



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 22, 1994

Mr. Phil Steven Kosub
Soules & Wallace
100 West Houston, Suite 1500
San Antonio, Texas 78205-1457

OR94-467

Dear Mr. Kosub:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 25761.

The City of Luling (the "city"), which you represent, has received a request for information relating to its negotiations with Caldwell County regarding emergency medical services. Specifically, the requestor seeks "a copy of the preliminary proposals for providing EMS service for Caldwell County as presented to County Judge Rebecca Hawener." You have submitted the requested information to us for review and claim that sections 552.104 and 552.111 of the Government Code except it from required public disclosure.

We first address your claim that section 552.104 excepts the requested information from required public disclosure. You claim that release of the requested information would give other parties interested in providing Caldwell County with emergency medical services a competitive advantage over the city. Section 552.104 excepts from required public disclosure "information which, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to prevent one competitor or bidder from gaining an unfair advantage over others. Open Records Decision No. 541 (1990). Ordinarily, however, section 552.104 may not be claimed to protect a governmental body's "competitive advantage," because a governmental body cannot be regarded as being in competition with private enterprise. Open Records Decision No. 463 (1987). However, in Open Records Decision No. 593 (1991), this office for the first time held that a governmental body might be deemed, under certain circumstances, to be a "competitor" in the marketplace. That decision found that the Teacher Retirement System, as a governmental entity authorized by both constitutional and statutory law to invest its securities, could be considered, with regard to those

investments, to be a "competitor" for purposes of section 552.104. Article XVI, section 67 of the Texas Constitution authorizes the board of trustees of the Teacher Retirement System to "invest the funds of the system in such securities as the board may consider prudent investments." Tex.Const. art. XVI, § 67(a)(3). The constitution declares that the system shall invest its funds "in regard to the permanent disposition of [its] funds, considering the probable income therefrom as well as the probable safety of [its] capital." *Id.* The implicit charge to the Teacher Retirement System is to generate profit through sound investment. Accordingly, the decision found that certain information which could harm the system's competitive situation could be withheld from public disclosure.

The rationale of Open Records Decision No. 593 is not applicable to your claim under section 552.104. A governmental body may be afforded the right to claim the "competitive advantage" aspect of section 552.104 only where competition is authorized by law. Open Records Decision No. 604 (1992) at 2. Although the city may compete with other cities or private enterprise to provide emergency medical services to the county, we are not aware that the constitution or a statute empowers the city to engage in competition for purposes of gaining financial profit. Accordingly, we conclude that the city may not withhold the requested information under section 552.104 of the Government Code.

You also claim that section 552.111 excepts the requested information from required public disclosure. Section 552.111 excepts from disclosure an "interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined section 552.111 and concluded that it excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body at issue. In addition, this office concluded that section 552.111 does not except purely factual information. Open Records Decision No. 615 at 5. The information submitted to us for review is factual in nature. We conclude, therefore, that the city may not withhold it under section 552.111 of the Government Code. The city must release the requested information in its entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Government Section

Ref.: ID# 25761

Enclosure: Submitted document

cc: Ms. Barbara Chapman
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(w/o enclosure)