ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 7, 2010

Mr. Gerald E. Castillo
City Attorney
City of Edinburg
P.O. Box 1079
Edinburg, Texas 78540

OR2010-08258

Dear Mr. Castillo:

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# 382783.

The City of Edinburg (the "city") received a request for information related to the city's current electric provider contract. Although you take no position with respect to the public availability of the requested information, you state that the Texas General Land Office (the "GLO") has objected to the release of this information. Accordingly, you state that you notified the GLO of the request for information and of its right to submit arguments to this office as to why the information should not be released. *See* Gov't Code §§ 552.305(d), .304 (interested party may submit comments stating why information should or should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received arguments from the GLO. We have considered the submitted arguments and reviewed the submitted information.

The GLO raises section 552.104 of the Government Code. Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive

situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate that it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

The GLO asserts that it has specific marketplace interests in the information at issue because the GLO is authorized by statute to "convert oil and gas royalties taken in-kind to other forms of energy, and then to sell that energy[.]" *See* Tex. Util. Code §§ 35.101-.106. The GLO advises that, through the State Power Program, the GLO sells competitively priced electricity. The GLO informs us that it participates in the competitive bidding process for the right to sell electrical energy to public retail customers. Based on these representations, we find that the GLO has demonstrated that it has specific marketplace interests and may be considered a "competitor" for purposes of section 552.104. *See* ORD 593.

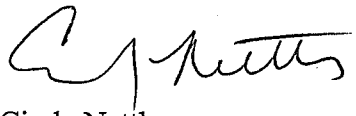
The GLO contends that the release of the submitted information would harm its marketplace interests because this information details the services and the prices the GLO charges for such services in order to provide the city with its electrical needs. The GLO further asserts that, if its competitors had access to this information, they would "be able to use the GLO's methods of delivery of electrical services and its pricing formula for such services as their own." Thus, the GLO contends that allowing competitors access to the documents at issue will significantly impair its ability to compete in this marketplace. Based on the GLO's representations and arguments, we conclude that the GLO has shown that release of the submitted information would cause specific harm to the GLO's marketplace interests. *See* ORD 593. We therefore conclude that the city may withhold the submitted information under section 552.104 of the Government Code. As our ruling is dispositive, we need not address the remaining arguments against disclosure.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 382783

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Ashley Allen
Staff Attorney - Administrative Law Section
Legal Services Division
Texas General Land Office
1700 Congress Avenue, Suite 910
Austin, Texas 78701
(w/o enclosures)