



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 8, 2013

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

OR2013-07638

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# 486689 (PIR No. W010790-021813).

The City of McAllen (the "city") received a request for responses to a specified request for proposals for redevelopment of the McAllen Civic Center. You claim the submitted information is excepted from disclosure under sections 552.110, 552.131, and 552.153 of the Government Code. Additionally, you state release of the requested information may implicate the proprietary interests of third parties.¹ You inform us the interested third parties were notified of this request for information and of their right to submit arguments as to why the requested information should not be released. *See* Gov't Code § 552.305 (permitting interested third parties to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested

¹The third parties notified pursuant to section 552.305 of the Government Code are: Cielo Realty Partners; HEB Development; Majestic Realty Co.; Property Commerce; Weingarten Realty & Rioco Real Estate Services, LLC; and White Leasure Development.

third party to raise and explain applicability of exception in certain circumstances). We have considered the submitted arguments and reviewed the submitted representative sample of information.²

Initially, you raise section 552.110 of the Government Code as an exception to disclosure. However, because section 552.110 is designed to protect the interests of third parties, not those of governmental bodies, a governmental body may not raise section 552.110 on behalf of a third party. Therefore, if we do not receive comments from a third party explaining why the information at issue should not be released, we will conclude section 552.110 is not applicable. 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 any of the third parties explaining why any portion of the submitted information should not be released. Therefore, we have no basis to conclude any of the third parties has a protected proprietary interest in the submitted information. *See* Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, third 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 any of the submitted information on the basis of any proprietary interest the third parties may have in it.

Section 552.131 of the Government Code 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:

- (1) a trade secret of the business prospect; or
- (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause

²We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than those submitted to this office.

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)-(b). Section 552.131(a) protects the proprietary interests of third parties that have provided information to governmental bodies, not the interests of governmental bodies themselves. There has been no demonstration by a third party that any of the information at issue constitutes a trade secret or that release of any of the information at issue would cause a third party substantial competitive harm. *See* ORDs 552 at 5 (attorney general will accept private person's claim under section 552.110(a) of the Government Code if person establishes *prima facie* case for trade secret exception, and no one submits argument that rebuts claim as matter of law), 661 at 5-6. Thus, the city may not withhold any of the information at issue under section 552.131(a) of the Government Code.

Section 552.131(b) of the Government Code protects information about a financial or other incentive that is being offered to a business prospect by a governmental body or another person. Gov't Code § 552.131(b). You state the submitted information contains economic incentives requested by the third parties during the ongoing contractual negotiations between the parties. You also explain no agreement had been reached at the time of the request. However, we note section 552.131(b) only excepts those incentives offered to the business prospect by a governmental body or another person; it does not except incentives requested by the business prospect. Upon review, we find you have not demonstrated how any of the information at issue consists of information about a financial or other incentive being offered to a business prospect by the city. Consequently, none of the information may be withheld under section 552.131(b).

Section 552.153 of the Government Code protects proprietary records and trade secrets involved in certain partnerships under chapter 2267 of the Government Code and provides in part:

(a) In this section, "affected jurisdiction," "comprehensive agreement," "contracting person," "interim agreement," "qualifying project," and "responsible governmental entity" have the meanings assigned those terms by [s]ection 2267.001.

(b) Information in the custody of a responsible government entity that relates to a proposal for a qualifying project authorized under [c]hapter 2267 is excepted from the requirements of [the Act] if:

(1) the information consists of memoranda, staff evaluations, or other records prepared by the responsible governmental entity, its staff, outside advisors, or consultants exclusively for the evaluation and negotiation of proposals filed under [c]hapter 2267 for which:

(A) disclosure to the public before or after the execution of an interim or comprehensive agreement would adversely affect the financial interest or bargaining position of the responsible governmental entity; and

(B) the basis for the determination under Paragraph (A) is documented in writing by the responsible governmental entity; or

(2) the records are provided by a contracting person to a responsible governmental entity or affected jurisdiction under [c]hapter 2267 and contain:

(A) trade secrets of the contracting person;

(B) financial records of the contracting person, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or other means; or

(C) other information submitted by the contracting person that, if made public before the execution of an interim or comprehensive agreement, would adversely affect the financial interest or bargaining position of the responsible governmental entity or the person.

Id. § 552.153(a)-(b). Section 2267.001(10) of the Government Code provides “qualifying project” means:

(A) any ferry, mass transit facility, vehicle parking facility, port facility, power generation facility, fuel supply facility, oil or gas pipeline, water supply facility, public work, waste treatment facility, hospital, school, medical or nursing care facility, recreational facility, public building, or other similar facility currently available or to be made available to a governmental entity for public use, including any structure, parking area, appurtenance, and other property required to operate the structure or facility and any technology infrastructure installed in the structure or facility that is essential to the project’s purpose; or

(B) any improvements necessary or desirable to unimproved real estate owned by a governmental entity.

Id. § 2267.001(10).³ Further, section 2267.001(11) provides that “responsible governmental entity” means “a governmental entity that has the power to develop or operate an applicable qualifying project.” *Id.* § 2267.001(11). The city has not explained, nor can we discern, how the city constitutes a responsive governmental entity and the information relates to a proposal for a qualifying project authorized under chapter 2267 of the Government Code. Accordingly, we find the city may not withhold any portion of the submitted information under section 552.153 of the Government Code. Further, we have not received any arguments from the third parties establishing that they otherwise have a proprietary interest in the submitted information. *See id.* § 552.110(a)-(b); ORDs 661 at 5-6, 552 at 5, 542 at 3. Accordingly, we find the city may not withhold any portion of the submitted information under section 552.153 of the Government Code. As no other exceptions to disclosure have been raised, the city must release the submitted information.

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,



Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/akg

³We note the 82nd Legislature created two versions of chapter 2267 of the Government Code. Section 552.153(a) refers to the version of chapter 2267 entitled “Public and Private Facilities and Infrastructure,” which was added by Senate Bill 1048.

Ref: ID# 486689

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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