



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 18, 2010

Ms. Michelle T. Rangel
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OR2010-02477

Dear Ms. Rangel:

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# 370431.

Fort Bend County (the "county") received three requests from different requestors for information pertaining to the Q09-042 "Four Story Parking Garage" ("parking garage") and Q09-069 "Medic 1 Facility" ("medic facility") projects. Although you take no position with respect to the submitted information, you state release of the information may implicate the proprietary interests of several third parties. Accordingly, you state, and provide documentation showing, you notified the interested third parties of the county's receipt of the requests for information and of each company's right to submit arguments to this office as to why its information should not be released to the requestors.¹ 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

¹The interested third parties are: Anslow Bryant Construction, Ltd. ("Anslow Bryant"); Axiom Construction Co., Inc.; Bartlett Cocke, LP; Bass Construction Co., Inc. ("Bass"); Brookstone, LP; Cadence McShane Construction Co., LLC; C.F. Jordan, LP ("C.F. Jordan"); Colorado Structures, Inc.; Crain Zamora, LLC; David E. Harvey Builders, Inc.; DPR Construction, Inc.; Durotech, LP; EMJ Corp.; Gilbane Building Co.; Hardin Construction Co., LLC; J.E. Dunn South Central, Inc.; Manhattan Construction Co.; MAPP Construction, LLC; McAden Cumby Builders, LLC; Pepper-Lawson Construction, LP; Rosenberger Construction, LP ("Rosenberger"); SpawGlass Construction Corp.; T. Howard and Associates, Inc.; Teal Construction Co.; Tribble and Stephens Construction, Ltd.; and Turner Construction Co.

explain applicability of exception in the Act in certain circumstances). We have reviewed the submitted information and considered the submitted arguments.

Initially, you inform this office that a portion of the submitted information is currently at issue in a lawsuit pending against the Office of the Attorney General: *Anslow Bryant Construction, LTD. v. Greg Abbott, Attorney Gen. of Tex.*, No. D-1-GN-09-004097 (261st Dist. Ct., Travis County, Tex.). We will not address whether the information at issue in the lawsuit is excepted under the Act, but will instead allow the trial court to determine whether this information must be released to the public.

Next, we note the remaining information at issue was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2009-16359 (2009). In that decision, we ruled that the county may withhold the statements of qualifications for the medic facility project under section 552.104 of the Government Code and must withhold the information we marked related to the parking garage project under sections 552.110, 552.130, and 552.136 of the Government Code. The remaining information related to the parking garage project was ordered to be released in accordance with copyright law. You inform this office that the contract for the medic facility project on which the previous ruling was based has since been executed. Further, you are no longer asserting section 552.104 for the documents pertaining to the medic facility project. Thus, we find that the circumstances relating to the medic facility project have changed, and the county may not continue to rely on Open Records Letter No. 2009-16359 as a previous determination for the information pertaining to the medic facility project. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). Accordingly, we will address the submitted arguments against the disclosure of the information pertaining to the medic facility project.

With respect to the information pertaining to the parking garage project that was the subject of the previous ruling, as we have no indication that the laws, facts and circumstances have changed with regards to that information since the issuance of the previous ruling, the county must continue to rely on Open Records Letter No. 2009-16359 as a previous determination and withhold or release the remaining information related to the parking garage project in accordance with that ruling.

We now address the submitted arguments against disclosure of the information related to the medic facility project. We note that Anslow Bryant and C.F. Jordan have submitted arguments against the disclosure of their information pertaining to the medic facility project. However, we note the county has not submitted any of Anslow Bryant's or C.F. Jordan's information pertaining to this project. The county has represented to this office that the information they have submitted is the only information they have responsive to this request.

This ruling does not address information that was not submitted by the county and is limited to the information submitted as responsive by the county. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Therefore, we do not address Anslow Bryant's or C.F. Jordan's arguments against disclosure of their information.

Next, 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, only Bass and Rosenberger have submitted to this office reasons explaining why their information should not be released. Therefore, the remaining third parties have provided us with no basis to conclude they have protected proprietary interests in the submitted information. Accordingly, the county may not withhold any portion of the information related to the parking garage project on the basis of any proprietary interest the remaining third parties may have in this information. *See* 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), 542 at 3.

Bass and Rosenberger both claim their statements of qualifications are confidential because the county informed bidders their financial information would be considered confidential. Information is not confidential under the Act simply because the party that submitted 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 by 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 Government Code section 552.110). Therefore, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Next, Bass and Rosenberger both claim their financial statements are confidential under section 552.101 of the Government Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. However neither company has directed our attention to any law, nor are we aware of any law, that makes their financial statements confidential. *See, e.g.*, Open Records Decision No. 478 at 2 (1987) (statutory confidentiality). Accordingly, the county may not withhold either company's financial statements under section 552.101.

Bass and Rosenberger both claim portions of their statements of qualifications are excepted from disclosure under section 552.110 of the Government Code. Section 552.110(b) of the Government Code 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, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

In asserting that its information should be excepted from disclosure, Rosenberger relies 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 & Conservation Association v Morton*, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body’s ability to obtain necessary information in the future. *National Parks*, 498 F.2d at 770. 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 that 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 section 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, in making our determinations under section 552.110, we will consider only Rosenberger’s interest in its information.

Bass claims that if its statement of qualifications is released, it will experience competitive harm because its marketing strategies could be copied and points it has made could be refuted. Rosenberger claims release of its financial information, specifically its 2007 audited financial statement and its dollar volumes of average annual construction work performed for years 2005 through 2008, would allow competitors to undercut its bids in future business dealings. Upon review, we find that Bass and Rosenberger have made only conclusory allegations that release of their information at issue would result in substantial damage to each company’s competitive position and have provided no specific factual or evidentiary showing to support such allegations. *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). Therefore, the county may not withhold any portion of either company's information under section 552.110(b) of the Government Code.

We note the remaining information contains insurance policy numbers. Section 552.136 of the Government Code provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136.² This office concluded that insurance policy numbers constitute access device numbers for purposes of section 552.136. Thus, the county must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.³

In summary, we will not address whether the information at issue in the lawsuit pending against the Office of the Attorney General is excepted under the Act, but will instead allow the trial court to determine whether this information must be released to the public. With respect to the remaining information pertaining to the parking garage project that was the subject of the previous ruling, the county must continue to rely on Open Records Letter No. 2009-16359 as a previous determination and withhold or release the remaining information related to the parking garage project in accordance with that ruling. The county must withhold the insurance policy numbers we have marked in the information pertaining to the medic facility project under section 552.136 of the Government Code. The remaining

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

³We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

submitted information pertaining to the medic facility project 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, 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,



Adam Leiber
Assistant Attorney General
Open Records Division

ACL/rl

Ref: ID# 370431

Enc. Submitted documents

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