



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 21, 2005

Mr. Matthew C. G. Boyle
Boyle & Lowry, L.L.P.
4201 Wingren, Suite 108
Irving, Texas 75062-2763

OR2005-09577

Dear Mr. Boyle:

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# 234804.

The City of Colleyville (the "city"), which you represent, received a request for a specified report by Buxton Group Consulting ("Buxton") and a list of all non-full-time city employees who have been given a copy or excerpts of this report. You state that you have released some of the requested information, but you claim that the remaining requested information is excepted from disclosure under section 552.104 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

As a preliminary matter, you state that some of the information at issue in the present request was the subject of a prior ruling issued by this office as Open Records Letter 2005-04698 (2005). See Open Records Decision No. 673 (2001) (governmental body may rely on prior ruling as previous determination when 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D); 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling). We understand that the facts and circumstances have not changed since the issuance of Open Records Letter No. 2005-04698. Thus, to the extent the information at

issue in the present request is in Open Records Letter No. 2005-04698. A previous determination with respect to such information is not identical to that in Open Records Letter No. 2005-04698, we will address your claim

Section 552.104 of the Government Code, which would give advantage to a governmental body for the purpose of section 552.104 is in competitive bidding situations. *See* Open Records Decision No. 541 at 4 (1991) and Open Records Decisions Nos. 306 (1982), 184 (1978). We have, however, stated that the "competitive bidding" aspect of section 552.104 requires a first demonstration that it has specific harm in a particular competitive bidding situation. *Id.* at 5, 10.

You inform us that the city "is in the midst of an effort to expand the [c]ity's tax base by creating new entities to the [c]ity." You state that as part of the economic development plan, the city hired a consultant to conduct a demographic and prospect analysis. You inform us that an important component of Buxton's work was to compile a list of potential product targets for economic development research "was intended to be used to create retail tenants." You assert that, because the city "is in the midst of an area where many other municipalities are engaged in economic development efforts to attract the same types and varieties of corporate entities[.]" the release of Exhibits B, C, and D would allow other such municipalities to take advantage of the city's investment in Buxton's research to the detriment of the city.

Based on the submitted arguments, we conclude that the city has legitimate

marketplace interests in the information that was the subject of Open Records Letter No. 2005-04698. We determine that the city must rely on that ruling as a precedent to such information. To the extent the submitted information is not identical to that in Open Records Letter No. 2005-04698, we will address your claim for an exception to disclosure.

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give a competitive bidding competitor or bidder an unfair advantage." Gov't Code § 552.104. 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 harm in a particular competitive bidding situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1991) and Open Records Decisions Nos. 306 (1982), 184 (1978). We have, however, stated that the "competitive bidding" aspect of section 552.104 requires a first demonstration that it has specific harm in a particular competitive bidding situation. *Id.* at 5, 10.

You inform us that the city "is in the midst of an economic development initiative in an effort to pursue, cultivate, and attract new commercial entities to the [c]ity." You state that as part of the foundation for the city's economic development plan, the city hired a consultant to conduct a demographic and prospect analysis. You inform us that an important component of Buxton's work was to compile a list of potential product targets for economic development research "was intended to be used to create retail tenants." You assert that, because the city "is in the midst of an area where many other municipalities are engaged in economic development efforts to attract the same types and varieties of corporate entities[.]" the release of Exhibits B, C, and D would allow other such municipalities to take advantage of the city's investment in Buxton's research to the detriment of the city.

Based on the submitted arguments, we conclude that you have legitimate marketplace interests for purposes of section 552.104.

We also find that you have shown the possibility of specific harm if Exhibits B, C, and D are released. Therefore, we conclude that you may withhold Exhibits B, C, and D under section 552.104. We note that you have the discretion to release any part of the information that is not otherwise confidential by law. Gov't Code § 552.007.

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, 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); *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 Office of the Attorney General 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. 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,



Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/sdk

Ref: ID# 234804

Enc. Submitted documents

c: Mr. Dave Lieber
7712 Marble Canyon Drive
Fort Worth, Texas 76137
(w/o enclosures)