



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 25, 2008

Ms. Chelsea Thornton
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2008-01132

Dear Ms. Thornton:

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# 300563.

The Office of the Governor (the "governor") received a request for the following categories of information: 1) any documents that refer to House Bill 3367; 2) any documents that refer to a named company within the last three years; 3) any documents between the governor's office and the City of San Antonio pertaining to economic development in the city of Windcrest, Texas within the last three years; 4) any documents between the governor's office and the City of Windcrest pertaining to economic development in Windcrest, Texas within the last three years; and 5) any documents pertaining to the award of a grant through the Texas Enterprise Fund to the City of Windcrest or any other entity involved in economic development in Windcrest, Texas. You state you will provide the requestor with a portion of the requested information. You claim that the remaining information is excepted from disclosure under sections 552.104 and 552.106 of the Government Code. You further indicate that release of a portion of the remaining information may implicate the proprietary interests of a third party. Accordingly, you state that you notified Rackspace Managed Housing ("Rackspace") of the governor's receipt of the request for information and its right to submit arguments to this office as to why the requested information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain

circumstances). We have considered the exceptions you claim and reviewed the submitted information.

Section 552.104 of the Government Code excepts from public disclosure "information that, if released, would give advantage to a competitor or bidder." Govt. Code § 552.104(a). The protections afforded by section 552.104 serve two purposes. One purpose 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. *See* Open Records Decision No. 541 (1990). The other purpose is to protect the legitimate marketplace interests of a governmental body when acting as a competitor in the marketplace. *See* Open Records Decision No. 593 (1991). In both cases, the governmental body must demonstrate the existence of actual or potential harm to its interests in a particular competitive situation. *See id.* at 2; *see also* Open Records Decision Nos. 463 (1987), 453 at 3 (1986). A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *See* ORD 593 at 2. Although you raise section 552.104, you have not explained how the release of the submitted information would harm the governor's competitive interests. Therefore, the governor may not withhold any of the submitted information pursuant to section 552.104 of the Government Code.

Section 552.106(b) excepts from disclosure "[a]n internal bill analysis or working paper prepared by the governor's office for the purpose of evaluating proposed legislation." Gov't Code § 552.106(b). Section 552.106(b) encourages frank discussion on policy matters; however, this section applies to information created or used by employees of the governor's office for the purpose of evaluating proposed legislation. Furthermore, section 552.106(b) only protects policy judgments, advice, opinions, and recommendations involved in the preparation or evaluation of proposed legislation; it does not except purely factual information from public disclosure. *See* House Committee on State Affairs, Public Hearing, 5/6/97, H.B. 3157, 75th Leg. (1997) (stating that protection given to legislative documents under section 552.106(a) comparable with protection given to governor's legislative documents under section 552.106(b)); *see also* Open Records Decision No. 460 at 2 (1987).

You inform us that the documents you have submitted as Exhibit B are "internal working documents relating to [House Bill 3367]." You further state that the advice, opinions, and recommendations contained within these documents determine the policy position taken by the governor regarding this bill throughout its legislative process. Accordingly, you assert that the documents submitted as Exhibit B should be withheld in their entirety under section 552.106(b). Upon review, however, we find that the responsive information within the bill tracking cover sheet is purely factual and may not be withheld under section 552.106(b). The remaining information in Exhibit B consists of bill analysis memoranda, which contain recommendations and factual information. Accordingly, the governor may withhold the recommendations regarding the bill that we have marked within

the submitted memoranda. The remaining information in Exhibit B must be released to the requestor.

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Rackspace has not submitted to this office any reasons explaining why the information responsive to the request should not be released. On behalf of Rackspace, however, you assert that a portion of the submitted information may be excepted under section 552.110(b) of the Government Code, which protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" *Id.* § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm).

After reviewing the governor's arguments and the information submitted as Exhibit C, we find that the governor has not made the specific factual or evidentiary showing required by section 552.110(b) that the release of any of the information at issue would cause Rackspace substantial competitive harm. Further, as stated previously, Rackspace has not submitted to this office any reasons explaining why the information responsive to the request should not be released. We therefore conclude that the governor may not withhold any of the information in Exhibit C under section 552.110.

Finally, we note that the information in Exhibit C includes e-mail addresses that are subject to section 552.137 of the Government Code.¹ Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses we have marked in the remaining information are not a type specifically excluded by section 552.137(c). As such, these e-mail addresses must be withheld under section 552.137 unless the owners of the e-mail addresses have affirmatively consented to their release. *See id.* § 552.137(b).

¹ The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the governor may withhold the information we have marked in Exhibit B under section 552.106 of the Government Code. The governor must withhold the e-mail addresses we have marked in Exhibit C under section 552.137 of the Government Code. The remaining information 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/ma

Ref: ID# 300563

Enc. Submitted documents

c: Mr. Scott M. Tschirhart
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(w/o enclosures)