



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 27, 2008

Mr. Bradford E. Bullock
McKamie Law
13750 San Pedro, Suite 640
San Antonio, Texas 78232

OR2008-07145

Dear Mr. Bullock:

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# 311352.

The City of Boerne (the "city"), which you represent, received a request for a copy of all analyses and studies of the wastewater treatment plant alternatives prepared by or for the city during a specified time period. You state that you will release a portion of the requested information. You claim that portions of the submitted information are excepted from disclosure under sections 552.104 and 552.105 of the Government Code. We have considered the exceptions you claim and reviewed the information you have submitted.

Initially, we note that the submitted information includes a completed report, which is subject to section 552.022 of the Government Code. Section 552.022 provides in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, the submitted report must be released under section 552.022(a)(1) unless it is expressly confidential under other law or excepted from disclosure under section 552.108. You claim that the submitted report is excepted from disclosure under sections 552.104 and 552.105 of the Government Code. However, section 552.105 is a discretionary exception under the Act that does not constitute "other law" for purposes of section 552.022. *See* Open Records Decision No. 564 (1990) (governmental body may waive statutory predecessor to section 552.105). Accordingly, the city may not withhold the submitted information under section 552.105 of the Government Code. However, section 552.104(b) states that section 552.022 does not apply to information that is excepted under section 552.104. Gov't Code § 552.104(b). Thus, we will consider your argument under this exception for the submitted information.

Section 552.104 of the Government Code 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 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 or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded. Open Records Decision Nos. 306 (1982), 184 (1978). Section 552.104 does not apply when there is only a single individual or entity seeking a contract because there are no "competitors" for that contract. *See* Open Records Decision No. 331 (1982).

You state that the information at issue in Exhibit B relates to the location of real property that the city is considering for the wastewater treatment plant. You also state that the city "has not finalized its decision as to which specific parcel it may purchase for a new proposed plant[.]" Further, you state that release of the information at issue would prejudice the city's bargaining position because "landowners competing to have the [c]ity purchase their land would . . . know the other sites under consideration, [and] . . . the [c]ity's bargaining position with each landowner." Based on these representations and our review, we find that you have demonstrated that public release of the information at issue would cause specific harm to the city's interests in a particular competitive bidding situation. Accordingly, the city may withhold the information it has marked under section 552.104 of the Government Code until such time as the contract has been executed. As no arguments against disclosure are raised for the remaining information, it 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,



Melanie J. Villars
Assistant Attorney General
Open Records Division

MJV/jh

Ref: ID# 311352

Enc. Submitted documents

c: Mr. Mike Morton
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(w/o enclosures)