



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 14, 2009

Ms. Bertha A. Ontiveros
Assistant City Attorney
The City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901

OR2009-17606

Dear Ms. Ontiveros:

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# 364430.

The City of El Paso (the "city") received two requests for the responses to a specified request for proposals. You state you are releasing some of the requested documents to the requestors. You claim that a portion of the submitted information is excepted from disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. You also state the release of the submitted information may implicate the proprietary interests of Prudential Retirement, The Hartford, ING Life Insurance and Annuity Company, MetLife Resources, and Nationwide Retirement Solutions (collectively the "third parties"). Accordingly, you state, and provide documentation showing, that the city notified the third parties of the request and of their right to submit arguments stating why their information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the city's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. 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 ten business days after receiving the request. *See* Gov't Code § 552.301(b). In addition, 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 information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e). While the city raised sections 552.101 and 552.110 within the ten-business-day time period as required by subsection 552.301(b), the city did not raise section 552.104 for the first request until the fifteen-business-day deadline. Consequently, we find the city failed to comply with the requirements of section 552.301 with respect to its claim under section 552.104 of the Government Code.

Generally, a governmental body's failure to comply with section 552.301 results in the waiver of its claims under the exceptions at issue, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—Amarillo 2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). You assert the submitted information is excepted under section 552.104 of the Government Code. This section, however, is discretionary in nature. It serves only to protect a governmental body's interests, and may be waived; as such, it does not constitute a compelling reason to withhold information for purposes of section 552.302. *See also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions). Consequently, the city may not withhold any of the submitted information under section 552.104 of the Government Code. However, we will consider your timely raised claims under sections 552.101 and 552.110 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. However, you have cited no law under which any of the submitted information is considered to be confidential for purposes of section 552.101 of the Government Code. Therefore, the city may not withhold any of the submitted information, under section 552.101.

Although the city argues that the submitted information is excepted under section 552.110 of the Government Code, that exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the city's argument under section 552.110. We note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, none of the third parties have submitted comments to this office explaining why any portion of the

submitted information should not be released to the requestor. Therefore, we have no basis to conclude that any of the third parties have a protected proprietary interest in the submitted information, and none of it may be withheld on that basis. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, 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), 542 at 3 (1990).

However, we note that some of the information at issue appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990). As no further arguments against disclosure have been raised, the city must release the information at issue to the requestors, but any information that is protected by copyright may only be released in accordance with copyright law.

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, toll free, at (888) 672-6787.

Sincerely,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/jb

Ref: ID# 364430

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

Mr. George Castineiras
Senior Vice President
Prudential Retirement
280 Trumbull Street
Hartford, Connecticut 06103
(w/o enclosures)

Mr. Zachary J. Karas
Senior Vice President
The Hartford Retirement Plans Group
200 HopMeadow Street
Simsbury, Connecticut 06103
(w/o enclosures)

Mr. Carl P. Steinhilber
CFS, Vice President, Product Director
ING Life Insurance and Annuity Company
One Orange Way, A3N
Windsor, Connecticut 06195-4774
(w/o enclosures)

Ms. Nancy Zeller Foo
Divisional Marketing Director
MetLife Resources
5055 Business Center Drive, Suite 108, Box 191
Fairchild, California 94534
(w/o enclosures)

Mr. Eric Krywanio
Nationwide Retirement Solutions
5900 Parkwood Place
Dublin, Ohio 43016
(w/o enclosures)