



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

April 1, 2015

Ms. Lauren Crawford  
First Assistant City Attorney  
City of Bryan  
P.O. Box 1000  
Bryan, Texas 77805

OR2015-06179

Dear Ms. Crawford:

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# 558390.

The City of Bryan (the "city") received two requests from different requestors for information pertaining to request for proposals number 15-006, Full Cost Allocation Plan. You claim the submitted information is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. You also state release of this information may implicate the proprietary interests of third parties. Accordingly, you state you notified the third parties of the request and of their right to submit arguments to this office as to why their information should not be released.<sup>1</sup> See Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received

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<sup>1</sup>The third parties notified pursuant to section 552.305 are: Economists.com, L.L.C.; Matrix Consulting Group; Maximus Consulting Services, Inc.; MGT of America, Inc. ("MGT"); NewGen Strategies & Solutions; and Sequoia Consulting Group.

comments from MGT. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we note the city did not fully comply with section 552.301 of the Government Code. Section 552.301(b) requires that a governmental body ask for a decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. Gov't Code § 552.301(b). We note the city has submitted the same evaluation document as responsive to both requests. In response to the first request, the city raised section 552.104 of the Government Code within the ten-business-day time period required by section 552.301(b) for the document at issue. However, in response to the second request, the city submitted the document at issue as also being excepted under section 552.111 of the Government Code. Because the city did not raise section 552.111 in your briefing regarding the first request, with respect to section 552.111 and the submitted evaluation document, we find the city violated section 552.301(b).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Although you raise section 552.111 of the Government Code for the document at issue, this section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 592 (1991) (governmental body may waive statutory predecessor to section 552.104), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process). Thus, in failing to comply with section 552.301, the city has waived its argument under section 552.111 for the evaluation document that is responsive to the first request, and may not withhold the information on that basis. However, we will consider your timely raised claim under section 552.104 of the Government Code for the information at issue.

Next, we note an interested third party is allowed 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 not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have only received comments from MGT on why the company's submitted information should not be released. Therefore, we have no basis to conclude any of the remaining third parties have protected proprietary interests in the submitted information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific

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<sup>2</sup>We 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 that those records contain substantially different types of information than that submitted to this office.

factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the city may not withhold any portion of the submitted information on the basis of any proprietary interests the remaining third parties may have in it.

Section 552.104 of the Government Code excepts from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991). Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except information pertaining to a completed bidding process for which a contract has been executed. *See* Open Records Decision No. 541 (1990). However, in Open Records Decision No. 541, this office stated the predecessor to section 552.104 may protect information after bidding is complete if the governmental body demonstrates public disclosure of the information will allow competitors to undercut future bids, and the governmental body solicits bids for the same or similar goods or services on a recurring basis. *See id.* at 5 (recognizing limited situation in which statutory predecessor to section 552.104 continued to protect information submitted by successful bidder when disclosure would allow competitors to accurately estimate and undercut future bids); *see also* Open Records Decision No. 309 (1983) (suggesting that such principle will apply when governmental body solicits bids for same or similar goods or services on recurring basis).

You inform us some of the submitted information contains information from “previous external auditor bidding situations that would disadvantage the [c]ity in [its] current bid process to procure external auditor services.” You explain the city solicits bids annually for substantially similar external auditor services, and releasing the information at issue could put the city at a competitive disadvantage in this and future bid processes by disclosing what the city is willing to pay for such services. Based on your representations and our review, we find the city may withhold the information we have marked under section 552.104 of the Government Code.<sup>3</sup> As no further exceptions to disclosure have been raised, the city must release the remaining information.

In summary, the city may withhold the information we have marked under section 552.104 of the Government Code

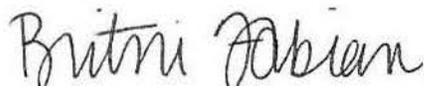
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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<sup>3</sup>As our ruling is dispositive, we need not address MGT’s arguments against disclosure.

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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Britni Fabian  
Assistant Attorney General  
Open Records Division

BF/bhf

Ref: ID# 558390

Enc. Submitted documents

c: Requestors  
(w/o enclosures)

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