



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 26, 2011

Ms. Leticia D. McGowan
School Attorney
Dallas Independent School District
3700 Ross Avenue
Dallas, Texas 75204-5491

OR2011-15733

Dear Ms. McGowan:

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# 434249 (ORR # 10468).

The Dallas Independent School District (the "district") received a request for proposals and score totals for proposals pertaining to RFP TF-203709 for tutorial services. You claim the submitted information is excepted from disclosure under section 552.104 of the Government Code. You also believe the submitted information may implicate the proprietary interests of Ed2Net Learning, Inc. ("Ed2Net"), Education 2020 ("e2020"), Group Excellence, and SES Texas Tutors ("SES"). You inform us the district notified Ed2Net, e2020, Group Excellence, and SES of this request for information and of their right to submit arguments to this office as to why the submitted information should not be released.¹ We have considered the exception you claim and reviewed the information you submitted. As the information at issue does not include the requested score totals, we assume the district has released any information responsive to that aspect of this request that existed when the district received the request. If not, then the district must release any such information immediately.² See Gov't Code §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

We note the submitted proposals of Ed2Net, e2020, and SES were the subject of a previous request for a decision by the district, in response to which this office issued Open Records

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 the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. 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), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

Letter No. 2011–05693 (2011). In the prior ruling, we concluded the district must withhold portions of those three parties’ proposals under sections 552.101, 552.110, and 552.136 of the Government Code and release the remaining information in their proposals. The district now seeks to withhold the same three proposals under section 552.104 of the Government Code. Section 552.007 of the Government Code provides, however, that if a governmental body voluntarily releases information to any member of the public, the governmental body may not subsequently withhold such information from public disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Gov’t Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act but may not disclose information made confidential by law). Thus, pursuant to section 552.007, the district may not now withhold the information that was released pursuant to the prior ruling unless release of the information is expressly prohibited by law or the information is confidential under law. Section 552.104 of the Government Code, which you now claim for the information the district previously released, is a discretionary exception to disclosure a governmental body may waive. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 592 at 8 (statutory predecessor to Gov’t Code § 552.104 subject to waiver). As such, section 552.104 does not prohibit the release of information to the public or make information confidential under law. Therefore, the district may not withhold any information in the proposals of Ed2Net, e2020, and SES on the basis of section 552.104 of the Government Code. Instead, the district must release or withhold the information in those three proposals in accordance with Open Records Letter No. 2011–05693. *See* Gov’t Code § 552.301(f); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov’t Code § 552.301(a)). We will address the district’s claim under section 552.104 of the Government Code for the proposal of Group Excellence, which was not at issue in the prior ruling.

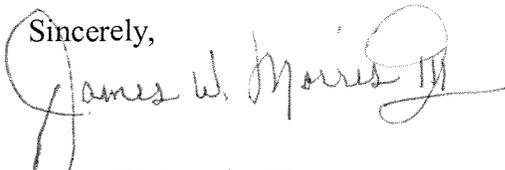
Section 552.104(a) excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). The purpose of this exception is to protect a governmental body’s interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). 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 inform us Group Excellence’s proposal pertains to an RFP that did not result in an award of a contract. We understand the district intends to solicit further bids for the services that were the subject of the previous RFP. You state the release at this time of Group Excellence’s proposal would jeopardize the district’s bargaining position when entering into future negotiations for such services. Based on your representations, we conclude the district may withhold Group Excellence’s proposal under section 552.104 of the Government Code. We note the district may no longer withhold the information in question on this basis once a contract has been executed and is in effect.

In summary, the district (1) must release or withhold the information in the proposals of Ed2Net, e2020, and SES in accordance with Open Records Letter No. 2011-05693 and (2) may withhold the proposal of Group Excellence 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,



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

JWM/em

Ref: ID# 434249

Enc: Submitted documents

c: Requestor
(w/o enclosures)

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