



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 15, 2011

Mr. Gary Henrichson
Assistant City Attorney
City of McAllen
P.O. Box 220
McAllen, Texas 78505-0220

OR2011-13361

Dear Mr. Henrichson:

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#430158 (McAllen ORR# W004925-052611).

The City of McAllen (the "city") received a request for the bid tabulations submitted by Audio Fidelity Communications Group d/b/a The Whitlock Group ("Whitlock") for a specified project. You claim the submitted information is excepted from disclosure under sections 552.101, 552.110, and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the city's responsibilities under the Act. Section 552.301 of the Government Code prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e) of the Government Code, a governmental body receiving an open records request for information it wishes to withhold pursuant to one of the exceptions to public disclosure is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). As of the date of this letter, the city has not provided our office with a copy of the written request for information, a signed statement or sufficient

evidence showing the date the city received the request, or general written comments stating the reason why the stated exceptions apply. Thus, we find the city failed to comply with the requirements of section 552.301 of the Government Code.

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 the information is public and must be released. Information presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information sufficient to overcome the presumption. *See* Gov't Code § 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 (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 exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Although you raise section 552.131, we note this is a discretionary exception that protects, in part, a governmental body's interests, and it may be waived. In failing to comply with the procedural requirements of section 552.301, we find the city has waived its claim under section 552.131(b) of the Government Code. Accordingly, the city may not withhold any of the submitted information based on its assertion of section 552.131 of the Government Code. We note, however, a third party's assertion of section 552.131(a) or section 552.110 of the Government Code can provide a compelling reason to withhold information. Additionally, your claim under section 552.101 of the Government Code also can provide a compelling reason for non-disclosure. Accordingly, we will consider these exceptions.

When a third party's proprietary interests are at stake, section 552.305(d) of the Government Code requires a governmental body to notify that party of its right to submit its reasons, if any, as to why information relating to the third party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received arguments from Whitlock. Thus, Whitlock has not demonstrated it has a protected proprietary interest in any of the submitted information. *See id.* § 552.110(a)–(b); 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 city may not withhold the submitted information on the basis of any proprietary interests Whitlock may have in the information.

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. While the city generally asserts the submitted information is subject to section 552.101, you have not directed our attention to any confidentiality provision that would make any of the submitted information confidential under section 552.101. *See, e.g.*, Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992)

(constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the city may not withhold any portion of the submitted information under section 552.101 of the Government Code.

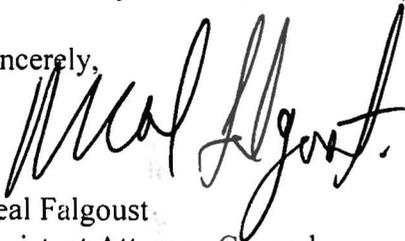
The city raises section 552.110 of the Government Code. We note section 552.110 is designed to protect the interests of third parties, such as Whitlock, not the interests of a governmental body. Thus, we do not address the city's arguments under section 552.110 of the Government Code.

Section 552.136(b) of the Government Code provides, "[n]otwithstanding any other provision of [the Act], 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."¹ Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). This office has concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. Thus, the city must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code. 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,



Neal Falgoust
Assistant Attorney General
Open Records Division

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¹The 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).

Ref: ID# 430158

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Audio Fidelity Communications Corporation
d/b/a The Whitlock Group
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