



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 5, 2013

Mr. Jeffery T. Pender
Deputy General Counsel
Texas Department of Housing and Community Affairs
P.O. Box 13941
Austin, Texas 78711-3941

OR2013-09309

Dear Mr. Pender:

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# 487805.

The Texas Department of Housing and Community Affairs (the "department") received a request for all Waivers, Pre-Clearance, Determinations, and Disclosure ("WPDD") packets submitted in connection with the 2013 Housing Tax Credit Application Cycle and a request for eleven specified WPDD packets. Although you take no position with respect to the public availability of the requested information, you state release of this information may implicate the proprietary interests of third parties. Accordingly, you have notified the third parties of the request and of their right to submit arguments to this office as to why the requested information should not be released.¹ *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the circumstances). We have received comments submitted by National, Kilday, DMA, Hamilton, NRP, and YesHousing. We have

¹The notified third parties are: National Church Residences ("National"); Kilday Realty Corp. ("Kilday"); DMA Development Company, L.L.C. ("DMA"); Hamilton Apartment, L.P. ("Hamilton"); Yes Housing Developing Communities ("Yes Housing"); NRP; McKinney Millennium, L.P.; Songhai at West Gate, L.P.; Lakewood Property Management, L.L.C.; Lafayette Plaza Apartments, L.P.; Palladium USA International, Inc.; City Wide Serenity Place Apartment, L.P.; TX Nolanville Apartments, Ltd.; AD Trinity Station, L.P.

also received and considered comments from the first requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note in response to the second requestor's request for eleven specified WPDD packets, you have only submitted five of the requested WPDD packets. Thus, to the extent any additional responsive information existed when the present request was received, we assume it has been released. If such information has not been released, then it must be released at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we note the first requestor claims the submitted information is public and cites to various sections of subchapter DD of chapter 2306 of the Government Code, including section 2306.6717. Section 2306.6717(a) provides in relevant part:

(a) Subject to Section 2306.67041, the department shall make the following items available on [its] website:

(1) as soon as practicable, any proposed application submitted through the preapplication process established by [subchapter DD.]

Gov't Code § 2306.6717(a)(1); *see also id.* § 2306.67041(b) (department shall determine process for allowing access to on-line pre-applications, applications, and information related to applications submitted through on-line application system). Pursuant to section 552.303(c) of the Government Code, this office asked the department to provide us with additional information concerning whether section 2306.6717(a)(1) is applicable to the requested WPDD packets. *See id.* § 552.303(c)-(d) (if attorney general determines that information in addition to that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of notice). In response to our office's request for additional information, the department states this office's question "appears to assume that [the department] believe[s] section 2306.6717(a)(1) is not applicable." The department further states it "takes no position on the applicability of Government Code [s]ection 2306.6717(a)(1) in this particular fact situation." Rather, the department states whether to release the submitted WPDD packets is a decision reserved for this office.

Section 2306.6702(a)(2) of the Government Code defines "application" as "an application filed with the department by an applicant and includes any exhibits or other supporting materials." *Id.* § 2306.6702(a)(2). We note an applicant is required to request a waiver or pre-clearance at or prior to the submission of a pre-application for a Competitive Housing Tax Credit. *See* 10 T.A.C. § 10.207; *see also id.* § 11.8(b)(1)(H) (pre-application threshold

criteria includes all issues requiring waivers necessary for filing of eligible application). Upon review, we find the submitted WPDD packets constitute part of the application submitted in the pre-application process for the Housing Tax Credit Program. Accordingly, we find section 2306.6717(a) of the Government Code is applicable to the submitted WPDD packets, and such information is made public by section 2306.6717(a)(1).

National raises section 552.101 of the Government Code in conjunction with common-law privacy for its information. NRP raises sections 552.104 and 552.110 of the Government Code, and National, Kilday, DMA, Yes Housing, and Hamilton also raise section 552.110 for their respective information. However, we note information that is specifically made public by statute may not be withheld under section 552.101 on the basis of common-law privacy. *See Collins v. Tex Mall, L.P.*, 297 S. W.3d 409, 415 (Tex. App.—Fort Worth 2009, no pet.) (statutory provision controls and preempts common law only when statute directly conflicts with common-law principle); *Center Point Energy Houston Elec. LLC v. Harris County Toll Rd. Auth.*, 436 F.3d 541, 544 (5th Cir. 2006) (common law controls only where there is no conflicting or controlling statutory law). We further note information that a statute specifically makes public may not be withheld from the public under any of the Act's exceptions to public disclosure. *See, e.g.*, Open Records Decision Nos. 544 (1990), 378 (1983), 161 (1977), 146 (1976). Thus, none of the submitted information may be withheld under section 552.101 in conjunction with common-law privacy, section 552.104, or section 552.110 of the Government Code. The submitted 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,



Kathleen J. Santos
Assistant Attorney General
Open Records Division

KJS/som

Ref: ID# 487805

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

Songhai at West Gate
c/o Jeffrey T. Pender
Deputy General Counsel
Texas Department of Housing and
Community Affairs
P.O. Box 13941
Austin, Texas 78711-3941
(w/o enclosures)

Palladium USA International
c/o Jeffrey T. Pender
Deputy General Counsel
Texas Department of Housing and
Community Affairs
P.O. Box 13941
Austin, Texas 78711-3941
(w/o enclosures)

Kilday Realty Corporation
c/o Tamea a Dula
Coats Rose
3 East Greenway Plaza-Suite 2000
Houston, Texas 77046-0307
(w/o enclosures)

Ad Trinity Station
c/o Jeffrey T. Pender
Deputy General Counsel
Texas Department of Housing and
Community Affairs
P.O. Box 13941
Austin, Texas 78711-3941
(w/o enclosures)

City Wide Serenity Place Apartment
c/o Jeffrey T. Pender
Deputy General Counsel
Texas Department of Housing and
Community Affairs
P.O. Box 13941
Austin, Texas 78711-3941
(w/o enclosures)

Tx Nolan Apartments
c/o Jeffrey T. Pender
Deputy General Counsel
Texas Department of Housing and
Community Affairs
P.O. Box 13941
Austin, Texas 78711-3941
(w/o enclosures)

McKinney Millennium
c/o Jeffrey T. Pender
Deputy General Counsel
Texas Department of Housing and
Community Affairs
P.O. Box 13941
Austin, Texas 78711-3941
(w/o enclosures)

Lafayette Plaza Apartments
c/o Jeffrey T. Pender
Deputy General Counsel
Texas Department of Housing and
Community Affairs
P.O. Box 13941
Austin, Texas 78711-3941

Mr. Joseph R. Kasberg
National Church Residences
2335 North Bank Drive
Columbus, Ohio 43220
(w/o enclosures)

Lakewood Property Management
c/o Jeffrey T. Pender
Deputy General Counsel
Texas Department of Housing and
Community Affairs
P.O. Box 13941
Austin, Texas 78711-3941
(w/o enclosures)

Ms. Janine Sisak
Senior Vice President
General Counsel
DMA Development Company
4101 Parkstone Heights Drive-Suite 310
Austin, Texas 78746
(w/o enclosures)

The Hamilton Apartments
c/o Andrew C. Wright
Buck Keenan
700 Louisiana - Suite 5100
Houston, Texas 77002
(w/o enclosures)

Mr. Theodore Einhorn
General Counsel
Nrp
Skylight Office Tower
1660 West 2nd Street, Suite 1100
Cleveland, Ohio 44113-1448
(w/o enclosures)

Mr. Joseph R. Ortega
Executive Vice President
Yes Housing Developing Communities
104 Roma North West
Albuquerque, New Mexico 87102
(w/o enclosures)