



October 5, 2001

Ms. Marcelle Sattiewhite Jones
General Counsel
North Texas Tollway Authority
P.O. Box 360729
Plano, Texas 75026

OR2001-4490

Dear Ms. Jones:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152954.

The North Texas Tollway Authority (the "authority") received a request from TransCore Amtech Systems ("TransCore") for the financial information related to the RITE Software Maintenance agreement between the authority and Electronic Transaction Consultants Corporation ("ETC"). You state that in response to an earlier request and with the consent of TransCore and ETC, the authority released a redacted version of the agreement. You have submitted a copy of the requested agreement for our review. You claim that portions of the submitted agreement are excepted from disclosure under sections 552.104 and 552.110 of the Government Code. You have also notified ETC of the request, in compliance with section 552.305 of the Government Code. *See Gov't Code § 552.305* (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). We have received a section 552.305(b) brief from ETC. We have considered the exceptions claimed by the authority and ETC and reviewed the submitted information. We have also received and considered the requestor's comments. Gov't Code § 552.304.

Initially, we note that the submitted agreement is subject to section 552.022 of the Government Code. Section 552.022 provides, in pertinent part:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). The authority must release any requested information that falls within subsection (3) of section 552.022(a), unless that information is expressly confidential under other law.

The authority asserts that portions of the agreement are excepted from disclosure under section 552.104 of the Government Code. The Seventy-seventh Legislature enacted Senate Bill 1458, which amended section 552.104 by adding subsection (b) as follows:

The requirement of Section 552.022 that a category of information listed under Section 552.022(a) is public information and not excepted from required disclosure under this chapter unless expressly confidential under law does not apply to information that is excepted from required disclosure under [section 552.104].

Gov't Code § 552.104(b). Senate Bill 1458 became effective on June 15, 2001, and is therefore applicable to this ruling. *See* Act of May 27, 2001, 77th Leg., R.S., S.B. 1458, § 7.01 (to be codified at Gov't Code § 552.104).

Section 552.104 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) (holding that the Teacher Retirement System, as an entity that is authorized by both constitutional and statutory law to invest its securities, may be deemed, with regard to its investments, a competitor in the marketplace for purposes of section 552.104). 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.

The authority, in support of its section 552.104 argument, states that:

The [authority] considers TransCore its competitor in the marketplace for the development and distribution of an integrated electronic toll collection systems [sic]. As . . . verified by affidavit, TransCore is developing an electronic toll collection system to market it to other toll agencies

. . . . The [authority] would contend that Chapter 366 of the Transportation Code authorizes it to compete in the private market by allowing it to make portions of its properties available for use by others in the furtherance of its powers by increasing the feasibility or the revenue of a turnpike project or system.

In addition, the authority states:

The [authority] has a fiduciary obligation to its bond holders and the public to develop an efficient tollway system. An opportunity to recoup its expenses is a means of fulfilling these obligations. The [authority] cannot disclose the financial information within the contract, without disclosing the operational constraints and marketing strategy of ETC. Further, disclosure of this information would be equivalent to providing competitors and end-users the competition's playbook.

Based on the authority's arguments and our review of the submitted information, we find that the authority has demonstrated that it has specific marketplace interests; therefore, we believe that the authority may be considered a "competitor" for purposes of section 552.104. *See* Open Records Decision No. 593 (1991). Furthermore, we conclude that the authority has shown that release of the financial information will bring about a specific harm to the authority's marketplace interest. Accordingly, the authority may withhold the following information from the agreement under section 552.104 of the Government Code: sections 8.2, 9.7, 10.3, 11.1, 11.5, 11.6, 11.7, 13.2, and 13.4 and exhibits A, D, E, F, and G. Because section 552.104 is dispositive, we do not address the parties' additional arguments.

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 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 Dept. of Public Safety v. Galbraith*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/DKB/sdk

Ref: ID# 152954

Enc. Submitted documents

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