



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 15, 2005

Mr. Dan F. Junell
Assistant General Counsel
Teacher Retirement System of Texas
1000 Red River Street
Austin, Texas 78701-2698

OR2005-06309

Dear Mr. Junell:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 228139.

The Teacher Retirement System of Texas (the "system") received two requests for information relating to the scoring of proposals for health care consulting services. You inform us that the system has released some of the information to which the first requestor seeks access. You claim that the rest of the requested information is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

Initially, we address the information that the system has released to the first requestor. You indicate that the system released that information because it relates to the first requestor's company, which submitted a proposal to the system. We note that the Act does not permit the selective disclosure of information to the public. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Thus, if information has been voluntarily released to any member of the public, that same information may not subsequently be withheld from the public, unless its public disclosure is expressly prohibited by law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988). The exceptions to disclosure that the system claims, sections 552.104 and 552.111 of the Government Code, are discretionary exceptions to disclosure and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). These exceptions do not prohibit the release of information to the public. Therefore, any information that the system has released to the first requestor must also be released to the second requestor, to the extent that such information is responsive to the second request.

Next, we address your claim under section 552.104 of the Government Code. This section excepts from public disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). The purpose of this exception is to protect a governmental body’s interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). 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. *See* Open Records Decision No. 541 at 4 (1990). Generally, section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded and is in effect. *See id.* at 5. However, this office has determined that under some circumstances, section 552.104 may apply to information pertaining to an executed contract where the governmental body solicits bids for the same or similar goods or services on a recurring basis. *Id.*

You inform us that the submitted information relates to an existing contract with a private party to provide health care consulting services to the system. You state that the system’s need for such services is ongoing. You inform us that although the existing contract is renewable, the system may elect not to renew, but instead to reopen the competitive procurement process. You explain that, in order to ensure that any new consultant would be in place and ready to perform services when the existing contract expires, it would be necessary for the system to request proposals during April, 2007. You contend that, at that time, “the [submitted] information would still be recent and relevant enough to give a prospective bidder . . . an unfair competitive advantage if [the system] decides not to renew the [current] contract but to issue a new [request for proposals].”¹ Having considered your arguments, we find that you have demonstrated that section 552.104 is applicable to the information at issue. We therefore conclude that the system may withhold the information under section 552.104 of the Government Code.²

In summary: (1) any information that the system has released to the first requestor must also be released to the second requestor, to the extent that the information is responsive to the second request; and (2) with that exception, the system may withhold the submitted information under section 552.104 of the Government Code.

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

¹You also inform us that “[t]here is a small community of companies that have the capacity to handle programs of the size [the system] is charged with administering.”

²As we are able to make this determination, we do not address your other arguments against disclosure.

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).

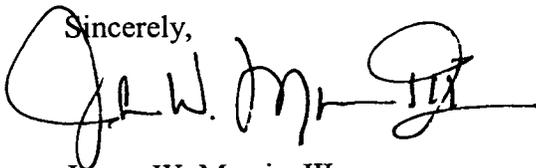
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,

A handwritten signature in black ink, appearing to read "J.W. Morris, III", with a long horizontal flourish extending to the right.

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

JWM/sdk

Ref: ID# 228139

Enc: Submitted documents

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