



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 14, 2004

Mr. Dan Junell
Assistant General Counsel
Teacher Retirement System of Texas
100 Red River Street
Austin, Texas 78701-2698

OR2004-5788

Dear Mr. Junell:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 205098.

The Teacher Retirement System of Texas (the "system") received a request for the following information relating to a specified Request for Proposals: the resulting contract, the successful proposal, and the evaluations of submitted proposals. You state that the requested contract does not exist. We note that the Public Information Act (the "Act") does not require a governmental body to disclose information that did not exist at the time the request was received.¹ You claim that the submitted information is excepted from disclosure under section 552.104 of the Government Code. You also claim that release of the requested information may implicate the proprietary interests of third parties under section 552.110 of the Government Code, although you take no position as to whether the information is so excepted. You state, and provide documentation showing, that you notified the interested third parties of the request and of their right to submit arguments to this office as to why the information should not be released.² See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits

¹*Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

²The submitted records indicate that you notified the following third parties pursuant to section 552.305: Aetna Life Insurance Company ("Aetna"); Gabriel, Roeder, Smith & Company; and Watson, Wyatt & Company.

governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances). We have considered the exception you claim and reviewed the submitted information.³

You indicate that some of the requested information is subject to a previous determination of this office issued as Open Records Letter No. 2004-3753 (2004) on May 7, 2004. In Open Records Decision No. 673 (2001), this office determined that a governmental body may rely on a ruling from this office as a previous determination if the following conditions are met: (1) the requested information is precisely the same information addressed in a prior attorney general ruling; (2) the ruling is addressed to the same governmental body; (3) the ruling concludes that the information is or is not excepted from disclosure; and (4) the law, facts, and circumstances on which the ruling was based have not changed. We understand you to represent that the pertinent facts and circumstances have not changed since the issuance of the prior ruling. Thus, to the extent the records responsive to the present request are precisely the same records at issue in Open Records Letter No. 2004-3753, we determine that the system may continue to follow our ruling in Open Records Letter No. 2004-3753 with respect to that information. To the extent that the information requested in this instance was not the subject of the prior ruling, we will address your argument under section 552.104 of the Government Code.

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. *See* Open Records Decision No. 541 at 4 (1990). Generally, section 552.104 does not except information relating to competitive bidding situations once a bid has been awarded and a contract has been executed. *See id.*

In this instance, you state that negotiations with Aetna, the respondent initially selected by the system for this RFP, are still ongoing and that a contract with Aetna has not yet been finalized or signed. You indicate that the release of the submitted information before the selection process has been concluded with respect to this RFP could give an advantage to the requestors in this selection process. Based on your arguments and our review of the

³You inform us that Exhibits A and B contain representative samples of some of the requested information. We 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.

submitted information, we conclude that the system may withhold the submitted information in its entirety pursuant to section 552.104.⁴

In summary, to the extent information responsive to the present request is identical to the information at issue in Open Records Letter No. 2004-3753, the system may continue to follow Open Records Letter No. 2004-3753 as a previous determination with respect to such information. The remaining submitted information may be withheld pursuant to section 552.104 of the Government Code.

You also request that we issue the system a previous determination that would allow it in the future to withhold bid proposal information related to any system-“HRAccount” procurement process prior to contract award under section 552.104 and under section 552.110 for any information excepted from disclosure under that particular section. We decline to issue such a previous determination at this time.

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).

⁴As we are able to make this determination, we do not address any remaining arguments against the disclosure of the submitted information.

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,



Amy D. Peterson
Assistant Attorney General
Open Records Division

ADP/sdk

Ref: ID# 205098

Enc. Submitted documents

c: Mr. Mark Hichar
Edwards & Angell, L.L.P.
2800 Financial Plaza
Providence, Rhode Island 02903
(w/o enclosures)

Ms. Caroline Weidler
FSA/IBA Product Head
Aetna Life Insurance Company
151 Farmington Avenue
Hartford, Connecticut 06156
(w/o enclosures)