



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 8, 2009

Ms. Cary Grace
Assistant City Attorney
City of Austin Law Department
P.O. Box 1088
Austin, Texas 78767-8828

OR2009-04677

Dear Ms. Grace:

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# 339434.

The City of Austin (the "city") received a request for all agreements from 1998 to 2008 between the city and AMLI Corporation ("AMLI") regarding the "construction, oversight and management of the 2nd St District." You state the city has provided some of the requested information to the requestor. Although you take no position with respect to the public availability of the submitted contracts, you indicate their release may implicate the proprietary interests of AMLI. Accordingly, you state, and have provided documentation showing, you notified AMLI of the request and of the company's right to submit arguments to this office as to why the submitted contracts should not be released. *See Gov't Code* § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances). We have considered comments submitted by AMLI, and reviewed the submitted information.

Initially, we note, and you acknowledge, the city failed to request a ruling within the statutory time period prescribed by section 552.301(b) of the Government Code, and the city failed to submit a portion of the responsive information within the statutory time period prescribed by section 552.301(e) of the Government Code. *See Gov't Code* § 552.301(b), (e). Pursuant

to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *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 section 552.302); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential by law. Open Records Decision No. 150 (1977). Because the third-party interests at issue here can provide a compelling reason to overcome the presumption of openness, we will consider whether the submitted contracts are excepted under the Act.

Next, you and AMLI acknowledge the submitted supplemental responsive information is the same information the city has already provided to the requestor. However, AMLI claims this information is confidential and proprietary. The Act does not permit the selective disclosure of information. *See Gov't Code* §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Information that has been voluntarily released to a member of the public may not subsequently be withheld from the public, unless the information is confidential by law. *See Gov't Code* § 552.007(a); Open Records Decision Nos. 518 at 2 (1989), 490 at 1 (1988). In this instance, because AMLI claims the information provided to the requestor is proprietary and confidential, we will consider whether or not this information, along with the other submitted responsive information, is excepted from disclosure under the Act.

AMLI asserts portions of its contracts are confidential because those portions are "contractually protected from disclosure pursuant to confidentiality provisions set forth in" the contracts. Information is not confidential under the Act, however, simply because the party that submits the information anticipates or requests it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See Attorney General Opinion JM-672* (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110 of the Government Code). Consequently, unless the contract information at issue comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

AMLI asserts some of its information is excepted from disclosure pursuant to section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." *Gov't Code* § 552.104. Section 552.104, however, is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests

of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the city does not seek to withhold any information pursuant to this exception, we find section 552.104 is not applicable to AMLI's information. *See* ORD 592 (governmental body may waive section 552.104).

AMLI also raises section 552.105 of the Government Code, which 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. We note section 552.105 is also a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 564 at 2 (1990) (statutory predecessor to section 552.105 designed to protect governmental body's planning and negotiating position with respect to particular transactions), 357 at 3 (1982), 310 at 2 (1982) (statutory predecessor to section 552.105 protects information relating to the location, appraisals, and purchase price of property to be purchased by governmental body for public purpose); *see also* ORD 522. As the city does not raise section 552.105, we find this section does not apply to the submitted information. *See* ORD 564 (governmental body may waive statutory predecessor to section 552.105).

AMLI claims its submitted contract information is excepted under section 552.110(b) of the Government Code, which 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, substantial competitive injury would likely result from release of the information at issue. *Id.* § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Among other things, AMLI argues the release of its information could deter vendors such as AMLI from competing for government contracts, so as to lessen competition for such contracts and deprive governmental entities in future procurements. In advancing this argument, AMLI appears to rely on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks*. *See also Critical*

Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871 (D.C. Cir. 1992) (commercial information exempt from disclosure if it is voluntarily submitted to government and is of a kind that provider would not customarily make available to public). Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. See *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. See ORD 661 at 5-6 (discussing enactment of Gov't Code § 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only AMLI's interests in its information.

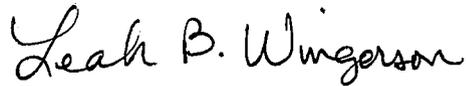
AMLI also argues its contract information is confidential commercial and financial information, the release of which would harm the company's future business dealings. Upon review, we find AMLI has failed to provide specific factual evidence demonstrating release of any of the submitted contract information would result in substantial competitive harm to the company. See ORD 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Furthermore, we note AMLI's information consists of completed contracts with the city, and the pricing information contained in a contract with a governmental body is generally not excepted under section 552.110(b). See Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). This office considers the prices charged in government contract awards to be a matter of strong public interest. See Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). See *generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Accordingly, we determine AMLI's submitted contract information may not be withheld under section 552.110(b) of the Government Code. As no other exceptions to disclosure have been claimed, the submitted contract information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and

responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 339434

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Lenora DuBose
Senior Counsel
Jackson Walker L.L.P.
100 Congress Avenue, Suite 1100
Austin, Texas 78701
(w/o enclosures)