



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 13, 2012

Mr. Bob Davis
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2012-00694

Dear Mr. Davis:

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# 442367 (OOG ID# 643-11).

The Office of the Governor (the "governor's office") received a request for "any documents regarding communication between the Texas Governor's office and CME Group Inc. ["CME"] in the past year regarding the possibility of CME moving any or all of its operations to Texas." You claim that the submitted information is excepted from disclosure under sections 552.104 and 552.131 of the Government Code. You also believe the submitted information may implicate the privacy and proprietary interests of CME. You inform us the governor's office notified CME 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 received comments from CME. We have considered the submitted arguments and reviewed the submitted information.

Both the governor's office and CME argue that the submitted information is excepted from disclosure pursuant to section 552.104 of the Government Code. However, section 552.104 only protects the interests of a governmental body and does not protect the interests of third parties. *See* Open Records Decision No. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of governmental body in competitive situation,

¹*See* 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).

and not interests of private parties submitting information to government). Thus, we will not consider CME's arguments under section 552.104. *See* ORD 592 at 8. However, we will address the governor's office arguments under section 552.104 for the submitted information.

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 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 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).

You contend that the governor's office has specific marketplace interests in the submitted information because the governor's office is competing against other states attempting to expand or recruit businesses to their respective states. You state the submitted information relates to negotiations among the governor's office and CME to relocate certain company operations to Texas. You further assert that release of the submitted information could provide a competitive advantage to other competing states who are attempting to recruit CME to their own state. Based on these representations and our review, we find you have demonstrated the governor's office has specific marketplace interests and may be considered a "competitor" for purposes of section 552.104. Further, the governor's office explains CME has not yet made a final determination as to their relocation and negotiations are still pending. Therefore, we find you have demonstrated release of the submitted information would cause specific harm to the governor's office marketplace interests. Accordingly, the submitted information may be withheld under section 552.104 of the Government Code.²

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

²As our ruling is dispositive, we need not address your remaining arguments, or the arguments of CME, against disclosure of the submitted information.

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,



Sean Opperman
Assistant Attorney General
Open Records Division

SO/dls

Ref: ID# 442367

Enc. Submitted documents

c: Requestor
(w/o enclosures)

CME Group Inc.
c/o Ms. Lessie Gilstrap Fitzpatrick
Fritz, Byrne, Head & Harrison, P.L.L.C.
98 San Jacinto Boulevard, Suite 2000
Austin, Texas 78701
(w/o enclosures)