



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 2, 2009

Mr. Paul M. Gonzales
Davidson & Troilo, P.C.
7550 West IH-10, Suite 800
San Antonio, Texas 78229-5815

OR2009-12384

Dear Mr. Gonzales:

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# 354167.

The Brownsville Public Utility Board (the "board"), which you represent, received a request for the salary range and educational and skill requirements for four specified positions, as well as the number of individuals employed in each position. You state you have released some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.104 and 552.133 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We note the submitted information is subject to section 552.022(a)(2) of the Government Code, which provides:

the following categories of information are public information and not excepted from required disclosure under [the Act] unless they are expressly confidential under other law:

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body[.]

Gov't Code § 552.022(a)(2). The submitted information consists of a "Job Value Matrix" that shows the pay grades of board employees. This information must be released under section 552.022(a)(2), unless the information is expressly confidential under other law. You claim that the submitted information is excepted from disclosure under sections 552.104 and 552.133. Section 552.104(b) 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 [the Act] does not apply to information that is excepted from required disclosure under this section." *Id.* § 552.104(b). Further, section 552.133(d) 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 other law does not apply to information that is excepted from required disclosure under [section 552.133]." *Id.* § 552.133(d). Therefore, we will consider your arguments under sections 552.104 and 552.133.

Section 552.133 of the Government Code excepts from disclosure a public power utility's information related to a competitive matter. Section 552.133(b) provides as follows:

Information or records are excepted from the requirements of Section 552.021 if the information or records are reasonably related to a competitive matter, as defined in this section. Excepted information or records include the text of any resolution of the public power utility governing body determining which issues, activities, or matters constitute competitive matters. Information or records of a municipally owned utility that are reasonably related to a competitive matter are not subject to disclosure under this chapter, whether or not, under the Utilities Code, the municipally owned utility has adopted customer choice or serves in a multiply certificated service area. This section does not limit the right of a public power utility governing body to withhold from disclosure information deemed to be within the scope of any other exception provided for in this chapter, subject to the provisions of this chapter.

Gov't Code § 552.133(b). A "competitive matter" is defined as a matter the public power utility governing body in good faith determines by vote to be related to the public power utility's competitive activity, and the release of which would give an advantage to competitors or prospective competitors. *Id.* § 552.133(a)(3). Section 552.133(a)(3) lists thirteen categories of information that may not be deemed competitive matters. The attorney general may conclude that section 552.133 is inapplicable to the requested information only if, based on the information provided, the attorney general determines the public power utility governing body has not acted in good faith in determining that the issue, matter, or activity is a competitive matter or that the information requested is not reasonably related to a competitive matter. *Id.* § 552.133(c).

You inform us that the board, as governing body of a public power utility, passed a resolution pursuant to section 552.133 in which it defined the information at issue to be within the scope of the term "competitive matter." You have submitted a copy of the resolution. The information at issue is not among the thirteen categories of information expressly exempted from the definition of competitive matter, and based on the information provided in connection with this request, we cannot conclude that the board failed to act in good faith. Consequently, we agree that with the exception of the information you have marked, the submitted information is a competitive matter in accordance with the board's resolution and, therefore, is excepted from disclosure pursuant to section 552.133.

Next, section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations, including when a governmental body competes with private entities in the marketplace. *See* Open Records Decision No. 592 (1991). Under section 552.104, a governmental body may withhold information in order to maintain its competitive advantage in the marketplace if it can demonstrate (1) it has specific marketplace interests and (2) there is a possibility of specific harm to those marketplace interests if the requested information is released. *See* Open Records Decision No. 593 ("competitive aspect" of previous version of section 552.104 applies to governmental bodies as bidders).

You have provided an affidavit from the board's chief financial officer, in which the officer informs us that the board is subject to "competition by virtue of dual or multiple certification of the service area, which means that other utilities have a right to serve within areas served by [the board.]" The officer further asserts that release of the submitted information would allow a competitor to "cherry-pick" the board's employees. Having considered your representations, we find that the board has not established that release of the remaining information would harm the board's marketplace interests in a competitive situation. Thus, we conclude that the board may not withhold the remaining information under section 552.104 of the Government Code.

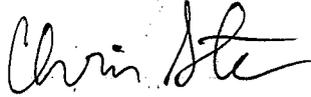
In summary, with the exception of the information you have marked, the board may withhold the submitted information under section 552.133. The remaining information must be released to the requestor.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free,

at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Christopher D. Sterner
Assistant Attorney General
Open Records Division

CDSA/eeg

Ref: ID# 354167

Enc. Submitted documents

c: Requestor
(w/o enclosures)