



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 1, 2013

Mr. Paul E. Hamilton
Assistant District Attorney
County of Dallas
411 Elm Street
Administration Building - 5th Floor
Dallas, Texas 75202-3317

OR2013-05126

Dear Mr. Hamilton:

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# 482807.

The Dallas County Commissioner's Court (the "commissioner's court") received a request for information pertaining to the Immigrant Investor Program or "Targeted Employment Areas." Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of MBS Partners, LLC ("MBS"), and McDonald Associates, PLLC ("McDonald"). Accordingly, you state, and provide documentation showing, you notified MBS and McDonald of the request for information and of the right of each to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from MBS. We have reviewed the submitted information and the submitted arguments.

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request for information because it was created after the commissioner's court received the request for information. This ruling does not address the

public availability of any information that is not responsive to the request and the commissioner's court is not required to release such information in response to this request.

Next, we note, and you acknowledge, the commissioner's court has not complied with the time periods prescribed by section 552.301 of the Government Code in seeking an open records decision from this office. *See* Gov't Code § 552.301. When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public and must be released unless there is a compelling reason to withhold it. *See 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); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason exists to withhold information when the information is made confidential by another source of law or affects third party interests. *See* Open Records Decision No. 150 at 2 (1977). Because third party interests are at stake, we will address the submitted arguments against release of the submitted information.

Next, we note 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, we have not received comments from McDonald explaining why any portion of the submitted information should not be released. Therefore, we have no basis to conclude McDonald has a protected proprietary interest in any of the submitted 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 commissioner's court may not withhold any of the submitted information on the basis of any proprietary interest McDonald may have in the information.

MBS states portions of its information are excepted from disclosure under section 552.110(b) of the Government Code. Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5.

MBS argues portions of the responsive information consist of commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find MBS has made only conclusory allegations that the release of any of its information would result in substantial harm to its competitive position. *See* ORD 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Accordingly, none of MBS's information may be withheld under section 552.110(b).

MBS seeks to withhold some of the responsive information under the deliberative process privilege. We address the deliberative process privilege under section 552.111 of the Government Code, which exempts from disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]" Gov't Code § 552.111. Section 552.111 is a discretionary exception to public disclosure that protects a governmental body's interests, not those of a third party, and may be waived. *See id.* § 552.007; Open Records Decision No. 663 at 5 (1999) (governmental body may waive section 552.111). Therefore, because the commissioner's court does not raise section 552.111 for the information at issue, this information may not be withheld under the deliberative process privilege.

Next, we address MBS's argument under section 552.131 of the Government Code. Section 552.131 relates to economic development information and provides in part:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

...

(2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

(B) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131(a)(2), (b). Section 552.131(a)(2) excepts from disclosure only "commercial or financial information for which it is demonstrated based on specific factual

evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.” *Id.* This aspect of section 552.131 is co-extensive with section 552.110(b) of the Government Code. *See id.* § 552.110(b). Because we have already disposed of MBS’s claims under section 552.110(b), the commissioner’s court may not withhold any of the responsive information under section 552.131(a)(2) of the Government Code. We note section 552.131(b) protects the interests of governmental bodies, not third parties. As the commissioner’s court does not assert section 552.131(b) as an exception to disclosure, we conclude no portion of the submitted information is excepted under section 552.131(b) of the Government Code.

We note the responsive information contains e-mail addresses that may be subject to section 552.137 of the Government Code.¹ Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs affirmatively consents to its public disclosure. *See id.* § 552.137(b). Because we are unable to discern whether the e-mail addresses within the responsive documents fall within the scope of section 552.137(c), we must rule conditionally. To the extent the e-mail addresses at issue belong to members of the public, the commissioner’s court must withhold such e-mail addresses under section 552.137, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release.² *See id.* § 552.137(b). However, to the extent the e-mail addresses at issue are excluded by subsection 552.137(c), the e-mail addresses may not be withheld under section 552.137 of the Government Code.

We note some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the

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).

²We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the commissioner's court must withhold any personal e-mail addresses in the responsive information under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release or the e-mail addresses are excluded by subsection 552.137(c) of the Government Code. The remaining information must be released; however, any information that is subject to copyright may be released only in accordance with copyright law.

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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 482807

Enc. Submitted documents

c: Requestor
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