



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 12, 2015

Ms. Leah Robertson
School Attorney
Midland Independent School District
615 West Missouri Avenue
Midland, Texas 79701-5092

OR2015-09174

Dear Ms. Robertson:

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# 563310.

The Midland Independent School District (the "district") received a request for all contracts for the provision of electricity to the district during a specified time period. Although you state the district takes no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of Cavallo Energy Texas, L.L.C. ("Cavallo"), Reliant Energy, Inc., and the Texas General Land Office (the "GLO"). Accordingly, you state, and provide documentation showing, you notified these third parties of the request and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code §§ 552.304 (providing that interested party may submit comments stating why information should or should not be released), .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). We have received comments from Cavallo and the GLO. We have considered the submitted arguments and reviewed the submitted information.¹

¹We note the district did not comply with section 552.301 of the Government Code in requesting this decision. *See* Gov't Code § 552.301(b). Nevertheless, because the interests of a third party can provide a compelling reason to overcome the presumption of openness, we will consider the submitted arguments for the submitted information. *See id.* §§ 552.007, .302, .352.

The GLO raises section 552.104 of the Government Code for the submitted electricity contracts in their entirety. Section 552.104 excepts from public disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104. This exception protects a governmental body’s interests in competitive bidding and certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held 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 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).

The GLO asserts it has specific marketplace interests in the electricity contracts at issue because it is authorized by statute to sell or otherwise convey power generated from royalties taken in kind. Util. Code § 35.102. The GLO advises us, under that authority, it has created the State Power Program, with Cavallo and Reliant Energy Solutions as its representatives, through which it bids on contracts for the right to sell electrical energy to public retail customers. The GLO states it “competes with private companies for the awards of these contracts.” Based on these representations, we find the GLO has demonstrated it has specific marketplace interests and may be considered a “competitor” for purposes of section 552.104. *See* ORD 593.

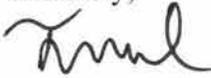
The GLO contends the release of its information would harm its marketplace interests because this information details the services, the business strategies, the business methodologies, the pricing formulas, the pricing structures, the start and end date of the contract, and extension options. The GLO further asserts, if its competitors had access to this information, it would allow competitors to gain insight into the GLO’s business and marketing strategies, and this would put the GLO at a great disadvantage in the marketplace. Thus, the GLO contends that allowing competitors access to the information at issue will undermine its ability to compete in this marketplace. Based on the GLO’s representations and arguments, we conclude the GLO has shown that release of its information would cause specific harm to the GLO’s marketplace interests. *See id.* Therefore, we conclude the district may withhold the submitted information under section 552.104 of the Government Code.²

²As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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.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,



Tim Neal
Assistant Attorney General
Open Records Division

TN/bhf

Ref: ID# 563310

Enc. Submitted documents

c: Requestor

Requestor
(w/o enclosures)

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