



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 16, 2020

Mr. Kieran Hillis
Public Information Coordinator and Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2020-26158

Dear Mr. Hillis:

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# 849213 (OOG ID# 459-20).

The Office of the Governor (the "governor's office") received a request for information and communications pertaining to specified topics. You claim some of the submitted information is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. You also state you notified 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* §§ 552.304 (interested party may submit comments stating why information should or should not be released), .305; *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 the City of Lancaster (the "city") and the Taylor Economic Development Corporation (the "TEDC"). We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

Initially, you state some of the requested information was the subject of a previous request for a ruling, as a result of which this office issued Open Records Letter No. 2020-19236

¹ We 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 that submitted to this office.

(2020). In that ruling, we determined the governor's office (1) may withhold certain information under section 552.104 of the Government Code, (2) may withhold certain information under section 552.111 of the Government Code, and (3) must release the remaining responsive information. We understand the law, facts, or circumstances on which the prior ruling was based have not changed. Thus, the governor's office may continue to rely on Open Records Letter No. 2020-19236 as a previous determination and withhold or release the information at issue in accordance with that ruling.² See Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, you note, and we agree, some of the remaining information is not responsive to the instant request for information because it was created after the date the governor's office received the instant request for information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983). This ruling does not address the public availability of the non-responsive information you marked and the governor's office need not release it in response to this request.

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 remaining third party explaining why the submitted information should not be released. Therefore, we have no basis to conclude any remaining third party has a protected proprietary interest in the submitted information. See, e.g., *id.* § 552.110 (requiring the provision of specific factual evidence demonstrating the applicability of the exception). Accordingly, the governor's office may not withhold the submitted information on the basis of any proprietary interest any remaining third party may have in the information.

Section 552.104(a) of the Government Code excepts from disclosure information that a governmental body demonstrates, if released, would "harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation or in a particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future." Gov't Code § 552.104(a). The "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex. 2015). You explain the governor's office is tasked by statute with "[facilitating] the location, expansion, and retention of domestic and international business investment to the [S]tate [of Texas (the "state")]" and "[promoting] and [administering]

² As we are able to make this determination, we need not address the arguments against the disclosure of this information.

business and community economic development programs and services in the state, including business incentive programs.” Gov’t Code § 481.022(2)-(3). You also explain the governor’s office competes on behalf of the state with other states for the expansion and recruitment of businesses by “providing various incentives and employing strategies to attract new business to the state or assist with the expansion of existing business in the state.” Thus, you assert the governor’s office has specific marketplace interests in the information at issue because it competes on behalf of the state to recruit and expand businesses within the state. You argue release of the information at issue would provide a competitive advantage to competing states, as well as companies considering relocation or expansion in the state. Based upon your representations and our review, we find you have demonstrated the governor’s office has specific marketplace interests and may be considered a “competitor” for purposes of section 552.104. We also find you have demonstrated release of the information at issue would give advantage to a competitor or bidder. Accordingly, the governor’s office may withhold the information you marked under section 552.104(a) of the Government Code.³

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 subsection (c). *See* Gov’t Code § 552.137(a)-(c). The e-mail address at issue is not excluded by subsection (c). Therefore, the governor’s office must withhold the personal e-mail addresses of members of the public in the remaining information 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 governor’s office may continue to rely on Open Records Letter No. 2020-19236 as a previous determination and withhold or release the information at issue in accordance with that ruling. The governor’s office may withhold the information you marked under section 552.104(a) of the Government Code. The governor’s office must withhold the personal e-mail addresses of members of the public in the remaining information under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The governor’s office must release the remaining information; however, any information that is subject to copyright may be released only in accordance with copyright law.

³ As our ruling is dispositive, we need not address your remaining argument against disclosure of this 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's open government hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the public information act may be directed to the cost rules administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Sean McCormick
Assistant Attorney General
Open Records Division

SMC/rm

Ref: ID# 849213

Enc. Submitted Documents

C: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)