



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 28, 2011

Ms. Allison Bastian  
Assistant City Attorney  
City of Brownsville  
P.O. Box 911  
Brownsville, Texas 78520

OR2011-09206

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# 421860.

The City of Brownsville (the "city") received a request for five categories of information pertaining to "any attempts to secure passenger services for air services between Brownsville, Texas and any Mexico destinations." You state some of the requested information does not exist.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 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.<sup>2</sup> You also inform us the submitted information may implicate the interests of Public Charters Inc. ("Public Charters"). You inform us Public Charters was notified of this request for

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<sup>1</sup>The Act does not require a governmental body to release information that did not exist when it received a request or to create 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), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.3, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Furthermore, although you assert the attorney-client privilege under rule 503, we note none of the submitted information is subject to section 552.022 of the Government Code. Thus, we understand you to raise section 552.107 of the Government Code because it is the proper exception to raise for your attorney-client privilege claim in this instance. *See generally* ORD 676.

information and of its rights to submit arguments to this office as to why its requested information should not be released. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exceptions to disclosure under certain circumstances). We have considered your arguments and reviewed the submitted information. We have also received and considered comments from the requestor. Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request because it was created after the date of the request. The city need not release nonresponsive information in response to this request, and this ruling will not address that information.

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. *Id.* § 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, 552.111, 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 (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, 552.111, and 552.131 of the Government Code for the responsive information.

Next, we note the responsive information includes minutes of an open meeting of the city's Airport Advisory Board. Section 551.022 of the Open Meetings Act, chapter 551 of the Government Code, expressly provides that the "minutes and tape recordings of an open meeting are public records and shall be available for public inspection and copying on request to the governmental body's chief administrative officer or the officer's designee." Gov't Code § 551.022. Although you raise section 552.111 of the Government Code as an exception to disclosure of this information, we note that as a general rule, the exceptions to disclosure found in the Act are not applicable to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). In addition, Open Records Decision No. 225 (1979) concluded section 552.111 is not applicable to notes of minutes because they do not contain advice or opinion and only reflect what in fact occurred. ORD 225 at 3. Therefore, the city must release the submitted open meeting minutes we have marked pursuant to section 551.022 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. This exception encompasses information that other statutes make confidential. Section 551.104 of the Open Meetings Act, chapter 551 of the Government Code, provides in part 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). Thus, such information cannot be released to a member of the public in response to an open records request. *See* Attorney General Opinion JM-995 at 5-6 (1988) (public disclosure of certified agenda of closed meeting may be accomplished only under procedures provided in Open Meetings Act). Section 551.146 of the Open Meetings Act makes it a criminal offense to disclose a certified agenda or tape recording of a lawfully closed meeting to a member of the public. *See* Gov't Code § 551.146(a)-(b); *see also* Open Records Decision No. 495 at 4 (1988) (attorney general lacks authority to review certified agendas or tapes of executive sessions to determine whether governmental body may withhold such information under statutory predecessor to Gov't Code § 552.101). The responsive information includes a certified agenda from a closed meeting of the city. Accordingly, this information, which we have marked, must be withheld under

section 552.101 of the Government Code in conjunction with section 551.104 of the Government Code.<sup>3</sup>

Section 552.104 of the Government Code 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 remaining responsive 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 remaining responsive information relates to contract negotiations among the city, Public Charters, and Fly Frontera, Inc. to provide passenger air services to various destinations in Mexico. You further assert that release of the remaining responsive 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 remaining responsive information would cause specific harm to the city’s marketplace interests. Accordingly, the city may withhold the remaining responsive information under section 552.104.<sup>4</sup>

In summary, the city must release the submitted open meeting minutes we have marked pursuant to section 551.022 of the Government Code. The city must withhold the certified agenda we have marked under section 552.101 of the Government Code in conjunction with

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<sup>3</sup>We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a certified agenda of a closed meeting under section 552.101 in conjunction with section 551.104 of the Government Code, without the necessity of requesting an attorney general decision.

<sup>4</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

section 551.104 of the Government Code. The city may withhold the remaining responsive information under section 552.104 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,



Sean Nottingham  
Assistant Attorney General  
Open Records Division

SN/bs

Ref: ID# 421860

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Public Charters, Inc.  
201 Hangar Road  
Avoca, Pennsylvania 18702  
(w/o enclosures)