



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 3, 2009

Mr. W. Montgomery Meitler
Assistant Counsel
Office of Legal Services
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2009-15679

Dear Mr. Meitler:

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# 360365 (PIR # 11717).

The Texas Education Agency (the "agency") received a request for any correspondence to and from the agency related to any contractors that have been retained on the Race to the Top application. You state you will release some of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

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 connection with competitive bidding and in certain other competitive situations.

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.

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. *See id.* First, the governmental body must demonstrate that it has specific marketplace interests. *See id.* 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. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

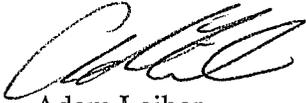
You argue that release of the information at issue would harm the interests of the agency in a competitive situation. You inform us that the American Recovery and Reinvestment Act of 2009 provides money for the Race to the Top Fund, a competitive grant program designed to encourage and reward states for education innovation and reform. You explain that states are the entities eligible to compete in this competition and must submit applications individually, and that these applications must include certain funding criteria proposed by the United States Department of Education. You state that the submitted information consists of correspondence and draft documents concerning the agency’s development of Texas’ application for Race to the Top funds. You argue that “[p]ublic disclosure of this information at this time would impair the competitive aspect of the application process and grant potential competitors a significant and unfair advantage over [the agency].” You also argue that “[the agency]’s ability to produce the most competitive application would be hindered.” Based on these representations and our review, we find that the agency has demonstrated that it has specific marketplace interests and may be considered a “competitor” for purposes of section 552.104. Further, we find that you have demonstrated that release of the information at issue would cause specific harm to the agency’s marketplace interests. We therefore conclude that the agency may withhold the submitted information under section 552.104 of the Government Code. As our ruling is dispositive, we need not address your remaining argument against disclosure.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read 'Adam Leiber', written in a cursive style.

Adam Leiber
Assistant Attorney General
Open Records Division

ACL/rl

Ref: ID# 360365

Enc. Submitted documents

c: Requestor
(w/o enclosures)