



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 4, 2010

Mr. Erik A. Eriksson
General Counsel
Port of Houston Authority
P.O. Box 2562
Houston, Texas 77252-2562

Ms. Susan Denmon Banowski
Vinson & Elkins
2801 Via Fortuna, Suite 100
Austin, Texas 78746-7568

OR2010-08127

Dear Mr. Eriksson and Ms. Banowski:

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# 381610.

The Port of Houston Authority (the "authority"), which you represent, received a request for information related to a lease, sub-lease, or other agreement between the authority and a named third party related to a specified property.¹ You state some of the responsive information has been released. You state you have no information responsive to a portion of the request.² You claim portions of the submitted information are excepted from

¹You inform us the requestor clarified portions of the request. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

disclosure under sections 552.104 and 552.105 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in part:

(a) [t]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). The submitted information consists of a contract relating to the receipt of public funds by the authority that is subject to subsection 552.022(a)(3). The authority must release this information unless it is expressly confidential under other law. Although you raise section 552.105 of the Government Code, this section is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See* Open Records Decision Nos. 564 (1990) (statutory predecessor to section 552.105 subject to waiver), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.105 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the authority may not withhold the information at issue under section 552.105. However, because information subject to section 552.022 may be withheld under section 552.104 of the Government Code, we will consider your claims under this exception. *See* Gov't Code § 552.104(b) (information protected by section 552.104 not subject to required public disclosure under section 552.022(a)).

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 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). This office has long held that section 552.104 does not except information relating to competitive bidding situations once a contract is in effect. *See, e.g.*, Open Records Decision Nos. 541 (1990), 514 (1988), 306 (1982), 184 (1978), 75 (1975).

You inform us the authority is a navigation district authorized by the Texas legislature to lease land, wharves, piers, docks, and equipment within the Port of Houston to various entities for use in freight handling services and loading and unloading cargo. You state the

current lease for the property at issue “runs month to month while [the authority] negotiates with several parties for a new lease agreement.” You state the financial provisions of the existing lease, which you have marked, could be used unfairly and to the authority’s detriment by the competing entities in the ongoing negotiation process. You further state the competing entities could use the information you have marked to undercut the bidding process, which would impair the authority’s ability to obtain the best competitive lease offer for the property at issue. Based on your representations and our review of the information at issue, we find the authority has demonstrated the information you have marked is excepted from disclosure by section 552.104. We therefore conclude the authority may withhold the marked information under section 552.104 of the Government Code.

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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/jb

Ref: ID# 381610

Enc: Submitted documents

c: Requestor
(w/o enclosures)