior Assistant City Attorney
City of Irving
825 West Irving Boulevard
Irving, Texas 75060

OR2007-16838

Dear Ms. Williams:

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# 297707.

The City of Irving (the "city") received a request for ten categories of information pertaining to a specified individual and a development project. You state that you have released some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.104, 552.105, 552.106, 552.107, 552.110, 552.111, and 552.131 of the Government Code.¹ You further indicate that the release of some of the submitted information may implicate the proprietary interests of McDougal Companies. Pursuant to section 552.305 of the Government Code, you were required to notify McDougal Companies of the request and of its opportunity to submit comments to this office explaining why the submitted information should be withheld from disclosure. *See Gov't Code § 552.305(d)* (determining that statutory predecessor to section 552.305 permits governmental body to rely on third party to raise and explain applicability of exception to

¹Although you initially raised section 552.103 of the Government Code, you have not submitted arguments explaining how this exception applies to the submitted information. Therefore, we presume that you have withdrawn this exception. *See Gov't Code §§ 552.301, 552.302.*

disclosure in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.²

We note that the city has failed to comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information that it wishes to withhold. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving a written request for information. *Id.* § 552.301(b). Pursuant to section 552.301(e), the governmental body is required to submit to this office within fifteen business days of receiving the request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e)(1)(A)-(D). The city received the request for information on September 27, 2007. We note that the city did not raise sections 552.106 and 552.110 within ten business days. Consequently, you failed to timely raise those exceptions. Further, the fifteenth business day after the city received the request was October 18, 2007. We received the city's arguments and representative sample of information on October 22, 2007. There is no postmark on the mail, and we are otherwise unable to determine that the city mailed its arguments and representative sample of information on or before October 18, 2007. *See* Gov't Code § 552.308(b) (prescribing standards for timeliness of action by United States or interagency or common or contract carrier). Consequently, we find that the city failed to comply with the procedural requirements mandated by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Generally, a compelling reason exists when third party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977).

²We 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 Nos. 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.

Although you assert that the submitted information is excepted pursuant to sections 552.104, 552.105, 552.106, 552.107, and 552.111 of the Government Code, these are discretionary exceptions that protect a governmental body's interests and may be waived by a governmental body's failure to comply with the procedural requirements of the Act. *See* Open Records Decision Nos. 522 at 4 (1989) (discretionary exceptions in general), 592 at 8 (1991) (statutory predecessor to section 552.104 subject to waiver), 564 (1990) (statutory predecessor to section 552.105 subject to waiver), 470 (1987), 676 at 12 (2002) (attorney-client privilege under section 552.107 constitutes compelling reason to withhold information under section 552.302 only if information's release would harm third party), 677 at 10 (2002) (claim of attorney work-product privilege under section 552.111 does not provide compelling reason for purposes of section 552.302 if it does not implicate third party rights), 470 (1987) (statutory predecessor to section 552.111 is a discretionary exception). Thus, the city may not withhold any of the submitted information under sections 552.104, 552.105, 552.106, 552.107, and 552.111. Because sections 552.110 and 552.131(a) can provide compelling reasons to withhold information, we will address your arguments concerning these exceptions.

The city claims that the submitted information is excepted from disclosure under section 552.110(b) of the Government Code. By its terms, section 552.110 only protects the interests of the person from whom the information was obtained. This provision does not protect the interests of the governmental body that receives proprietary information, nor does it allow a governmental body to assert section 552.110 for information it creates. However, a governmental body may assert section 552.110 on behalf of an interested third party. Therefore, we will address the city's claim on behalf of McDougal Companies.

Section 552.110(b) of the Government Code 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. Gov't Code § 552.110(b); *see also Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

After reviewing the city's arguments and the information at issue, we find that the city has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the submitted information would cause McDougal Companies substantial competitive harm. *See* ORD 661 at 5-6 (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm); *see also* Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). Furthermore, we

note that as of the date of this letter, McDougal Companies has not submitted comments to this office explaining why any portion of the submitted information should not be released to the requestor. Thus, McDougal Companies has not provided any basis to conclude that the release of any portion of the submitted information would implicate its proprietary interests. We therefore conclude that the city may not withhold any of the submitted information under section 552.110 of the Government Code.

The city claims that portions of the submitted information are excepted from disclosure under section 552.131 of the Government Code, which provides in part:

(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

(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 disclosure only "trade secret[s] of [a] business prospect" 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." *Id.* Thus, the scope of section 552.131(a) is co-extensive with that of section 552.110 of the Government Code. *See id.* § 552.110(a)-(b), Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999). We note that the third party whose information the city seeks to protect is a developer working on behalf of the city, rather than a business which the city is seeking to have "locate, stay, or expand in or near the territory of the governmental body." *See* Gov't Code § 552.131(a). Therefore, we conclude that the city may not withhold any of the information at issue under section 552.131(a) of the Government Code.

Next, we note that the submitted information contains a bank account number. Section 552.136(b) 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."³ *Id.*

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

§ 552.136. The city must withhold the bank account number we have marked under section 552.136 of the Government Code.

Finally, we note that section 552.137 of the Government Code is applicable to some of the submitted information. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You also do not inform us that the relevant members of the public have consented to the release of these e-mail addresses. We have marked the e-mail addresses that the city must withhold under section 552.137 of the Government Code.

In summary, the city must withhold the bank account number we have marked under section 552.136 of the Government Code and the e-mail addresses we have marked under section 552.137 of the Government Code. The remaining submitted 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

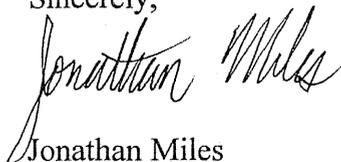
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 challenge 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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/jh

Ref: ID# 297707

Enc. Submitted documents

c: Mr. Ray Sanchez
c/o Ms. Nancy O. Williams
Senior Assistant City Attorney
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Irving, Texas 75060
(w/o enclosures)