ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 21, 2003

Ms. Ruth H. Soucy
Deputy General Counsel
Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2003-5902

Dear Ms. Soucy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 186356.

The Comptroller of Public Accounts (the "comptroller") received a written request for certain "detailed information about current annual expenditures, use limitations, and license terms for specific software . . . currently licensed to" the comptroller. You contend that the information you submitted to this office as being responsive to the request is excepted from required disclosure pursuant to section 552.104 of the Government Code.

Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990).

You explain that the comptroller has recently issued a Request for Offers for Software Licenses and Related Services and that

> the deadline for submitting bids has passed. However, selection and approval of successful bidders, together with contract negotiations and execution of the contracts remain pending. The Comptroller may not approve any of the bids and could direct re-bidding or some other action. Therefore, this remains a competitive bidding situation in which bidding is competitive . . . .

> The requestor has asked for the current pricing information, in detail. . . . A competitor who has this information could clearly use the pricing information to a competitive advantage in this particular bidding situation. Until the contracts are awarded and signed, additional information may be sought from entities submitting offers. Making public the prices currently in place – as requested here – at this time would provide bidders with a competitive advantage because the bidders could tailor their responses accordingly.

Section 552.104 generally does not except information relating to competitive bidding situations once a contract has been awarded. Open Records Decision Nos. 306 (1982), 184 (1978). However, section 552.104 may protect information submitted by a previously successful bidder if public disclosure will allow competitors to accurately estimate and thereby undercut future bids, but only where the governmental body solicits bids for the same or similar goods or services on a recurring basis. *See* Open Records Decision Nos. 541 (1990), 309 (1982). We understand you to represent that such is the case in this instance. Accordingly, we conclude that the comptroller may withhold the requested information revealing current and committed expenditures at this time pursuant to section 552.104 of the Government Code, but because you have not demonstrated how the release of the remaining requested information would result in competitive harm, the remaining requested information must be released. We have marked the submitted documents accordingly.

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

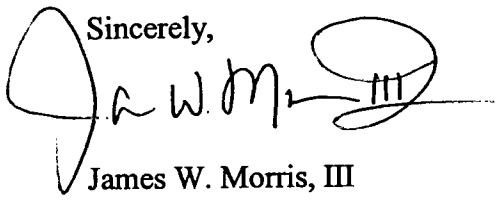
fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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 Dep't of Pub. Safety v. Gilbreath*, 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/RWP/seg

Ref: ID# 186356

Enc: Submitted documents

c: Mr. Dan Hunter
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(w/o enclosures)