



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 23, 2007

Ms. Susan Camp-Lee  
Sheets & Crossfield, PC  
309 East Main Street  
Round Rock, Texas 78664-5246

OR2007-04578

Dear Ms. Camp-Lee:

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#276571.

The City of Hutto (the "city"), which you represent, received a request for the following: (1) information pertaining to rate studies prepared by HDR Engineering, Inc. ("HDR"); (2) any and all payment to HDR Engineering, Inc. in 2006 by the city; (3) the status of any and all rate studies by HDR; and (4) the status of the contract renegotiations between the city and Heart of Texas Water Suppliers ("HOTWS"), the city and Manville Water Supply, and the city and Taylor. You state that information responsive to items (2), (3), and (4) will be released to the requestor. You further state that the requested "rate study" does not exist.<sup>1</sup> You claim that the submitted information is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor's attorney. See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, the city informs us that a portion of the requested information, which you have submitted as Exhibit C, was the subject of a previous request for information, in response to

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<sup>1</sup>We note the Act does not require a governmental body to disclose information that did not exist when the request for information was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.App.--San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986).

which this office issued Open Records Letter No. 2006-10563 (2006). Open Records Letter No. 2006-10563 held that the city may withhold certain information prepared by HDR as advice, recommendations, and opinions which pertain to the policymaking processes of the city under section 552.111 of the Government Code. However, it appears that a portion of Exhibit C has been subsequently released to the public during a city council meeting. Because the city has voluntarily released this information to members of the public, it may not now withhold such information from another requestor under section 552.111. *See id.* § 552.007 (prohibiting selective disclosure of information); Open Records Decision Nos. 490 (1988), 463 (1987) (if governmental body voluntarily releases information to one member of public, the Act's exceptions to disclosure are waived unless information is deemed confidential), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 may be waived). Therefore, as relevant facts have changed since the issuance of Open Records Letter No. 2006-10563, we conclude that the city may not rely on that ruling as a previous determination. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). Accordingly, we will address the information in Exhibit C, along with the remaining information that you have submitted as Exhibit B.

Next, with regard to the information that has been released to the public, 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). If a governmental body voluntarily releases information to a member of the public, such information may not later be withheld unless its disclosure is expressly prohibited by law. *See* Gov't Code § 552.007. Although you assert that this information is protected under sections 552.104 and 552.111 of the Government Code, these exceptions are discretionary and may be waived. As such, sections 552.104 and 552.111 do not make information confidential for purposes of section 552.007. *See id.* (prohibiting selective disclosure of information that governmental body has voluntarily made available to any member of the public); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, the information we have marked in Exhibit C may not be withheld pursuant to sections 552.104 or 552.111. As you raise no further exceptions against the disclosure of this information, it must be released to the requestor. We next address your arguments for the remaining information in Exhibits B and C.

You seek to withhold the submitted information under section 552.104 of the Government Code. Section 552.104 is applicable to "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This exception protects a governmental body's interests in competitive bidding and certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor).

This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the “competitive advantage” aspect of this exception if it can satisfy two criteria. First, the governmental body must demonstrate that it has specific marketplace interests. *Id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *Id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body’s legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body’s demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *Id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You indicate that the city has specific marketplace interests in the information at issue. You inform this office that the information at issue “relates directly to strategies and information developed by a consultant to the city to renegotiate a water supply contract.” You explain further that because the submitted information reflects the current negotiations, “[d]isclosure of the information at this time would severely hamper the city’s negotiating position in that it would expose the city’s strategies to the other party to the negotiations, crippling the city’s bargaining power.” You state that such a disclosure would “put the city at an extreme disadvantage in obtaining the most favorable provisions available.” You further inform us that disclosure of the information at issue “would put the city in an unfavorable position compared to its competitors who also contract with HOTWS,” and that “these competitors are not required to reveal their negotiation strategies which will result in more favorable provisions for those entities.” Based upon your arguments and our review of the information at issue, we find that you have demonstrated that release of the information at issue would result in a specific threat of actual or potential harm to the city’s interests in a particular competitive situation. Therefore, you may withhold the remaining information under section 552.104 of the Government Code.<sup>2</sup> As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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

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<sup>2</sup>Section 552.104(b) of the Government Code provides that “[t]he requirement of Section 552.022 that a category of information listed under Section 552.022(a) is public information and not excepted from required disclosure under this chapter unless expressly confidential under law does not apply to information that is excepted from required disclosure under this section.” Gov’t Code § 552.104(b). Thus, we do not address the requestor’s argument that a portion of the submitted information is subject to section 552.022, in light of our conclusion under section 552.104.

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,



Holly R. Davis  
Assistant Attorney General  
Open Records Division

HRD/eeg

Ref: ID# 276571

Enc. Submitted documents

c: Ms. Andrea Lorenz  
Austin American-Statesman  
Williamson County Bureau  
203 East Main Street  
Round Rock, Texas 78664  
(w/o enclosures)

Ms. Julie A. Ford  
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