



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 15, 2004

Ms. Noelle C. Letteri
Staff Attorney
Texas General Land Office
1700 North Congress Avenue
Austin, Texas 78711-2873

OR2004-1959

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# 197605.

The Texas General Land Office (the "land office") received a request for information relating to gas purchased by the land office over the past two years. You inform us that you will release the underlying contract between the land office and a third party to the requestor. You claim that the highlighted portions of the submitted information are excepted from disclosure under section 552.104 of the Government Code. We have considered the exception you claim and reviewed the submitted information.¹ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

First, we address the requestor's contention that the land office failed to timely request a decision from this office. *See* Gov't Code §§ 552.301 (the governmental body must ask for an attorney general's decision and state the exceptions that apply not later than the 10th business day after the date of receiving the written request), .302 (a governmental body's failure to comply with section 552.301 results in the legal presumption that the information is public and must be released). The land office received the initial request for information on December 22, 2003. The land office sought clarification of the request on December 29,

¹We assume that 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 that those records contain substantially different types of information than that submitted to this office.

2003, the second business day after receiving the request. The ten business day deadline under section 552.301(b) was tolled during the time the land office was communicating with the requestor regarding the scope of the request. *See* Open Records Decision No. 663 at 2-5 (1999) (addressing circumstances under which governmental body's communications with a requestor to clarify or narrow request will toll ten-business-day deadline to request decision under section 552.301(b)) The ten business day period resumed the day after the land office received clarification from the requestor, which was January 6, 2004. *Id.* at 5. The land office requested a ruling from this office on January 8, 2004, which is the fifth business day after the land office received the request. Therefore, the land office requested a ruling within the ten business day deadline as mandated by section 552.301(b) of the Government Code. Thus, we will address the land office's arguments against disclosure.

Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." This exception protects a governmental body's interests in competitive bidding and 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. First, the governmental body must demonstrate that it has specific marketplace interests. *See* Open Records Decision No. 593 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. *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 inform us that the Seventy-sixth Legislature amended chapter 52 of the Natural Resources Code and chapter 35 of the Utilities Code to allow the land office to utilize oil and gas royalties taken in kind to convey power directly to public retail customers and particularly to other state agencies and school districts under the State Energy Marketing Program ("SEMP"). You also inform us that, through SEMP, the land office provides gas and electricity through the Public Customer Gas Program and the State Power Program. You state that these programs enable customers to obtain energy at a discount while enhancing the revenues of the Permanent School Fund. You explain that section 52.133(a) of the Natural Resources Code authorizes the land office to take royalties in kind under leases covering land leased by the school land board or a board for lease or Relinquishment Act land. You explain that section 52.133(c) allows the land office to increase its supply of the royalties taken in kind through, among other things, the purchase of oil and gas. You inform us that the land office uses the increase in royalties taken in kind to provide natural gas to customers under the Public Customer Gas Program.

You further inform us that under subchapter D of chapter 35 of the Utilities Code, the commissioner of the land office, acting on behalf of the state, is authorized to sell or convey power generated from royalties taken in kind directly to public retail customers. You state that the land office created the State Power Program in order to supply electrical energy to public retail customers. You explain that the land office uses the purchases of royalties taken in kind under section 52.133 of the Natural Resources Code to enhance the power supply source available to the State Power Program.

You contend that the land office has a legitimate marketplace interest in purchasing gas for its portion of royalty taken in kind to enhance the supply of energy for the Public Customer Gas and State Power Programs, in order to supply customers dependable energy resources at a discounted price. You state that the land office has entered into a contract with a third party to purchase gas for SEMP. You explain that some of the highlighted information that you wish to withhold represents the negotiated price for the purchase of the gas. You assert that if this information is released that competitors in the energy supply marketplace will be able to negotiate more advantageous prices and that as a result, the land office could potentially lose its customers. After reviewing your arguments and the submitted information, we conclude that you may withhold the highlighted pricing information in Attachments B and C under section 552.104 of the Government Code.

You also seek to withhold the quantity purchased information in Attachments B and C under section 552.104. In your brief you explain that “[t]he information highlighted under ‘Quantity Purchased MMBTU/day’ in Attachment B is the total production purchased. . . . [.]” You further explain that “[i]nformation such as total production is public information, however if the competitors have access to information such as the total production, and total prices paid under the leases, they will be able to calculate the price paid per MMBTUs.” Based on your arguments, it is unclear whether the quantity purchased information is already in the public domain. Furthermore, it appears that the land office is only concerned about withholding the quantity purchased information to the extent that it reveals corresponding pricing information. Since pricing information may be withheld under section 552.104, you have not adequately explained how solely releasing quantity purchased information will harm the land office’s competitive interests. Thus, you must release the quantity purchased information we have marked.

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).

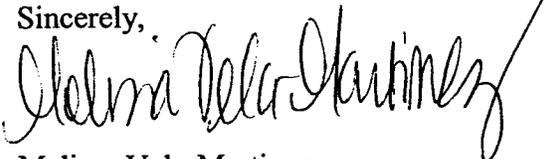
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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); *Tex. 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,



Melissa Vela-Martinez
Assistant Attorney General
Open Records Division

MVM/sdk

Ref: ID# 197605

Enc. Submitted documents

c: Mr. David W. Scott
Attorney at Law
406 Keenland Drive
Georgetown, Texas 78626
(w/o enclosures)