



August 18, 2000

Ms. Linda S. Wiegman
Supervising Attorney
Texas Department Of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR2000-3174

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 138133.

The Texas Department of Health (the "department") received a request for information pertaining to a Request for Proposal ("RFP") issued by the department that invited applicants to seek grant funding under the department's Permanent Fund for Children and Public Health project. The requestor specifically requested the following information:

1. A list of the 43 grant recipients, "including name and affiliation of awardee, grant amount, grant period, grant title, overall score, and parts applied for;"
2. Copies of the grant applications;
3. Copies of the "critiques and scoring tools for the 13 awarded Part 1 applications[;]" and
4. A "copy of the critiques and scoring tool for [the requestor's] application."

You indicate that the department has released to the requestor information that is responsive to item 1 above, except for the "grant period, grant title, and overall score." You explain that "[n]o documents exist that reference a grant title, although each application contains a

description of each applicant's project." You have submitted for our review the documents that are responsive to above-stated item 4, and a representative sample of information that is responsive to items 1 through 3.¹ You assert that this information is excepted from disclosure under section 552.104 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.104 of the Government Code states:

Information is excepted from the requirements of Section 552.021 if it is information that, if released, would give advantage to a competitor or bidder.

The purpose of this exception is to protect the interests of a governmental body in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. This exception protects information from public disclosure if the governmental body demonstrates potential specific harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). A general allegation or a remote possibility of an advantage being gained is not enough to invoke the protection of section 552.104. Open Records Decision Nos. 541 at 4 (1990), 520 at 4 (1989). A general allegation of a remote possibility that some unknown "competitor" might gain some unspecified advantage by disclosure does not trigger section 552.104. Open Records Decision No. 463 at 2 (1987). As the exception was developed to protect a governmental body's interests, that body may waive section 552.104. *See* Open Records Decision No. 592 at 8 (1991).

In this instance, you explain:

Unlike many other RFPs which have a predetermined project to be funded, each applicant developed its own unique project relating to essential public health services and requested funding in response to the RFP. After review of the preliminary plans submitted by each applicant (there were over 200 applications), [the department] selected a number of finalists, and contract negotiations are about to start. Separate negotiations are necessary with each and every finalist in order to develop final contract language with each one. If negotiations should break down, or the finalists do not submit acceptable additional information that may be

¹You indicate that the submitted sample consists of the scoring documents and the application materials for one of the thirteen Part 1 grant applications that was funded. In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of those records as a whole that are responsive to the request and that the department has not released to the requestor. *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.

necessary, [the department] may have to reopen the bidding process or select other finalists. No contracts have been executed or even finalized yet.²

As to whether the release of the information at issue prior to the final award of the contracts would serve to harm the department's interests, you state:

Release of the information on the finalists or other applicants would specifically harm [the department] by damaging its commitments to negotiate in good faith and confidentiality without interference from third parties. Since each finalist's project is different from the other, some of the terms and conditions will be different from one contract to the other. Comparison of one application, score, and/or critique to another would create difficulties with potential finalists (including applicants who were not initially chosen, but who may be offered funding if any of the other chosen finalists should drop out during negotiations) in their requests and demands for certain terms and conditions. The requestor, like any other applicant, might be considered to become a finalist if others drop out.

We have previously held in more traditional bidding situations that so long as negotiations are in progress regarding the interpretation of bid provisions, and so long as any bidder remains at liberty to furnish additional information relating to the proposed contract, bidding should be deemed competitive and therefore, information relevant thereto may be withheld under section 552.104 prior to the award of the contract. Attorney General Opinion MW-591 (1982); Open Records Decision No. 170 (1977); *see* Open Records Decision No. 541 (1990). Based on the above representations and our review of the information at issue, we believe you have demonstrated the applicability of section 552.104 in this instance. You correctly acknowledge that "once the contracts are executed, [the department] can no longer withhold information under [section] 552.104."

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the

²The requestor has contacted this office by telephone and disputes the contention that no contracts have been executed or finalized. In response, this office contacted the department's Public Information Coordinator by telephone, who advised that as of August 15, 2000, contract negotiations remained pending for all 43 finalists. Because the Open Records Division of this office does not act as a fact-finder, disputed questions of fact are not resolvable by this office in rendering open records decisions. Accordingly, this office must rely on the representations of the governmental body or third parties who may have proprietary interests in the requested information. Open Records Decision Nos. 554 (1990), 552 (1990). In rendering this decision, we therefore rely upon the representations of the department as to the status of the contract negotiations.

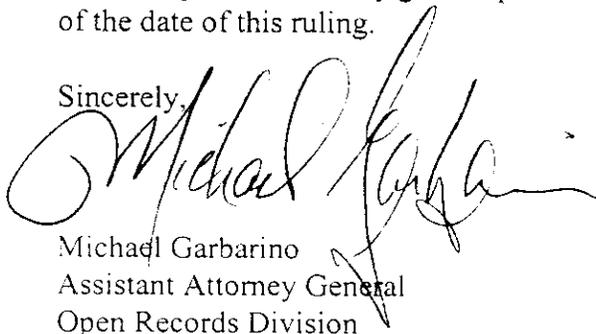
governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Garbarino
Assistant Attorney General
Open Records Division

MG/pr

Ref: ID# 138133

Encl. Submitted documents

cc: Mr. Daniel Goldman
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(w/o enclosures)