



May 14, 1999

Mr. John Steiner
Division Chief
Law Department
City of Austin
P.O. Box 1546
Austin, Texas; 78767-1546

OR99-1339

Dear Mr. Steiner:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 124118.

The City of Austin (the "city") received a request for the old and new business plans for the conservation programs of Austin Energy and other information related to the city's energy conservation services. You state that you will provide to the requestor all of the requested information except the business plans. You claim that the information at issue is excepted from disclosure under sections 552.101, 552.104, 552.110 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.104 of the Government Code protects from required public disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect the government's interests when it is involved in certain commercial transactions. Open Records Decision 592 at 8 (1991). For example, section 552.104 is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. *See, e.g.*, Open Records Decision No. 463 (1987). In these situations, the exception protects the government's interests in obtaining the most favorable proposal terms possible by denying access to proposals prior to the award of a contract. When a governmental body seeks protection as a competitor, however, we have stated that it may 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. Open Records Decision No. 593 at 4 (1991). Second, a 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. *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.

You contend that section 402.001 (b) of the Local Government Code and the Charter of the City of Austin permit the city to authorize the sale by Austin Energy of a variety of products and services related to electric service, and that in Ordinance 980531-C the city authorized Austin Energy to sell electric products and services at “competition-based pricing.” You have demonstrated that the city has a market place interest in electric products and services and may be considered a “competitor” in this area for purposes of section 552.104.

You also argue:

The energy services market is highly competitive. Local contractors, subcontractors, investor-owned utilities’ (sic) unregulated energy service company affiliates, and other energy service companies are active in this market. . . . Competitors could use the research, financial and general information in the business plans to their advantage. . . .

Much of the information contained in the business plans addresses sales and marketing strategies and intentions. . . . [I]f sales and marketing information is released, competitors would be advantaged not only by being able to offer the products and services Austin Energy is designing, but they would also be able to target Austin Energy’s potential customers.

Further, the business plans also include a variety of confidential information concerning costs, pricing and profit margins. . . .

In addition, Austin Energy’s business plans identify areas Austin Energy’s (sic) considers competitive strengths and weaknesses. . . . Knowing Austin Energy’s strengths and shortcomings would provide competitors a huge benefit when involved in discussions with potential clients.

Based upon our review of the submitted documents and your arguments, we conclude that you have demonstrated actual or potential harm to the city’s interests in a particular competitive situation. You have shown that releasing portions of the submitted documents will result in specific harm. You may withhold the marked information under section 552.104.

In addition to the exception from disclosure under section 552.104, you assert that the information at issue is protected from disclosure by section 552.111. You argue that Austin

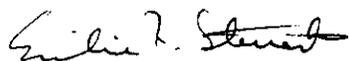
Energy's business plans contain advice, opinion and recommendations concerning policy matters. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. Section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. Open Records Decision No. 615 at 4-5 (1993). Information that might be excepted from disclosure as advice, recommendations, and opinions reflecting the policymaking processes of the city under section 552.111 are protected already under section 552.104. Therefore, we have not marked any information as protected under this aspect of 552.111.

You argue that Austin Energy's new business plan should be excepted as a draft document under section 552.111. The preliminary draft of a policymaking document that has been released or is intended for release in a final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 (1990). This open records decision has been modified implicitly by Open Records Decision No. 615 (1993) to apply only to those records involving an agency's policy matters. The city does not intend to release the final version of the draft business plan. Therefore, this aspect of section 552.111 does not apply.

We have marked the information that you may withhold from disclosure under section 552.104. None of the remaining information may be withheld under sections 552.101, 552.110, or 552.111.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Emilie F. Stewart
Assistant Attorney General
Open Records Division

EFS\nc

Ref: ID# 124118

encl: Submitted documents

cc: Mr. Paul Robbins
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Austin, Texas 78704
(w/o enclosures)