



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 12, 2009

Ms. Griselda Sanchez
Assistant City Attorney
City of San Antonio
9800 Airport Boulevard
San Antonio, Texas 78216-9990

OR2009-06398

Dear Ms. Sanchez:

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# 342997 (COSA File No. 09-0213).

The City of San Antonio (the "city") received a request for the discretionary contract disclosure for a named company and five categories of information related to a specified concession space at the San Antonio International Airport. You claim that the submitted information is excepted from disclosure under sections 552.104, 552.110, and 552.128 of the Government Code. Further, we understand that the city notified International Duty Free Stores/UETA-LLC ("UETA"), NGSi-HDS-Duty-Free SAT, LLC ("NGSI"), EJE-Retail, LLC ("EJE"), and HKG-Duty-Free Shops, LLC ("HKG") of the request for information and of their rights to submit arguments to this office as to why the submitted 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). UETA has responded to this notice and argues that portions of the submitted information are excepted from disclosure under sections 552.101, 552.104, 552.110, and 552.131.¹ NGSi has also responded to this notice and argues that portions of the submitted information are

¹In its brief to this office, UETA claims sections 552.104, 552.110, 552.128 and 552.137 for information the city did not submit. This ruling does not address information that was not submitted by the city and is limited to the information submitted as responsive by the city. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

excepted from disclosure under sections 552.104 and 552.110. We have considered the submitted arguments and reviewed the submitted information.

Initially, we address the city's obligations under section 552.301 of the Government Code. This section prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See Gov't Code § 552.301(b)*. You state that the city received the present request on February 19, 2009; therefore, as you acknowledge, the city's ten-day deadline was March 5, 2009. However, the envelope in which you sought a decision from this office was postmarked March 6, 2009. *See Gov't Code § 552.308* (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we find that the city failed to comply with the procedural requirements of section 552.301.

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 a compelling reason exists 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). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Section 552.104 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived by the governmental body. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (untimely request for a decision resulted in waiver of discretionary exceptions), 592 (1991) (governmental body may waive statutory predecessor to section 552.104). Accordingly, the city may not withhold any portion of the information at issue under section 552.104 of the Government Code. However, because section 552.128 can provide a compelling reason for non-disclosure, we will address your argument under this section. Further, because third party interests are at stake, we will consider whether any of the submitted information must be withheld on those grounds.

An interested third party is allowed ten business days after the date of its receipt of a governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See Gov't Code § 552.305(d)(2)(B)*. As of the date of this letter, EJE and HKG have not submitted comments to this office explaining why any portion of the submitted information relating to them should not be released to the requestor. Although you assert that the submitted information is excepted under section 552.110 of the Government

Code, we note that section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we have no basis to conclude that the release of any portion of the submitted information would implicate the proprietary interests of EJE or HKG; thus, none of the information pertaining to EJE or HKG may be withheld on that basis. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (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), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret).

Next, we note that the city has not submitted arguments or information responsive to items one, two, three, five, and six of the request. To the extent any information responsive to these portions of the request existed on the date the city received the request, we assume the city has released it. If the city has not released any such information, it must do so at this time. *See Gov't Code* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

We will now address the submitted arguments. First, you represent that some of the submitted information is confidential because the party that submitted the documents to the city marked them as such. We note that information is not confidential under the Act simply because the party that submits the information anticipates or requests that 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). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Both UETA and NGSi assert that section 552.110(b) of the Government Code excepts from disclosure their respective financial information. Section 552.110(b) protects the property interests of private persons by excepting from disclosure 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. The interested third party raising this exception must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. *Gov't Code* § 552.110(b); *see also Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). After reviewing both companies' arguments, we find that NGSi has shown how release of a portion of its financial information would result in substantial competitive injury to the company. Thus, the city must withhold

the financial information of NGSi that we have marked under section 552.110(b). However, we find that UETA has not demonstrated how release of the financial information at issue would cause UETA substantial competitive harm. Accordingly, the city may not withhold any of the financial information of UETA on the basis of section 552.110(b).

Next, UETA claims that the submitted information pertaining to UETA is excepted under section 552.101 of the Government Code. Section 552.101 encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 600 (1992), 545 (1990). Although UETA claims that the company's submitted information contains personal financial information of UETA stockholders, the submitted information at issue does not identify any stockholders of the company, nor does it consist of personal financial information. Thus, we find that no portion of the submitted information pertaining to UETA is intimate or embarrassing and of no legitimate public concern. Accordingly, the city may not withhold any of the submitted information pertaining to UETA under section 552.101 of the Government Code in conjunction with common-law privacy.

Both UETA and NGSi claim that the submitted information is excepted under 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 has waived its claim under section 552.104, we find that this section is not applicable to either UETA's or NGSi's information. See Open Records Decision No. 592 (governmental body may waive section 552.104).

Next, the city raises section 552.128 of the Government Code, which is applicable to "[i]nformation submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program[.]" Gov't Code

§ 552.128(a). The city does not indicate that any of the submitted information was submitted to the city in connection with an application for certification under such a program. Moreover, section 552.128(c) states that

[i]nformation submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on a bidders list . . . is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

Id. § 552.128(c). In this instance, the information at issue was submitted by third parties in proposals to the city in connection with a proposed contractual relationship with the city. We therefore conclude that the city may not withhold any of the submitted information under section 552.128 of the Government Code.

Finally, UETA raises 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.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131(a)-(b). 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 protection provided by section 552.131(a) is co-extensive with that afforded by section 552.110. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 (1990), 661 (1999).

Having considered UETA's claims under section 552.131, we find that UETA has not demonstrated that any of the submitted information pertaining to UETA constitutes a trade secret for the purposes of section 552.110(a). *See* Gov't Code § 552.110(a); ORD 552 at 5 (if governmental body takes no position on application of section 552.110(a) to information at issue, attorney general will accept private person's claim as valid if person establishes a *prima facie* case for exception and no one submits argument that rebuts claim as matter of law).² Likewise, we find that UETA has not demonstrated that the submitted documents pertaining to UETA contain any commercial or financial information whose disclosure would cause UETA substantial competitive harm. *See* Gov't Code § 552.110(b); ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm). We therefore conclude that the city may not withhold any of the submitted information pertaining to UETA under section 552.131(a) of the Government Code.

Next, we note that section 552.131(b) is designed to protect the interests of governmental bodies, not third parties. As the city does not assert section 552.131(b) as an exception to disclosure, we conclude that no portion of the remaining submitted information pertaining to UETA is excepted under section 552.131(b) of the Government Code.

In summary, the city must withhold the information we have marked under section 552.110(b) of the Government Code. The remaining information must be released to the requestor.

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.

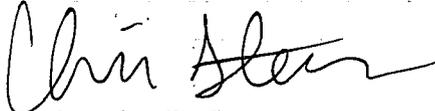
²The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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,



Christopher D. Sterner
Assistant Attorney General
Open Records Division

CDSA/eeg

Ref: ID# 342997

Enc. Submitted documents

c: Requestor
(w/o enclosures)