



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 5, 2004

Ms. Noelle C. Letteri
Attorney
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873

OR2004-0024

Dear Ms. Letteri:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 193721.

The Texas General Land Office (the "land office") received a request for information pertaining to the land office's sale of energy. You claim that the requested information is excepted from disclosure under section 552.104 of the Government Code. In addition, you have notified third party Reliant Energy ("Reliant") of the request and of its opportunity to submit comments to this office. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have considered all claimed exceptions and reviewed the submitted information.

Initially, we note that the submitted information consists almost exclusively of "contract[s] relating to the receipt or expenditure of public or other funds by a governmental body" and is therefore generally "public information and not excepted from required disclosure . . . unless . . . expressly confidential under other law." *See* Gov't Code § 552.022(a)(3). However, you claim that this information is excepted from disclosure under section 552.104, and we will therefore address your arguments. *See* Gov't Code § 552.104(b) (section 552.022 does not apply to information that is excepted from disclosure under section 552.104).

Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception

if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate that it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See Open Records Decision No. 514 at 2 (1988).*

You assert that the land office has specific marketplace interests in the information at issue because the land office is authorized by statute to "sell or otherwise convey power generated from royalties taken in kind." Tex. Util. Code § 35.102. You inform us that under this authority, the land office has created the State Power Program through which it "bids on contracts for the right to sell electrical energy to public retail customers." You also inform us that the land office "competes with other private companies for the awards of these contracts." Based on these representations, we conclude that the land office has demonstrated that it has specific marketplace interests and may be considered a "competitor" for purposes of section 552.104. *See ORD 593.*

You also assert that release of the submitted information would harm the land office's marketplace interests. You inform us that the submitted information "represents the method by which the [land office] will provide and charge for electric energy to it[s] electrical energy customers." You assert that, if the land office's competitors had access to this information, they would "be able to use the [land office's] methods of delivery of electrical services and its pricing formula for such services as their own." You further contend that the "competitors could use this information to structure their own proposals for future electrical customers" to better compete against the land office. You also inform us that the land office "working with Reliant is able to offer unique products, services and pricing formulas in the competitive marketplace of electrical energy" and contend that allowing competitors access to this information will undermine the land office's ability to compete in this marketplace. Based on your representations and arguments, we conclude that the land office has shown that release of the submitted information will bring about specific harm to the land office's marketplace interests. *See ORD 593.* Accordingly, under section 552.104 of the Government Code, the land office may withhold the submitted information. As our ruling on this issue is dispositive, we need not address the land office's other arguments or the claims made by Reliant.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by

filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

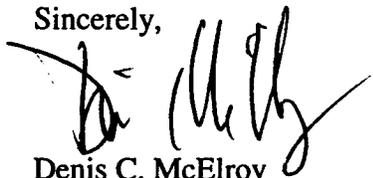
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 193721

Enc. Submitted documents

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