



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 25, 2008

Ms. Cary Grace
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR2008-11690

Dear Ms. Grace:

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# 320714.

The City of Austin (the "city") received a request for information relating to the Green Water Treatment Plant project, including the proposals submitted by the prospective development teams and correspondence regarding the proposals. You state that some of the requested information will be released. You claim that the submitted information is excepted from disclosure under section 552.104 of the Government Code. You also believe that some of the submitted information may implicate third-party interests. You notified the parties to whom the information pertains of this request for their information and their right to submit arguments to this office as to why it should not be released.¹ We received correspondence from Forest City Residential Group and Simmons Vedder Partners, Inc.² We have considered all of the submitted arguments and reviewed the information you submitted.³

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(a). The

¹See 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).

²We note that one of the third parties has submitted information that it seeks to have withheld from disclosure. This decision is applicable only to the information that the city submitted to this office. See Gov't Code § 552.301(e)(1)(D).

³This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the city to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

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 and is in effect. *See* Open Records Decision Nos. 306 (1982), 184 (1978).

You state that the submitted information is related to competition among five development teams for the Green Water Treatment Plant project. You inform us that the city council has adopted a resolution that authorizes the city manager to negotiate and execute an Exclusive Negotiation Agreement (the "ENA") with the Trammell Crow team. You explain that the final ENA will set out the terms for the creation of a Master Development Agreement (the "MDA"), which will provide the terms for the redevelopment of the Green Water Treatment Plant and the Austin Energy Control Center. You state that the city had not entered into an ENA as of the date of its request for this decision. You explain that if the city fails to reach an agreement with the Trammell Crow team on the ENA or the MDA, then the city council may either authorize negotiations with another of the five development teams or direct city staff to issue a new solicitation for the project. You contend that release of the submitted information at this time would compromise the city's negotiations with the Trammell Crow team concerning the terms of the ENA and adversely affect negotiation of the terms of the MDA. Based on your representations, we conclude that the city may withhold the submitted information under section 552.104 of the Government Code. We note that the city may no longer withhold this information under section 552.104 once the negotiations have been concluded and the related contracts have been executed and are in effect.⁴ *See* Open Records Decision No. 541 at 5 (1990).

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). If the governmental body does not file suit over 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).

⁴As we are able to make this determination, we do not address the third parties' arguments against disclosure.

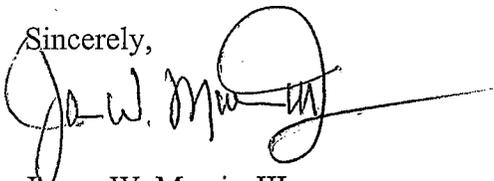
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is written in a cursive style with a long horizontal line extending to the right.

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

JWM/jh

Ref: ID# 320714

Enc: Submitted documents

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