



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 9, 2008

Mr. Jesus Toscano, Jr.  
Assistant City Attorney  
Ms. Heather Silver  
Assistant City Attorney  
City of Dallas  
1500 Marilla Street, Room 7DN  
Dallas, Texas 75201

OR2008-06390

Dear Mr. Toscano and Ms. Silver:

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# 309675.

The City of Dallas (the "city") received two requests for information pertaining to a proposed Dallas Convention Center Hotel. The first requestor seeks the proposals submitted in response to the city's Request for Qualifications for a Master Developer for the Convention Center Hotel. The second requestor seeks information pertaining to the land acquisition, financing, construction, and operation of the proposed hotel, including the proposals submitted in response to the Request for Qualifications and Request for Proposals for a Master Developer for the Convention Center Hotel. You state that the city has provided the second requestor with some of the requested information. You claim that the submitted responses to the Request for Qualifications and the submitted site evaluation update are excepted from disclosure under sections 552.104, 552.105, and 552.131 of the Government Code. You also state that release of the submitted information may implicate the proprietary interests of several third parties. Accordingly, pursuant to section 552.305 of the Government Code, you have notified the interested third parties of this request and of their right to submit arguments to this office as to why the requested information should not be

released.<sup>1</sup> *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received comments from Faulkner and Woodbine. We have also received comments from the second requestor and another interested party. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered all of the submitted comments and arguments, and we have reviewed the submitted information.

We first address comments submitted by the second requestor, Mr. David LaBrec, regarding the city's procedural requirements for requesting this decision. Initially, Mr. LaBrec questions whether the city's request for our opinion was timely. He also suggests that the city is seeking an opinion from our office to intentionally delay the production of the requested information. We note that pursuant to section 552.301(a) of the Government Code, "[a] governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [Act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions." *See* Gov't Code § 552.301(a). In this instance, because the city seeks to withhold information under the Act's exceptions, it is *required* to seek a ruling from this office pursuant to section 552.301(a). Furthermore, even if the city did not raise exceptions on its own behalf, because it believes the proprietary interests of third parties may be implicated by the request, it is required to request a ruling from this office and notify the interested third parties of their rights and responsibilities pursuant to section 552.305 of the Government Code. *See id.* § 552.305(a). Accordingly, we find the city properly requested this ruling as required by section 552.301(a) of the Government Code.

With regard to whether the city's request for our opinion was timely, we note that pursuant to section 552.301(b) of the Government Code, a governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the tenth business day after the date of receiving the written request. *See* Gov't Code § 552.301(b). Additionally, pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general 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

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<sup>1</sup>The interested third parties that received notice pursuant to section 552.305 are the following: Hines Interests Limited Partnership; Garfield Traub Development, LLC; Matthews Holdings Southwest, Inc.; Hamilton Properties; Jones Lang LaSalle; Faulkner USA ("Faulkner"); and Woodbine Development Corporation ("Woodbine").

information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e)(1)(A)-(D). In this instance, the city received Mr. LaBrec's request on March 13, 2008. It subsequently requested our opinion pursuant to section 552.301(a), stating the exceptions that applied on March 27, 2008. The city then submitted a copy of the requested information along with written comments stating the reasons why the stated exceptions applied on April 3, 2008. Thus, upon review, we find that the city timely complied with the requirements mandated by section 552.301 in requesting this decision.

Mr. LaBrec is also concerned with the fact that the city notified the interested third parties of this request, as he states that the city "gratuitously provided each of the six developer proponents with a letter from the City Attorney giving specific directions and legal advise [sic] on how to keep their documents from disclosure." As previously noted, a governmental body is *required* to notify third parties whose proprietary interests may be affected by release of information pursuant to section 552.305 of the Government Code. *See* Gov't Code § 552.305(d). Pursuant to section 552.305(d)(2)(B) of the Government Code, the governmental body must send the affected third parties a statement which is prescribed by this office that generally identifies the commonly-raised legal exceptions the third party may demonstrate if it seeks to withhold its information from public disclosure. Section 552.305(d)(2)(B) states that this notification must include a statement that the third party is entitled to submit to our office each reason the third party has as to why information should be withheld. The notification letter that the city sent was the Attorney General's prescribed form; accordingly, we find the city complied with the requirements of section 552.305 in notifying the third parties whose proprietary interests are at issue in this case.

Mr. Labrec also asserts that the city has not provided any correspondence to him pertaining to the hotel project at issue, and that it has not produced all relevant documents pertaining to prior hotel projects. We assume that, to the extent responsive information other than the documents submitted for our review existed on the date the city received the request for information, the city has released that information to Mr. LaBrec. If not, then the city must do so immediately. *See* Gov't Code §§ 552.006, 552.301, 552.302; Open Records Decision No. 664 (2000).

We now address the city's arguments. The city asserts that the submitted responses to its Request for Qualifications are excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations, including those in which the governmental body may wish to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 at 8 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a bidder will gain an unfair

advantage will not suffice. Open Records Decision No. 541 at 4 (1990). However, section 552.104 does not except from disclosure information relating to competitive bidding situations once a contract has been awarded. Open Records Decision Nos. 306 (1982), 184 (1978).

In this instance, the city informs us that the submitted responses to the Request for Qualifications pertain to a competitive bidding situation in which a contract has not yet been awarded. The city explains that six developers met the qualifications necessary to submit subsequent proposals, and that the city issued a Request for Proposals to the six developers. The city states that “[a] proposer’s subsequent submissions and negotiations with the city should not be influenced by knowledge of the contents of a competitor’s initial proposal” and that “a proposer with advance knowledge of the contents of a competitor’s initial proposal could propose during subsequent submissions and negotiations additional terms not originally submitted.” The city also states that “release of a proposal prior to the award of the Project would necessarily result in an advantage to one proposer at the expense of others and hinder the city’s ability to receive the best possible offer.” Based on these representations and our review, we find that the city has demonstrated that release of the responses would harm its competitive interests.

Mr. LaBrec asserts, however, that the city encourages the third parties to share information with each other and that the third parties have access to each other’s responses. He further states that the fact that the city encourages the developers to share information among themselves waives any claim of exemption from public disclosure. Section 552.007 of the Government Code provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law. *See* Gov’t Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim discretionary exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Whether the third parties in this case have shared information with each other has no bearing on the city’s claimed exceptions. On the other hand, if the city provided information to the third parties, then the city has waived its claim under section 552.104. We have no indication or evidence that the city released the responses and thus waived its claims against disclosure. Accordingly, we conclude that the city may withhold the submitted responses under section 552.104 of the Government Code until such time as a contract has been executed.<sup>2</sup> *See* Open Records Decision No. 170 at 2 (1977) (release of bids while negotiation of proposed contract is in progress would necessarily result in an advantage to certain bidders at the expense of others and could be detrimental to the public interest in the contract under negotiation).

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<sup>2</sup>As our ruling is dispositive for this information, we need not address the interested third parties’ arguments or the city’s remaining arguments against disclosure of this information.

Next, the city asserts that the submitted site evaluation update is subject to section 552.105 of the Government Code. Section 552.105 excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. Section 552.105 is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information that is excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted from disclosure so long as the transaction relating to that information is not complete. *See* ORD 310. But the protection offered by section 552.105 is not limited solely to transactions not yet finalized. This office has concluded that information about specific parcels of land obtained in advance of other parcels to be acquired for the same project could be withheld where release of the information would harm the governmental body's negotiating position with respect to the remaining parcels. *See* ORD 564 at 2. A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" ORD 357 at 3 (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiating position with regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good-faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564.

In this instance, the city states the submitted site evaluation update is an internal city evaluation and comparison of potential real estate sites that the city is considering purchasing for the future Convention Center Hotel. Mr. LaBrec claims, however, that an offer on one of the potential sites has been made, that the city put up \$500,000 as earnest money, and that "both the price and location are widely known throughout the City." He also claims that, because Texas law requires the location of the proposed hotel to be within one thousand feet of the Convention Center, locations of available property within one thousand feet are easily identified by any layman. The city explains that "[o]ne of the sites is currently under contract, which may or may not close" and that "a second site may be sought for acquisition depending upon the outcome of a competitive Request for Master Hotel Developer Proposals, currently underway." The city asserts that release of its preference rankings of potential alternative sites for its project would harm the city's negotiation position and strengthen the property owner's bargaining position. Upon review of the submitted arguments, we find that the city has demonstrated that release of the site evaluation update would harm its negotiation position with regard to these transactions. Accordingly, we

conclude that the city may withhold the submitted site evaluation update under section 552.105 of the Government Code.

In summary, the city may withhold the submitted responses under section 552.104 of the Government Code and the submitted site evaluation update under section 552.105 of the Government Code.

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,



Allan D. Meesey  
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Open Records Division

ADM/eeg

Ref: ID# 309675

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