



ATTORNEY GENERAL OF TEXAS
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April 17, 2013

Mr. David F. Brown
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111 Congress Avenue, Suite 400
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OR2013-06263

Dear Mr. Brown:

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# 484903.

We understand the Port of Houston Authority (the "authority"), which you represent, received a request for information related to RFP # 2012-2722.¹ Although you take no position as to whether the submitted information is excepted under the Act, you inform us the release of this information may implicate the proprietary interests of Aon Hewitt; Foundation Strategies; Gallagher Benefit Services, Inc.; Lockton Companies, L.L.C. ("Lockton"); McGriff, Seibels & Williams of Texas, Inc.; Milliman, Inc. ("Milliman"); and WJ Alexander & Associates, P.C. Accordingly, we understand you notified these third parties of the request for information and of their right 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 Act in certain circumstances). We have received comments from Lockton and Milliman. We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address the authority's obligations under the Act. Section 552.301 of the Government Code describes the obligations placed on a governmental body that receives a written request for information it wishes to withhold. *See Gov't Code* § 552.301. Pursuant to section 552.301(b), the governmental body must request a ruling from this office and state

¹As you have not submitted the request for information for our review, we take our description from the submitted information.

the exceptions to disclosure that apply within ten business days after receiving the request. *See id.* § 552.301(b). Furthermore, pursuant to section 552.301(e), the governmental body 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). You state the authority received the request for information on January 23, 2013. Accordingly, the authority's ten- and fifteen-business-day deadlines were February 6, 2013, and February 13, 2013, respectively. The authority's request for a decision, however, was hand-delivered to this office on February 13, 2013. Furthermore, as of the date of this letter, the authority has not submitted to this office a copy of the written request for information. Accordingly, we conclude the authority 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 section 552.301 results in the legal presumption that 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 to overcome this presumption. *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 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Normally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Because third-party interests are at stake, we will consider whether the submitted information must be withheld to protect the interests of the third parties.

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, only Lockton and Milliman have submitted comments to this office explaining why their information should not be released. Therefore, we have no basis to conclude the remaining third parties have a protected proprietary interest in 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 authority may not withhold any portion of the information it submitted for our review based upon the proprietary interests of the remaining third parties.

Lockton raises section 552.110(b) of the Government Code for its entire proposal, including specific parts of its proposal, and Milliman raises this section for its customer and pricing information. Section 552.110(b) excepts from disclosure "[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). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* ORD No. 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Upon review, we find Lockton has established some of its information, including its customer information, constitutes commercial or financial information, the release of which would cause it substantial competitive harm. We also find that Milliman has established its customer and pricing information constitutes commercial or financial information, the release of which would cause it substantial competitive harm. Therefore, the authority must withhold this information, which we have marked, under section 552.110(b) of the Government Code. However, we find Lockton and Milliman have made only conclusory allegations the release of their remaining information would result in substantial harm to their competitive positions. *See* Open Records Decision Nos. 661 at 5-6, 509 at 5 (1988) (because bid specifications and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (1982) (information relating to organization and personnel, market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Thus, the authority may not withhold any of the remaining information under section 552.110(b).

We note portions of the remaining information are subject to section 552.136 of the Government Code.² This section provides in part that “[n]otwithstanding any other provision of this chapter, 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.” Gov’t Code § 552.136(b); *see also id.* § 552.136(a) (defining “access device”). This office has determined that insurance policy numbers are subject to section 552.136. *See* Open Records Decision No. 684 at 9 (2009). Accordingly, the authority must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

We also note that some of the remaining information 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. *See* Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See id.*; *see also* 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 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.

²The 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).

In summary, the authority must withhold the information we have marked under sections 552.110 and 552.136 of the Government Code. The authority must release the remaining information, but any information protected by copyright may only be released 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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/bhf

Ref: ID# 484903

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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