ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 3, 2005

Mr. Frank J. Garza
Law Offices of Davidson & Troilo, P.C.
7550 West IH-10, Suite 800
San Antonio, Texas 78229-5815

OR2005-00046

Dear Mr. Garza:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 216181.

The Brooks Development Authority (the "authority"), which you represent, received a request for a copy of the Runway Demolition and Material Recycling Proposal bid packet presented to the authority by M&M Contracting, Ltd. ("M&M"), and a certified copy of the recorded minutes of the September 14, 2004 meeting of the authority's board of directors. You state that the authority will provide the certified copy of the minutes, and other responsive information, to the requestor. You claim, however, that certain information pertaining to M&M and the Project Implementation Plan pertaining to the project at issue are excepted from disclosure under section 552.104 of the Government Code. We have considered the exception you claim 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 competitive bidding has concluded and a contract has been executed. *See* Open Records Decision No. 541 (1990). In this case, you indicate that the project at issue

was awarded to M&M and that a contract between the authority and M&M had been executed as of the date of the request. Accordingly, we find you have not demonstrated that the authority was engaged in a specific open bidding situation at the time the authority received the present request. We therefore determine that section 552.104 is not applicable to the submitted information.

You also indicate that release of the requested information may implicate the proprietary interests of M&M. Pursuant to section 552.305 of the Government Code, a governmental body that receives a request for information that implicates the proprietary interests of a third party is required to notify the third party of the request and of its opportunity to submit comments to this office explaining why the requested information should not be released. *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 Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). An interested third party has ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B).

As of the date of this letter, this office has not received arguments from M&M indicating a proprietary interest in the submitted information. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Thus, we find the authority may not withhold any of the submitted information on that basis.

We also note that a substantial amount of information has been blacked out from the copy of the Project Implementation Plan you have submitted for review. Section 552.301 of the Government Code requires a governmental body to submit responsive information in a manner that permits this office to review the information. *See* Gov't Code § 552.301(e)(1)(D). A governmental body that submits redacted information can be found in violation of the procedural requirements of section 552.301, resulting in a determination that the information at issue must be released. *See* Gov't Code §§ 552.006, .301, .302. In this case, because we find your claimed exception to disclosure is not applicable and because we have not received any arguments from M&M explaining why the requested information should not be released, we determine the authority must release the information at issue to the requestor. We therefore do not reach the issue of the authority's failure to submit the Project Implementation Plan in reviewable form. In concluding that the requested information must be released, however, we emphasize that to the extent the authority

maintains the information at issue in non-redacted form, the authority must release the non-redacted version of the requested documents to the requestor.

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 thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten 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 ten 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 ten 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 ten calendar days of the date of this ruling.

Sincerely,

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 216181

Enc: Submitted documents

c: Mr. Olaf Landgrebe
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(w/o enclosures)