



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 22, 2004

Mr. Gary W. Smith  
City Clerk  
City of Baytown  
P.O. Box 424  
Baytown, Texas 77522-0424

OR2004-0476

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 194842.

The City of Baytown (the "city") received a request for a list of all persons who have been sent a bid packet on the Baytown Island project. You claim that the requested information is excepted from disclosure under sections 552.104 and 552.137 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

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). Section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded. *Open Records Decision Nos. 306* (1982), *184* (1978).

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<sup>1</sup>You have raised section 552.136 of the Government Code with respect to certain e-mail addresses. We note, however, that the Seventy-eighth Legislature recently repealed section 552.136 of the Government Code as it applies to the confidentiality of e-mail addresses. *See* Act of May 23, 2001, 77th Leg., R.S., ch. 545, § 5, 2001 Tex. Gen. & Spec. Laws 1036, repealed by Act of May 21, 2003, 78th Leg., R.S., ch. 1276, § 9.013, 2003 Tex. Sess. Law Serv. 4218. The section was duplicative of section 552.137. *See* Act of May 21, 2003, 78th Leg., R.S., ch. 1276, 2003 Tex. Sess. Law Serv. 4218. Accordingly, we will address your claim with respect to section 552.136 under section 552.137.

The submitted information indicates that the deadline for submitting bids had not passed on the date the city received the request for information, and therefore the requested list is a list of potential bidders and not actual bidders. In Attorney General Opinion No. MW-591 (1982), this office held that the predecessor to section 552.104 protected the identities of those who nominated tracts to be leased by the School Land Board even if they had not yet bid for the mineral rights to those tracts, because past practice established that the nominators would almost certainly bid for these rights. In Open Records Decision No. 453 (1986), this office concluded that the predecessor to section 552.104 did not except from disclosure the General Land Office's list of those who received bid packets for an offer of land to be sold by competitive bidding, where no qualified bids were received and the land was to be offered again in the near future. This conclusion was based on a finding that the General Land Office had not shown that there was a substantial likelihood that those who received bid packets for the first land sale would bid when the land was reoffered for sale. *Id.* at 3.

You assert that the release of the requested list of persons who have received a bid packet "could interfere with the [c]ity's ability to obtain the best bid possible." You inform us that the city's purchasing agency has spoken with many of the individuals who requested a bid packet, but you acknowledge that you do not know "how many of the persons on the list will submit bids . . . ." In other words, the identities of the actual bidders for the Baytown Island project cannot be determined from the requested list. Under these circumstances, we find that the city has not demonstrated a substantial likelihood that persons on the list will submit bids. Therefore, we are not persuaded that the competitive harm you complain of would result from release of the requested list. *See* Open Records Decision Nos. 453 (1986), 46 (1974) (knowledge of identity of numerous potential bidders for requested commodity class is not information which, if released, would give advantage to competitors or bidders). For these reasons, section 552.104 does not except the requested list from disclosure.

You also claim that e-mail addresses on the requested list are excepted from disclosure. Section 552.137 provides:

- (a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.
- (c) Subsection (a) does not apply to an e-mail address:

- (1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;
  - (2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;
  - (3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or
  - (4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.
- (d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Act of June 2, 2003, 78th Leg., R.S., ch. 1089, § 1, 2003 Tex. Sess. Law Serv. 3124 (to be codified as amendment to Gov't Code § 552.137). Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the relevant members of the public have affirmatively consented to the release of the e-mail addresses. We note, however, that section 552.137 does not apply to the work e-mail addresses of officers or employees of a governmental body, a website address or Uniform Resource Locator, or the general e-mail address of a business. E-mail addresses within the scope of section 552.137(c) are also not excepted from disclosure under section 552.137. We have marked the e-mail addresses that are protected by section 552.137(a). You do not inform us that a member of the public has affirmatively consented to the release of any of the marked e-mail addresses. The city must, therefore, withhold the marked e-mail addresses under section 552.137. The remaining information in the requested list 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,



Karen Hattaway  
Assistant Attorney General  
Open Records Division

KEH/sdk

Ref: ID# 194842

Enc. Submitted documents

c: Ms. Kathy Holmes  
c/o Gary W. Smith  
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(w/o enclosures)