ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 13, 2005

Ms. Cynthia J. Kreider
Attorney
Department of Information Resources
P.O. Box 13564
Austin, Texas 78711-3564

OR2005-11187

Dear Ms. Kreider:

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# 238076.

The Department of Information Resources (the "department") received a request for information related to deliverables produced by Gartner, Inc. in response to bid number DIR-RFO-ASSESSMENT. You state that you have released some of the information to the requestor. You claim that portions of the requested information are excepted from disclosure under section 552.104 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

We first note that you claim that the "Phase 1" report in Exhibit D is not a completed report, and therefore, it is not a public record pursuant to section 552.022 of the Government Code. Section 552.022(a)(1) provides that a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is made expressly public except as otherwise provided by section 552.108 of the Government Code or if confidential under other law. However, section 552.022 does not serve as an exhaustive list of public information or as an exception to the release of information. Rather, it lists eighteen categories of public information that generally may be withheld only if confidential by law, or, in the case of completed reports, is excepted under section 552.108 of the Government Code. *See* Gov't Code § 552.022 (section 552.022(a) expressly states that it does not limit "the amount or

kind of information that is public information under this chapter."). Therefore, you may not withhold the "Phase 1" report in Exhibit D under section 552.022.

Next, the department argues that Exhibits B and C are excepted from disclosure under section 552.104 of the Government Code. Section 552.104 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 interests of a governmental body by preventing one competitor or bidder from gaining an unfair advantage over others in the context of a pending competitive bidding process. Open Records Decision No. 541 (1990). The governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at3 (1986). A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. Open Records Decision No. 593 at 2. Furthermore, section 552.104 generally is not applicable once a competitive bidding situation has concluded and a contract has been executed. *See* Open Records Decision No. 541 (1990). You inform us that the requested information pertains to a competitive bidding situation in which a contract has not yet been awarded. You also assert that release of the information would give advantage to competitors. After considering your representations and reviewing the submitted documents, we find that the department may withhold Exhibits B and C under section 552.104 of the Government Code until such time as a contract has been executed.

Finally, we note that some of the remaining materials at issue are protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials protected by copyright, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the department may withhold the information in Exhibit B and C pursuant to section 552.104 of the Government Code. The remaining submitted information must be released to the requestor; however, in releasing information that is protected by copyright, the department must comply with applicable copyright law.

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,

James Forrest
Assistant Attorney General
Open Records Division

JF/segh

Ref: ID# 238076

Enc. Submitted documents

c: Ms. Adrienne O'Keefe
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(w/o enclosures)