



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 5, 2003

Ms. Noelle C. Letteri
Legal Services Division
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873

OR2003-8758

Dear Ms. Letteri:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 192266.

The Texas General Land Office (the "land office") received a request for information relating to the purchase and sale of gas by the land office, including (1) information detailing from which leases gas is being purchased, the person or company paid, the total price paid per lease, the mmbtu or mcf price paid on each lease, and the contract brief, and (2) a list of in-kind gas purchasers other than state agencies.¹ You inform us that the land office has released the information that is responsive to part 2 of the request. You state that there are no responsive contract briefs.² You seek to withhold other information that is responsive to the request under section 552.104 of the Government Code. We have considered the exception you raise and have reviewed the information you submitted.

¹You inform us that the land office requested and received clarification of this request. *See Gov't Code* § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); Open Records Decision No. 663 at 2-5 (1999) (addressing circumstances under which governmental body's communications with requestor to clarify or narrow request will toll ten-business-day deadline to request decision under section 552.301(b)).

²We note that chapter 552 of the Government Code does not require the department to release information that did not exist when it received this request or to create responsive information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

Section 552.104 of the Government Code excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." This exception protects a governmental body's interests in competitive bidding and certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. First, the governmental body must demonstrate that it has specific marketplace interests. *See* Open Records Decision No. 593 at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *Id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You inform us that the Seventy-sixth Legislature amended chapter 52 of the Natural Resources Code and chapter 35 of the Utilities Code to allow the land office to utilize oil and gas royalties taken in kind to convey power directly to retail customers and particularly to other state agencies and school districts under the State Energy Marketing Program ("SEMP"). You also inform us that, through SEMP, the land office provides gas and electricity through the Public Customer Gas Program and the State Power Program. You state that these programs enable customers to obtain energy at a discount while enhancing the revenues of the Permanent School Fund and the Available School Fund. You explain that section 52.133(a) of the Natural Resources Code authorizes the land office to take royalties in kind under leases covering land leased by the school land board or a board for lease or Relinquishment Act land. You explain that section 52.133(c) allows the land office to increase its supply of the royalties taken in kind through, among other things, the purchase of oil and gas. You inform us that the land office uses the increase in royalties taken in kind to provide natural gas to customers under the Public Customer Gas Program.

You further inform us that under subchapter D of chapter 35 of the Utilities Code, the commissioner of the land office, acting on behalf of the state, is authorized to sell or convey power generated from royalties taken in kind directly to public retail customers. You state that the land office created the State Power Program in order to supply electrical energy to public retail customers. You explain that the land office uses the purchases of royalties taken in kind under section 52.133 of the Natural Resources Code to enhance the power supply source available to the State Power Program.

You contend that the land office has a legitimate marketplace interest in purchasing gas for its portion of royalty taken in kind to enhance the supply of energy for the Public Customer Gas and State Power Programs, in order to supply customers dependable energy resources at a discounted price. You state that the land office has entered into agreements to purchase

gas. You explain that the negotiated price at which gas is purchased represents the cost that allows the land office to maintain a consistent supply of energy to its customers at a discounted price, while remaining competitive in the energy supply marketplace. You inform us that the highlighted information that you seek to withhold under section 552.104 reveals gas prices paid by the land office with regard to two leases. You assert that the release of this information would place the land office at a disadvantage in the energy supply marketplace and would be detrimental to its interests as a competitor in that marketplace. Having considered your arguments, we conclude that you have demonstrated that section 552.104 of the Government Code is applicable to the highlighted information. Therefore, the land office may withhold that information under section 552.104. As you do not claim that the remaining information is excepted from disclosure, it must be released.

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).

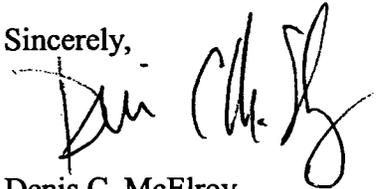
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/JWM/sdk

Ref: ID# 192266

Enc: Submitted documents

c: Mr. Dave W. Scott
406 Keenland Drive
Georgetown, Texas 78626
(w/o enclosures)