



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 17, 2012

Ms. Susan D. Banowsky
Counsel for Port of Houston Authority
Ewell, Bickham, Brown & Rabb, LLP
111 Congress Avenue, Suite 400
Austin, Texas 78701

OR2012-16597

Dear Ms. Banowsky:

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# 468302.

The Port of Houston Authority (the "authority"), which you represent, received two requests for six categories of information pertaining to the Bayport Terminal, Panama Canal, and Bayport Ship Channel. You state you have released some information to the requestor. You assert a portion of the submitted information is subject to a previous ruling issued by this office. You also claim the submitted information is excepted from disclosure under sections 552.104, 552.107, 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also received and considered comments from the requestors. *See Gov't Code* § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, you state Exhibit A was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2012-12436 (2012). In that

¹We assume 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 those records contain substantially different types of information than those submitted to this office.

ruling, we determined the authority may withhold the information at issue under section 552.111 of the Government Code. There is no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, the authority may rely on Open Records Letter No. 2012-12436 as a previous determination and withhold the identical information in accordance with that ruling.² See Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We will address your argument against the release of the remaining submitted information, which you state was not encompassed by Open Records Letter No. 2012-12436.

Section 552.104 of the Government Code excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." *Id.* § 552.104. This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive situations. 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 assert Exhibit B is excepted from disclosure under section 552.104 of the Government Code. You state the authority is one of hundreds of ports along the Gulf Coast and it competes with other ports in the area for import and export cargo business. You state the information at issue is confidential, a result of a significant investment of time, and used for strategic planning in order to maximize the authority's ability to attract and retain trade volume. Further, you state release of the information at issue would cause harm to the authority because other ports could use this information to gain insight into the authority's plans for limited cargo handling business and either undermine those plans or use them to gain an unfair advantage. In addition, you state competitors could reappropriate the authority's strategy planning information and thereby avoid the same research and investment costs that the authority had to expend. Further, you state the information at issue

²As our ruling is dispositive for this information, we need not address your arguments against its disclosure.

could expose the authority's limitations, which could be exploited in negotiations with competitors over the use of the authority's facilities. Thus, you state release of Exhibit B would subject the authority to a competitive disadvantage. Based on your representations, we find you have demonstrated the authority has specific marketplace interests. See ORD 593 at 3. We also find you have demonstrated a specific threat of actual or potential harm to the authority's interests in a particular competitive situation. Therefore, we conclude the authority may withhold Exhibit B under section 552.104 of the Government Code.

In summary, the authority may continue to rely on Open Records Letter No. 2012-12436 as a previous determination and withhold Exhibit A in accordance with that ruling. The authority may withhold Exhibit B under section 552.104 of the Government Code.

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,



Michelle R. Garza
Assistant Attorney General
Open Records Division

MRG/som

Ref: ID# 468302

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)