ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 22, 2011

Ms. Denise V. Cheney
Bickerstaff Heath Delgado Acosta LLP
For Austin Community College District
Building One, Suite 300
3711 South MoPac Expressway
Austin, Texas 78746

OR2011-08930

Dear Ms. Cheney:

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# 421911.

The Austin Community College District (the "college"), which you represent, received a request for a copy of the Purchase and Sale Agreement (the "contract") between the college and RedLeaf Properties, LLC ("RedLeaf") for the purchase of a named location for a specified amount. You claim that portions of the requested information are excepted from disclosure under sections 552.104 and 552.105 of the Government Code. Additionally, you state that release of some of the requested information may implicate the proprietary interests of RedLeaf. You inform us that, pursuant to section 552.305 of the Government Code, you notified RedLeaf of the request and of its right to submit arguments to this office explaining why its information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *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 applicability of exception in certain circumstances). We have considered the exceptions you claim and reviewed the submitted representative sample of information.[1]

[1]This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Initially, we note that 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, this office has not received comments from RedLeaf explaining why the requested information should not be released. Therefore, we have no basis to conclude that RedLeaf has a protected proprietary interest in the requested information. *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. Accordingly, the college may not withhold any portion of the requested information based upon the proprietary interests of RedLeaf.

Next, the college asserts that portions of the contract are excepted from disclosure because those portions are subject to confidentiality clauses. We note that information is not confidential under the Act simply because the party submitting 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, through an agreement or contract, overrule or repeal provisions of the Act. *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 contract falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement specifying otherwise.

We note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in part:

> (a) [t]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:
>
> . . .
>
> (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). The submitted information consists of a contract relating to the expenditure of public funds by the college and is, thus, subject to subsection 552.022(a)(3). Although you raise section 552.105 of the Government Code, this section is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See* Open Records Decision Nos. 564 (1990) (statutory predecessor to section 552.105

subject to waiver), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.105 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the college may not withhold the information at issue under section 552.105. However, because information subject to section 552.022 may be withheld under section 552.104 of the Government Code, we will consider your claims under this exception. *See* Gov't Code § 552.104(b) (information protected by section 552.104 not subject to required public disclosure under section 552.022(a)).

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Generally, section 552.104 does not except information relating to competitive bidding situations once a contract is in effect. *See* Open Records Decision Nos. 541 (1990). However, this office has determined that under some circumstances, section 552.104 may apply to information pertaining to an executed contract where the governmental body solicits bids for the same or similar goods or services on a recurring basis. *Id.*

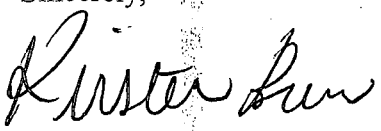
You inform us that negotiations for the purchase of the real property which neighbors the property subject to the contract ("neighboring property") are ongoing between the college, RedLeaf, and the seller of the neighboring property. You state further that disclosure of certain terms of the contract would give an unfair advantage to other prospective purchasers by revealing the terms that the college was willing to agree upon for the adjacent property, and enabling competitors to gauge the terms of their offer on the neighboring property accordingly. You also state that disclosure of certain terms of the contract would give the seller of the neighboring property an unfair advantage for similar reasons. Based on your representations and our review of the information at issue, we find you have demonstrated how the information you seek to withhold would harm the college's interest in a particular ongoing competitive situation. *See* ORD 592. Therefore, the college may withhold the information you have highlighted under section 552.104 of the Government Code until the final contract is executed. The remaining 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, toll free at (888) 672-6787.

Sincerely,



Kirsten Brew
Assistant Attorney General
Open Records Division

KB/em

Ref: ID# 421911

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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Austin, Texas 78763
(w/o enclosures)