ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 9, 2012

Ms. Cathy Cunningham
Counsel for the City of Bedford
Boyle & Lowry, L.L.P.
4201 Wingren, Suite 108
Irving, Texas 75062-2763

OR2012-18124

Dear Ms. Cunningham:

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# 470600.

The City of Bedford (the "city"), which you represent, received two requests, from different requestors, for information pertaining to the city's electricity contract.[1] You state you have released some of the information to each of the requestors. Although the city takes no position on the release of the submitted information, you state it may contain proprietary information subject to exception under the Act. Accordingly, you notified the Public Power Pool ("Public Power") and Reliant Energy Retail Services, L.L.C. ("Reliant"), of these requests for information and of their 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, you also notified the Texas General Land Office (the "GLO") of the requests 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).

[1]We take our description of the first request from your brief, as you did not submit the first requestor's written request for information.

Reliant and the GLO have submitted comments to this office. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the GLO seeks to withhold information the city did not submit for our review. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to information submitted by the city. *See id.* § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Next, we must address the obligations of the city under the Act. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *Id.* § 552.301. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) 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. *Id.* § 552.301(e).

You state the city received the first request for information on August 30, 2012, and the second request for information on September 5, 2012.[2] Thus, pursuant section 552.301(e), the city was required to submit a written copy of the request received on August 30, 2012 by September 14, 2012. However, as of the date of this letter, you have not submitted a copy of the written request received on August 30, 2012. Accordingly, we find the city failed to comply with section 552.301 of the Government Code with regard to the first request.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (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); *see also* Open Records Decision No. 319 (1982). Generally, a compelling reason exists when third party interests are at stake or when information is confidential under other law. Open Records Decision No. 177 (1977). As third party interests are at stake, we will consider whether any of the submitted information may be withheld on that basis.

---

[2]The city also states that it received a request for the city's electric contract on August 27, 2012, but states that it released the requested contract to the requestor.

The GLO raises section 552.104 of the Government Code, which excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). 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 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 the GLO has demonstrated it has specific marketplace interests and may be considered a "competitor" for purposes of section 552.104. *See* ORD 593.

The GLO contends 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 information at issue will undermine its ability to compete in this marketplace. Based on the GLO's representations and arguments, we conclude 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 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,

Jonathan Miles
Assistant Attorney General
Open Records Division

JM/bhf

Ref: ID# 470600

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

Public Power Pool
500 West 13th Street
Austin, Texas 78701
(w/o enclosures)

Ms. Ashley Allen
Staff Attorney
Administrative Law Section
Legal Services Division
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873
(w/o enclosures)

Reliant Energy Retail Services
C/O Ms. Carrie Collier-Brown
Winstead PC
401 Congress Avenue, Suite 2100
Austin, Texas 78701
(w/o enclosures)