



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 10, 2004

Ms. Susan Rocha  
Denton, Navarro, Rocha & Bernal  
2517 North Main Avenue  
San Antonio, Texas 78212

OR2004-4762

Dear Ms. Rocha:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 203157.

The San Antonio Water System ("SAWS") received a request for hydrologic and hydro geologic information pertaining to the Oliver and BSR Ranches. You state that, in accordance with a previous ruling issued by this office, SAWS provided the requestor with certain redacted materials. *See generally* Open Records Decision No. 673 (2001) (establishing criteria for previous determinations). You claim, however, that the submitted records are excepted from public disclosure under sections 552.101, 552.103, 552.104, 552.105, 552.107, 552.111, 552.113, and 552.131 of the Government Code. In addition, you assert that the release of this information may implicate the proprietary interests of a third party. Pursuant to section 552.305 of the Government Code, you notified the third party, Massah Development Corporation, of the request and of its opportunity to submit comments to this office. *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 to disclosure in certain circumstances). We have considered the submitted arguments and have reviewed the information at issue.

Initially, we find that almost all of the submitted documents fall within the scope of section 552.022 of the Government Code. Section 552.022 provides that

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:

- ...
- (1) a completed report, audit, evaluation, or investigation made of, for, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). Thus, SAWS must release information that is encompassed by section 552.022(a)(1) unless the information is expressly confidential under other law or is excepted under section 552.104 or section 552.108. *See* Gov't Code § 552.104(b) (stating that Gov't Code § 552.022 does not apply to information that is excepted under this provision). Sections 552.103, 552.105, 552.107, and 552.111 of the Government Code are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived. As such, sections 552.103, 552.105, 552.107, and 552.111 are not other law that make information confidential for the purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (stating that governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 677 at 8 (2002) (Gov't Code § 552.111 is not other law for purposes of Gov't Code § 552.022), 676 at 6 (2002) (Gov't Code § 552.107 is not other law for purposes of Gov't Code § 552.022), 542 at 4 (1990) (litigation exception does not implicate third-party rights and may be waived by governmental body); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally) Accordingly, you may not withhold these documents under sections 552.103, 552.105, 552.107, and 552.111.

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. 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. First, the governmental body must demonstrate that it has specific marketplace interests. *See* Open Records Decision No. 593 at 4 (1991) (stating that governmental body that has been granted specific authority to compete in private marketplace may demonstrate marketplace interests analogous to those of a private entity). Second, the 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.

This office has previously found that, for certain purposes, SAWS is a “competitor” in the private marketplace. You explain that SAWS is currently negotiating for water resources outside of the Edwards Aquifer in an attempt to meet the future needs of its customers. You state that SAWS and certain landowners have performed numerous tests and investigations to determine the best sites to drill wells into the Trinity Aquifer. You state that if this information is released, a competitor could use the data to drill its wells in the most productive spots and sell this water to SAWS’ detriment. Based on our review of your arguments and the submitted information, we conclude that SAWS has demonstrated that the release of the information for which it claims section 552.104 would result in actual or potential harm to its interests in this competitive situation. Accordingly, we conclude that SAWS may withhold this information under section 552.104 of the Government Code.<sup>1</sup> Any information for which SAWS does not claim section 552.104, 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).

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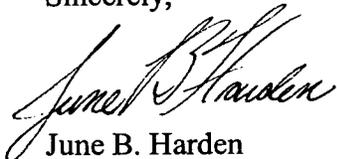
<sup>1</sup>Because our decision under section 552.104 is dispositive, we need not consider your remaining arguments or those submitted by the third party.

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,



June B. Harden  
Assistant Attorney General  
Open Records Division

JBH/seg

Ref: ID# 203157

Enc: Submitted documents

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