



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 18, 2007

Mr. Carey E. Smith  
General Counsel  
Texas Health and Human Services Commission  
P. O. Box 13247  
Austin, Texas 78711

OR2007-00592

Dear Mr. Smith:

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# 269138.

The Texas Health and Human Services Commission (the "commission") received two requests for information relating to the Enterprise Data Warehouse Request for Information ("RFI"), including certain vendors' responses to the RFI, the names of the vendors that responded, and the names of key commission personnel involved. The first requestor also seeks information relating to certain transactions involving ACS. You state that the commission has no information that is responsive to item 2 of the first request.<sup>1</sup> You also state that the commission will release some of the information to which the first requestor seeks access. You have submitted information that the commission seeks to withhold under section 552.104 of the Government Code. You also believe that most of the submitted information implicates the interests of third parties. You notified the interested parties of the request for that information and of their right to submit arguments to this office as to why the

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<sup>1</sup>We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

information should not be released.<sup>2</sup> We received correspondence from IBM and Thomson Medstat. We have considered all of the submitted arguments and reviewed the submitted information.

You also indicate that responsive information relating to ACS is encompassed by prior open records letter rulings that are now the subject of pending litigation in *ACS State Healthcare, L.L.C. v. Abbott*, No. GN-06-004664, 98<sup>th</sup> District Court, Travis County, Texas; *ACS State Healthcare, L.L.C. v. Abbott*, No. GN-06-003353, 98<sup>th</sup> District Court, Travis County, Texas; and *ACS State Healthcare, L.L.C. v. Abbott*, No. GN-06-002414, 250<sup>th</sup> District Court, Travis County, Texas. Accordingly, we will not address the public availability of the information that is the subject of the prior rulings and will allow the trial court to determine whether that information must be released to the public.

We next note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from either Bull Services or Cognos Incorporated. Thus, neither of those parties has demonstrated that any of the submitted information is proprietary for the purposes of the Act. *See* Gov't Code § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

The commission seeks to withhold all of the submitted information 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(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). Section 552.104 does not protect information relating to competitive bidding situations once a contract has been awarded. *See* Open Records Decision Nos. 306 (1982), 184 (1978).

You state that the information at issue relates to an RFI for an Enterprise Data Warehouse that would serve the commission and the other four state health and human service agencies.<sup>3</sup> You explain that after receiving responses to the RFI, the commission prepared a request for

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<sup>2</sup>*See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

<sup>3</sup>You explain that those agencies are the Departments of Aging and Disabilities Services, Assistive and Rehabilitative Services, State Health Services, and Family and Protective Services.

a legislative appropriation for the implementation of the Enterprise Data Warehouse project. You state that if the request is approved, the commission plans to begin implementation of the project in September, 2007. You argue that release at this time of the vendors' responses to the RFI would jeopardize the commission's bargaining position in the event that it issues a solicitation and enters into contract negotiations in a procurement for the project. You also argue that release of the vendors' names would compromise the commission's ability to receive competitive responses to a request for proposals ("RFP") and place the commission at a disadvantage in negotiating with a tentative winning vendor. You further contend that disclosure of the names of commission personnel involved in the project could subject such employees to outside attempts to influence either the terms of an RFP or evaluation of the responsive proposals.

Having considered all of your arguments, we conclude that you have demonstrated that the vendors' responses are excepted from disclosure at this time under section 552.104 of the Government Code.<sup>4</sup> We are not persuaded, however, that release of either the names of the vendors or the identities of commission employees involved in the project would result in actual harm to the commission's interests. *See* Open Records Decision Nos. 453 at 3 (1986) (quoting Open Records Decision No. 46 (1974)) (knowledge of identity of numerous potential bidders for requested commodity class not information that, if released, would give advantage to competitors or bidders), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees). As you claim no other exception to the disclosure of the submitted information, the names of the vendors and those of the employees 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).

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<sup>4</sup>As we are able to make this determination, we need not address the arguments that we received from IBM and Thomson Medstat.

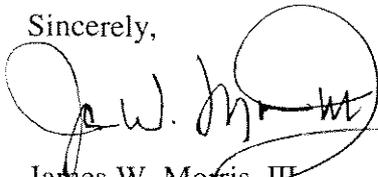
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,

A handwritten signature in black ink, appearing to read "J.W. Morris, III", is written over a horizontal line. The signature is stylized and includes a large circular flourish at the end.

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

JWM/krl

Ref: ID# 269138

Enc: Submitted documents

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