ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 14, 2007

Mr. Charles R. Kimbrough
Bickerstaff, Heath, Pollan & Caroom, L.L.P.
For the City of Marble Falls
816 Congress Avenue, Suite 1700
Austin, Texas 78701

OR2007-01913

Dear Mr. Kimbrough:

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# 271708.

The City of Marble Falls (the "city"), which you represent, received two requests from the same requestor for a copy of notes from which a particular motion was read into the record at a city council meeting, a copy of a voice recording of the same, as well as whether or not a particular motion completed the city's authority to purchase a golf course and all documents related to the effluent discharge issue related to the golf course. The city states that some of the requested information does not exist[1] and that the requested recording is not audible.[2] The city has released some of the requested information, but claims that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.107 and 552.111. The city additionally states, and provides documentation showing, that the city notified The Country Club of Meadowlakes, Inc. ("the club") of the request for information and of its right to submit arguments to this

[1]We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

[2]The city states that it has made the minutes of the meeting available for inspection and copying.

office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). The club has responded to the notice and argues that some of the submitted information is excepted under section 552.110 of the Government Code. We have considered the arguments submitted by the city and the club and reviewed the submitted information.

Initially, the city notes, and we agree, that the requestor has asked the city to answer questions regarding the purchase procedure adhered to by the city. The Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990).

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. 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. Open Records Decision No. 541 at 4 (1990). Section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded. Open Records Decision Nos. 306 (1982), 184 (1978). When a governmental body seeks protection as a competitor, however, we have stated that it must be afforded the right to claim the "competitive advantage" aspect of section 552.104 if it meets two criteria. The governmental body must first demonstrate that it has specific marketplace interests. *See* Open Records Decision No. 593 at 4 (1991) (governmental body that has been granted specific authority to compete in the private marketplace may demonstrate marketplace interests analogous to those of a private entity). Second, the governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *See id.* at 2. Whether release of particular information would harm the legitimate marketplace interests of a governmental body requires a showing of the possibility of some specific harm in a particular competitive situation. *Id.* at 5, 10.

The city informs this office that it is pursuing the purchase of a golf course and that it has executed an earnest money contract with the seller. The contract of sale has not been executed. The city is competing with the requestor for the purchase of the golf course from the seller. The city explains that the submitted information consists of proposals, reports, and communications all relating to the city's attempts to successfully purchase the golf course. Furthermore, the city states that if this information were released to the requestor, the city would suffer harm because the requestor would be able to use "this confidential, competitive information to gain a bargaining advantage" over the city's position with the

seller. The city argues that release of the submitted information would allow the requestor to attempt to persuade the seller to terminate or forego the city's earnest money contract.

Based on the submitted arguments and our review, we conclude that you have established that the city has legitimate marketplace interests for purposes of section 552.104. We also find that you have shown the possibility of specific harm if the submitted information is released. Therefore, we conclude that the city may withhold the submitted information under section 552.104.[3] We note that you have the discretion to release any part of the information that is not otherwise confidential by law. Gov't Code § 552.007.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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).

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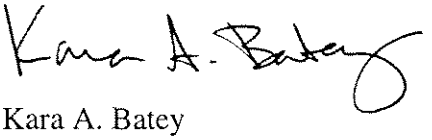
[3]As our ruling for this information is dispositive, we need not address the remaining arguments.

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 Office of the Attorney General 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. 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,



Kara A. Batey
Assistant Attorney General
Open Records Division

KAB/krl

Ref: ID# 271708

Enc. Submitted documents

c: Ms. Linda A. Wendling
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