



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 28, 2011

Ms. Allison Bastian
Assistant City Attorney
City of Brownsville
P.O. Box 911
Brownsville, Texas 78522-0911

OR2011-09184

Dear Ms. Bastian:

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# 421858.

The City of Brownsville (the "city") received a request for eleven categories of information related to the city's airline expansion project. You state you have released information related to category 11 of the request. You state you do not maintain information responsive to categories 1, 2, 4, and 5. You further state that information related to a portion of category 10 does not exist.¹ You claim that the submitted information is excepted from disclosure under sections 552.104, 552.107, 552.111, and 552.131 of the Government Code and privileged under rule 192.3 of the Texas Rules of Civil Procedure.² Additionally, you state release of this information may implicate the proprietary interests of Public Charters d/b/a Fly Frontera ("Frontera"). Accordingly, you have notified Frontera of the request and

¹In responding to a request for information under the Act, a governmental body is not required to disclose information that did not exist at the time the request was received. *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).

²Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, and rule 192.3 of the Texas Rules of Civil Procedure, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2, 575 at 2 (2002). Furthermore, although you assert the attorney-client privilege under rule 503 of the Texas Rules of Evidence, we note none of the submitted information is subject to section 552.022 of the Government Code. Thus, sections 552.107 is the proper exception to raise for your attorney-client privilege claim in this instance. *See generally* ORD 676.

of its right to submit arguments to this office as to why its information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note a portion of the submitted information was created after the request was received. This information, which we have marked, is not responsive to the instant request for information. This ruling does not address the public availability of non-responsive information, and the city is not required to release non-responsive information in response to this request.

Next, we must address the city's obligations under section 552.301 of the Government Code, which prescribes the procedural obligations 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 that a governmental body ask for a decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. Gov't Code § 552.301(b). You state the city received the request for information on April 7, 2011. While you raised sections 552.101, 552.104, 552.110, and 552.131 of the Government Code within the ten-business-day time period as required by subsection 552.301(b), the city did not raise section 552.107 of the Government Code and Texas Rule of Civil Procedure 192.3 until after the ten-business-day deadline had passed. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Thus, the city failed to comply with the requirements mandated by subsection 552.301(b) as to its arguments under section 552.107 and rule 192.3.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *Id.* § 552.302; *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, 381-82 (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. 630 (1994). A compelling reason generally exists when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). You raise section 552.107 of the Government Code. This section, however, is discretionary in nature. It serves to protect only a governmental body's interests and may be waived. Open Records Decision Nos. 676 at 11-12 (2002) (attorney-client privilege under section 552.107 and Texas Rule of Evidence 503 subject to waiver), 665 at 2 n.5 (2000)

(discretionary exceptions in general), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). Texas Rule of Civil Procedure 192.3 is a privilege against discovery and is also subject to waiver. *See* Tex. R. Evid. 511; *Jordan v. Court of Appeals*, 701 S.W.2d 644, 649 (Tex. 1985); *Arkla, Inc. v. Harris*, 846 S.W.2d 623, 630 (Tex. Civ. App.—Houston [14th Dist.] 1993, orig. proceeding); *Aetna Cas. & Surety Co. v. Blackmon*, 810 S.W.2d 438, 440 (Tex. Civ. App.—Corpus Christi 1991, writ denied). As such, section 552.107 and rule 192.3 do not constitute compelling reasons to withhold information for purposes of section 552.302. Consequently, the city may not withhold any of the responsive information pursuant to section 552.107 of the Government Code or Texas Rule of Civil Procedure 192.3. We will, however, consider your timely raised arguments under sections 552.101, 552.104, 552.110, and 552.131 of the Government Code for the responsive information.

Section 552.104 excepts from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 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 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 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).

You contend that the city has specific marketplace interests in the submitted information because the city’s airport is a competitor in the marketplace with regard to passenger air services to various destinations in Mexico. You state the submitted information relates to contract negotiations among the city and Frontera to provide passenger air services to various destinations in Mexico. You further assert that release of the submitted information could provide a competitive advantage to other competing airports who are attempting to obtain a new airline with direct service to cities in Mexico by revealing information which would enable competitors to offer higher subsidies or an otherwise more attractive proposal than the one currently being negotiated. Based on these representations and our review, we find you have demonstrated the city has specific marketplace interests and may be considered a “competitor” for purposes of section 552.104. Further, we find you have demonstrated release of the submitted information would cause specific harm to the city’s marketplace

interests. Accordingly, the city may withhold the submitted information under section 552.104.³

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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 421858

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Fly Frontera d/b/a Public Charters
c/o Allison Bastian
Assistant City Attorney
City of Brownsville
P.O. Box 911
Brownsville, Texas 78522-0911
(w/o enclosures)

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.