



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 7, 1994

Ms. Diana L. Granger
City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR94-537

Dear Ms. Granger:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 27435.

The City of Austin (the "city") received two separate requests for information about proposals received by the city in response to a Request for Proposal for replacement of electric power provided by the Holly Power Plant.¹ You contend that the proposals, which you submitted to this office for review, are excepted from disclosure under section 552.104 of the Open Records Act. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Section 552.104 is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. Open Records Decision No. 463 (1987) at 2. Governmental bodies may withhold proposals while governmental officials are in the process of evaluating those proposals and seeking clarification of proposals. Open Records Decision No. 170 (1977). Section 552.104 does not, however, except bids or proposals from disclosure once the bidding is over and the contract is in effect. Open Records Decision Nos. 184 (1978) at 2; 75 (1975).

¹We note that since one of the requestors represents another governmental entity the information could be transferred to the requesting governmental entity without such transfer being a public disclosure. Information generally can be transferred between governmental entities without violating the confidentiality of the information or waiving exceptions to disclosure under the Open Records Act. Attorney General Opinions H-917 (1976) at 1; H-242 (1974) at 4. *But see* Attorney General Opinion JM-590 (1986) (governmental body may not transfer confidential information to another governmental body when prohibited from doing so by statute).

You state that the proposals "are currently undergoing an extensive evaluation process. The evaluation process contemplates further submissions and clarifications from proposers and will take several months." If the contract has not yet been awarded, the city may withhold the submitted proposals at this time pursuant to section 552.104.² Release of the proposals during the time that competitors may clarify, modify, or withdraw their proposals could result in an advantage to the other competitors for the contract or damage the city's ability to obtain truly competitive bids.

In addition to the proposals, the requestors also seek other, related documents. You indicate that one of the requests is so broad that the requestor could be seeking a variety of documents. It is the city's responsibility to advise the requestor what documents may be responsive to the request so that the request can be narrowed. Open Records Decision No. 87 (1975). The city should ask for clarification if it reasonably cannot understand the request. Open Records Decision No. 304 (1982).

The second request also asks for the following information:³

- (3) Any similar summaries the city staff prepared on those proposals.
- (4) Any reports or internal memoranda describing how the city staff analyzed those proposals.
- (5) Any reports or internal memoranda describing how the city staff prepared the cost comparison on Page 12 of the June 21 city document "Holly Power Plant Closure Options."
- (6) The Request for Proposals for replacement of Holly Power, dated Jan. 24, 1994 and numbered CM9430029.

You state that the city has public documents that may be responsive to request (3) for "similar summaries" and that the document responsive to request (6) is a public record. We therefore assume that you have already disclosed these documents to the requestor. Gov't Code § 552.221(a) (public records shall be "promptly" produced). You also state that at the time the request was received the city did not have information responsive to request (5), but that this information is currently available to the public. Although the Open Records Act does not require a governmental body to inform a requestor that

²Because the city may withhold the proposals under section 552.104, we do not at this time address your arguments under section 552.101.

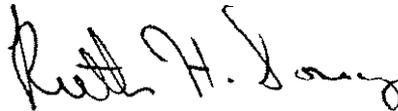
³The requestor asked for the proposals and for "executive summaries" prepared by the companies submitting the proposals. You indicate that any executive summaries submitted to the city are part of the proposals rather than separate documents. We have already determined that the proposals are excepted under section 552.104.

information has come into existence after the request has been received, when very little time has passed between receipt of the request and creation of the information, it may be easy for a governmental body to so inform the requestor. Open Records Decision No. 452 (1986) at 3.

You have also informed this office that the city has no documents which are responsive to request (4). The city is not obligated to provide information that does not exist. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978 writ dismissed w.o.j.) (official could not be compelled to produce documents not in his possession); Open Records Decision Nos. 561 (1990) at 9; 483 (1987) at 2; 362 (1983) at 2. However, you should inform the requestor that this information does not exist.

We are resolving this matter with an 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,



Ruth H. Soucy
Assistant Attorney General
Open Government Section

RHS/KKO/rho

Ref.: ID# 27435

Enclosures: Submitted documents

cc: Honorable Ken Oden
County Attorney
Travis County Courthouse
P.O. Box 1748
Austin, Texas 78767
(w/o enclosures)

Mr. Mike Todd
Reporter
Austin American-Statesman
P.O. Box 670
Austin, Texas 78767-0670
(w/o enclosures)

Ms. Cynthia J. Hill
Senior Supervising Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828
(w/o enclosures)