



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 22, 2004

Mr. Kevin McCalla
Director, General Law Division
Texas Commission on Environmental Quality
P. O. Box 13087
Austin, Texas 78711-3087

OR2004-9020

Dear Mr. McCalla:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 211357.

The Texas Commission on Environmental Quality (the "commission") received a request for "the complete response to the RFI for the Surface Water Quality Monitoring Information System . . . project, Solicitation Number 585-5-55875, for the phase that preceded the Pre-Solicitation Conference." You claim that the requested information is excepted from disclosure under sections 552.101 and 552.104 of the Government Code. You also claim that portions of the requested information may contain proprietary information subject to exception under the Act. You state that the commission notified Compuware Corporation, an interested third party, of the commission's receipt of the request and of that company's right to submit arguments to us as to why any portion of the submitted information pertaining to it should not be released. *See Gov't Code §552.305(d); see also 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 under the Act in certain circumstances).* We have considered the claimed exceptions and reviewed the submitted information.

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive situations, typically in the context of competitive bidding. *See Open Records Decision No. 592 (1991).* A governmental body seeking to withhold information from disclosure pursuant to section 552.104 must

demonstrate 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). Section 552.104 generally does not except bidding information after the competitive bidding has concluded and a contract has been executed. *See* Open Records Decision No. 541 (1990).

In this instance, you state that the requested information consists of responses to a Request for Information ("RFI") related to a Request for Offers ("RFO"), "which is currently under bid." You assert that release of the requested information "would be to the competitive advantage to those submitting RFOs at the expense of those who submitted RFI responses." Based on your arguments and our review of the submitted information, we conclude that the submitted information may be withheld pursuant to section 552.104 until the pending contract has been awarded.¹

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).

¹As our ruling is dispositive, we do not address the remaining claims.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 211357
Enc. Submitted documents

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