



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 12, 2008

Ms. Karen Brophy
Senior Assistant City Attorney
City of Irving
825 West Irving Boulevard
Irving, Texas 75060

OR2008-16962

Dear Ms. Brophy:

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# 328852.

The City of Irving (the "city") received a request for copies of all documents relating to agreements involving the city, Comerica Bank (the "bank"), and McDougal Companies ("McDougal"). You state you are providing most of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.105, 552.110, 552.136, and 552.137 of the Government Code. You also state the city notified McDougal of its rights 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 comments submitted by an attorney for McDougal. We have considered the submitted arguments and reviewed the submitted representative sample of information.¹ We have also considered comments

¹ 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 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.

submitted by the requestor's attorney. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

We first address McDougal's argument that the submitted information is not subject to the Act. The Act is only applicable to "public information." *See id.* § 552.021. Section 552.002(a) defines public information as "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." *Id.* § 552.002(a). McDougal argues that the submitted information is not subject to the Act because McDougal is a private company. The city explains that it wants to redevelop an area near the city's original downtown. The city enlisted the help of a private investor, McDougal, who agreed to purchase land within the redevelopment area. McDougal agreed to take out a loan with the bank to purchase this land. The city entered into an agreement with McDougal and the bank, whereby if McDougal defaults on any obligation of his loan, the city agreed to buy the note from the bank and then become the lender to McDougal on the loan. The city states that it maintains the submitted information to "protect its own interests in and obligation under the Loan Purchase and Sale Agreement" between the city and the bank. Because this information is maintained in connection with the transaction of the city's official business, we conclude that it is public information for purposes of section 552.002. Accordingly, the submitted information is subject to the Act and must be released unless it falls within an exception to disclosure. *See* Gov't Code §§ 552.006, 552.021, 552.301, 552.302. Thus, we will consider the claimed exceptions to disclosure.

The city and McDougal argue that the submitted information should be withheld under section 552.105 of the Government Code. Section 552.105 excepts from disclosure information that relates 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.

Id. § 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 excepted from disclosure under section 552.105 pertaining to such negotiations may be excepted from disclosure so long as the transaction relating to that information is not complete. *See* ORD 310. 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.

You state that the city seeks to redevelop the South Irving Heritage District. You further state that the public purpose of the redevelopment plan is the revitalization and diversification of the economy in an area of the city that has "stalled." You represent that the submitted information pertains to the location and purchase price of real property in that area. You have submitted an affidavit from the city's Assistant Director of Real Estate Services who states that release of the submitted information would damage the negotiating position in the acquisition of nearby properties. He further states that the failure of McDougal to acquire the remaining parcels in the area will jeopardize the city's redevelopment project and increase the city's risk of contingent liability under the agreement with the bank. *See* Open Records Decision No. 265 (1981) (location of a private company's proposed waste treatment plant could be withheld under statutory predecessor to section 552.105 until purchase of site was complete). Based on your representations and our review, we conclude that the city may withhold the submitted information under section 552.105 of the Government Code. As our ruling is dispositive, we need not address your remaining arguments against disclosure.

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). If the governmental body does not file suit over 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).

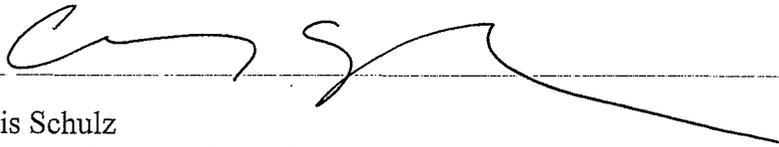
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Chris Schulz
Assistant Attorney General
Open Records Division

CS/ma

Ref: ID# 328852

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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