



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 21, 2017

Ms. Lisa M. Tatum
Counsel for the South Central Texas Regional Certification Agency
LM Tatum, PLLC
111 Soledad, Suite 902
San Antonio, Texas 78205

OR2017-19025

Dear Ms. Tatum:

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# 671654.

The South Central Texas Regional Certification Agency (the "agency"), which you represent, received a request for information pertaining to Go Rio San Antonio, L.L.C. ("Go Rio"), and any other business entities owned by a named individual during a specified time period. The agency claims some of the submitted information is excepted from disclosure under sections 552.101, 552.110, 552.115, 552.117, 552.130, and 552.147 of the Government Code. Additionally, the agency indicates release of the submitted information may implicate the proprietary interests of Go Rio and Landry's, Inc. ("Landry's"). Accordingly, we understand the agency notified Go Rio and Landry's of the request for information and of the 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 the Act in certain circumstances). We have received comments from Go Rio and Landry's. We have reviewed the submitted arguments and the submitted information.

Initially, the agency argues the submitted information should be withheld because the information was supplied to the agency by third parties with the expectation of confidentiality. The agency states, and has submitted documentation showing, its Policy and Procedure Manual provides information that "reasonably may be regarded as confidential, personal and business information" will be disclosed only "with the owner's advice and/or

consent.” However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov’t Code § 552.110). Consequently, unless information falls within an exception to disclosure, the agency must release it, notwithstanding any expectations or agreement specifying otherwise.

Section 552.128 of the Government Code provides,

(a) Information submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program is excepted from the requirements of Section 552.021, except as provided by this section.

(b) Notwithstanding Section 552.007 and except as provided by Subsection (c), the information may be disclosed only:

(1) to a state or local governmental entity in this state, and the state or local governmental entity may use the information only:

(A) for purposes related to verifying an applicant’s status as a historically underutilized or disadvantaged business; or

(B) for the purpose of conducting a study of a public purchasing program established under state law for historically underutilized or disadvantaged businesses; or

(2) with the express written permission of the applicant or the applicant’s agent.

(c) Information submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on a bidders list, including information that may also have been submitted in connection with an application for certification as a historically underutilized or disadvantaged business, is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

Gov't Code § 552.128. Go Rio and Landry's argue the submitted information consists of information submitted to the agency in connection with Go Rio's application for certification as a Disadvantaged, Minority, and/or Women-Owned Business Enterprise. Upon review, we find most of the submitted information, which we have marked, consists of information submitted to the agency in connection with applications for certifications as historically underutilized or disadvantaged businesses under a local, state, or federal certification program. Thus, we find section 552.128 is applicable to the information we marked. We note the requestor is not a state or local governmental entity. We further note the applicants and their agents have not given written permission to release their information. Further, we find subsection 552.128(c) does not apply in this instance. We therefore conclude the agency must withhold the information we marked under section 552.128 of the Government Code.¹

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses information protected by other statutes. A federal statute or an administrative regulation enacted pursuant to statutory authority can provide statutory confidentiality for purposes of section 552.101. *See* Open Records Decision No. 476 (1987) (addressing statutory predecessor). The agency raises section 552.101 in conjunction with section 26.109(a)(2) of title 49 of the Code of Federal Regulations. Title 49, part 26 of the Code of Federal Regulations governs the participation of disadvantaged business enterprises ("DBE") in the United States Department of Transportation ("DOT") financial assistance programs, and provides, in part, the following:

(a) Availability of records.

...

(2) Notwithstanding any provision of Federal or state law, you must not release any information that may reasonably be construed as confidential business information to any third party without the written consent of the firm that submitted the information. This includes applications for DBE certification and supporting information. However, you must transmit this information to DOT in any certification appeal proceeding under § 26.89 of this part or to any other state to which the individual's firm has applied for certification under § 26.85 of this part.

49 C.F.R. § 26.109(a)(2). Part 26 applies to recipients of certain federal-aid highway funds, federal transit funds, and airport funds. *See id.* § 26.3(a). Section 26.5 states, "You refers to a recipient, unless a statement in the text of this part or the context requires otherwise[.]"

¹As our ruling is dispositive for this information, we need not address the remaining arguments against its disclosure.

See id. § 26.5. The agency argues “certain information is protected by law pursuant to its adoption of the confidentiality protections of federal certification program policies into its local certification program, adopting 49 C.F.R. 26, particularly [section] 26.109(a)(2), into many aspects of its local programs.” The agency further states it “has adopted this non-disclosure position to protect all of its local program certification applicants, their applications and related supported documentation similar to the protections afforded to its DBE certification applicants, their applications and their related supporting documentation.” Upon review, we find the agency has not explained it is a recipient of federal-aid highway funds, federal transit funds, and airport funds. Moreover, the agency has not explained how section 26.109 provides the agency with the authority to make any information confidential. *See Gov’t Code* § 552.101 (excepting information made confidential by law). A governmental body may not promulgate a rule that designates information as being confidential, so as to bring the information within the scope of section 552.101 of the Government Code, unless the governmental body has been given specific statutory authority to do so. *See Open Records Decision Nos. 594 at 2-3 (1991) (city ordinance cannot operate to make information confidential when not excepted by Act), 263 (1981) (city ordinance may not conflict with Act); see also Indus. Found. v. Tex. Indus. Accident Bd., 540 S.W.2d 668, 677 (Tex. 1976) (agency rule may not make information confidential in circumvention of Act); City of Brookside Village v. Comeau, 633 S.W.2d 790, 796 (Tex. 1982) (local ordinance conflicting with or inconsistent with state legislation not permissible).* Thus, we find the agency has failed to demonstrate the applicability of section 26.109(a)(2) to the information at issue, and the agency may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with section 26.109(a)(2) of title 49 of the Code of Federal Regulations.

Next, the agency contends the remaining information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets obtained from a person and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See Gov’t Code* § 552.110(a)-(b). We note section 552.110 protects the interests of private parties that provide information to governmental bodies, not the interests of governmental bodies themselves. *See generally* Open Records Decision No. 592 (1991). Accordingly, we do not consider the agency’s arguments under section 552.110.

We note the remaining information contains e-mail addresses that are subject to section 552.137 of the Government Code.² Section 552.137 of the Government Code 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

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).*

subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the agency must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

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 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 agency must withhold the information we marked under section 552.128 of the Government Code. The agency must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. The agency must release the remaining information; 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/bw

Ref: ID# 671654

Enc. Submitted documents

c: Requestor
(w/o enclosures)

2 Third Parties
(w/o enclosures)