



October 1, 1999

Mr. Michael J. Cosentino
Bryan City Attorney
P.O. Box 1000
Bryan, Texas 77805

OR99-2789

Dear Mr. Cosentino:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 128787.

The City of Bryan (the "city") received a request for "the contract between the city of Bryan and its marketing firm, Macro International, any reports to the city from Macro International regarding the work they have done and any records of expenditures for entertainment-related activities paid for by the city of Bryan or Bryan Texas Utilities." You state that the city has released 416 pages of documents responsive to the request. You contend that the remaining responsive documents are excepted from disclosure under section 552.104 of the Government Code. You have submitted a representative sample of the documents at issue to this office for review.¹

The city contracted with Macro International, Inc. ("Macro") "to provide marketing reports and strategic advice to help [Bryan Texas Utilities] compete with investor-owned power utilities and other entities that provide retail electric service and other related products and services." The documents at issue are sections of reports provided by Macro to Bryan Texas

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.

Utilities (“BTU”), a municipally owned utility. The documents set forth a strategic business plan for BTU. You contend that the documents should be excepted from disclosure under section 552.104 because the release of the documents would harm BTU’s marketplace interests.

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. 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 must 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.

Having carefully considered your arguments, we conclude that BTU has legitimate marketplace interests, and that the release of the documents at issue would harm those marketplace interests. Accordingly, the city may withhold the documents from disclosure under section 552.104 of the Government Code.²

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

²The sample sections of the reports are identified as exhibits 1-A, 2-A, 3-A, 4-A, 5-A, and 6-A. Accompanying each sample section are specific arguments against disclosure tailored to the content of the section. You ask us to rule that the sample sections from the reports, as well as the accompanying arguments, are excepted from disclosure under section 552.104. We note, however, that a document is not within the purview of a Public Information Act request if, when a governmental body receives the request for it, the document does not exist. Open Records Decision Nos. 452 (1986), 476 (1987). The accompanying arguments against disclosure did not exist when the city received the request for information, and therefore they are not responsive to the request. For this reason, we do not reach the issue of whether the accompanying arguments are excepted from disclosure. *But see* Open Records Decision No. 459 (1987) (the governmental body’s letter to the attorney general stating why information is excepted from public disclosure is ordinarily available to the public).

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,

A handwritten signature in cursive script that reads "Karen Hattaway".

Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref: ID# 128787

Encl. Submitted documents

cc: Ms. Colleen E. Kavanagh
City Hall Reporter
The Eagle
P.O. Box 3000
Bryan, Texas 77805
(w/o enclosures)