



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 15, 2010

Ms. LeAnne Lundy  
Attorneys for Spring Branch Independent School District  
Rogers, Morris & Grover, L.L.P.  
5718 Westheimer Road, Suite 1200  
Houston, Texas 77057

OR2010-10520

Dear Ms. Lundy:

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# 386966.

The Spring Branch Independent School District (the "district"), which you represent, received a request for all correspondence relating to the possible purchase of a specified piece of real estate, including minutes of meetings of the district's Board of Trustees (the "board"). You state there are no minutes from an open board meeting responsive to the request.<sup>1</sup> You claim the requested information is excepted from disclosure under sections 552.101, 552.104, and 552.105 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information, a portion of which consists

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<sup>1</sup>The Act does not require a governmental body that receives a request for information to release information that did not exist when the request was received or to prepare new information in response to a request. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed), Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>Although you raised section 552.137 of the Government Code in your May 13, 2010, letter to this office, you have not submitted arguments explaining how this exception applies to the submitted information. Therefore, we presume you have withdrawn this exception. See Gov't Code §§ 552.301, .302.

of a representative sample.<sup>3</sup> We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note pages 78-149 of the submitted information constitute a completed appraisal report subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]" unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. *Id.* § 552.022(a)(1). You seek to withhold the submitted completed appraisal report under sections 552.104 and 552.105 of the Government Code. However, section 552.105 is discretionary in nature and does not constitute "other law" for purposes of section 552.022. *See* Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 564 (1990) (statutory predecessor to section 552.105 subject to waiver). Thus, the department may not withhold the submitted appraisal report under section 552.105 of the Government Code. However, section 552.104(b) states that section 552.022 does not apply to information excepted under section 552.104. Gov't Code § 552.104(b). Thus, we will consider your arguments under section 552.104 for the completed appraisal report subject to section 552.022(a)(1), as well as your arguments under sections 552.101, 552.104, and 552.105 for the remaining requested information.

Section 552.104 of the Government Code excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." *Id.* § 552.104. This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate that it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

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<sup>3</sup>We assume 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.

You state the district has a specific marketplace interest in certain real estate. You assert the release of the submitted information would give an advantage to a potential competitor for purchase of that real estate, resulting in the district either paying more for the real estate or not being able to purchase the real estate. However, you do not inform us of any actual competitor seeking to acquire the real estate; you only make general allegations of potential harm. We, therefore, find the district has failed to explain how the release of the submitted information would cause a specific threat of actual or potential harm to the district's interests in a specific competitive situation. *See* ORD 592. Thus, we conclude the district has failed to establish the applicability of section 552.104 to the submitted information, and none of it may not be withheld on that basis. As you raise no other argument against disclosure of the appraisal on pages 78-149, it must be released.

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. Section 552.101 encompasses information protected by other statutes, such as section 551.104(c) of the Government Code, which provides that "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3)." *Id.* § 551.104(c). The district is not required to submit a certified agenda or tape recording of a closed meeting to this office for review. *See* Open Records Decision No. 495 at 4 (1988) (attorney general lacks authority to review certified agendas or tapes of executive sessions to determine whether a governmental body may withhold such information from disclosure under statutory predecessor to section 552.101 of the Government Code). Such information cannot be released to a member of the public in response to an open records request. *See id.* You inform us it is the district's regular practice to keep certified agendas from the closed executive portions of its board meetings. You further inform us a certified agenda from one closed board meeting is responsive to the request for information. Accordingly, the district must withhold the certified agenda of this closed board meeting under section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code.

Section 552.105 of the Government Code 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. 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 pertaining to such negotiations that is excepted from disclosure under section 552.105 may be withheld so long as the transaction relating to the negotiations is not complete. *See* ORD 310. Under

section 552.105, 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 in regard to particular transactions is a question of fact. Thus, 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.

Upon review, we find the remaining information relates to the appraisal or purchase price of real property the district intends to purchase for a public purpose. You state the district has not acquired the property at issue. Further, you state that release of the requested information would damage the district's negotiating position with respect to the acquisition of the property at issue. Based on your representation and our review, we conclude the district may withhold the remaining information under section 552.105 of the Government Code.

In summary, the district must release the completed appraisal on pages 78-149 of the submitted information, which is subject to section 552.022(a)(1) of the Government Code. The district must withhold the certified agenda of the closed board meeting under section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code. The district may withhold the remaining information under section 552.105 of the Government Code.

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](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,



Mack T. Harrison  
Assistant Attorney General  
Open Records Division

MTH/tp

Ref: ID# 386966

Enc. Submitted documents

c: Requestor  
(w/o enclosures)