



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 9, 2010

Ms. Cari Lambrecht
Public Information Officer
Hidalgo County
2818 South Business Highway 281
Edinburg, Texas 78539

OR2010-13674

Dear Ms. Lambrecht:

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# 392840 (Hidalgo County PIR# 2010-81).

Hidalgo County (the "county") received a request for the energy contract between the county and Reliant Energy Retail Services, Inc. ("Reliant").¹ Although the county takes no position on the release of the submitted information, we understand you to believe that it may contain proprietary information subject to exception under the Act. Accordingly, you notified Reliant of this 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); 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). Further, we understand that you also notified the General Land Office (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 § 552.304 (interested party may submit comments stating why information should or should not be released). Both Reliant and the GLO responded to the notices and have submitted comments to this office. We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address the county's obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See id.*

¹We note the county sought and received clarification of this request. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request).

§ 552.301(b). Pursuant to section 552.301(e) of the Government Code, the governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). In this instance, the county missed both its ten-day and fifteen-day deadlines. The submitted information reflects that the county received the clarified request for information by May 28, 2010. *See City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). You did not, however, request a ruling from this office or submit a copy of the information requested until July 6, 2010. Thus, we find the county failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because third party interests can provide compelling reasons to withhold information, we will consider whether or not any of the submitted information is excepted from disclosure under the Act.

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 "sell or otherwise convey power generated from royalties taken in kind." Tex. Util. Code § 35.102. The GLO advises that under that authority, it has created the State Power Program, through which it bids on contracts for the right to sell electrical energy to public retail customers. The GLO states it competes with other private companies for the awards of these contracts. 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 county 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 undermine 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 county 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,



Kate Hartfield
Assistant Attorney General
Open Records Division

KH/em

Ref: ID# 392840

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Ron H. Moss
Graves, Dougherty, Hearon & Moody
P.O. Box 98
Austin, Texas 78767
(w/o enclosures)

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