



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 30, 2012

Ms. Linda Pemberton  
Paralegal  
Office of the City Attorney  
City of Killeen  
P.O. Box 1329  
Killeen, Texas 76540-1329

OR2012-19311

Dear Ms. Pemberton:

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# 472363 (W008909).

The City of Killeen (the "city") received a request for "a copy of the City's current electricity contract and any contracts with a 3rd party used for procuring the electricity." You inform us that some of the responsive information is being released, but raise section 552.110 of the Government Code for the submitted information. You also state the submitted documents may contain proprietary information of a third party. Accordingly, you notified the Texas 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). We have received correspondence from the GLO. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note a portion of the submitted information, which we have marked, is not responsive to the instant request for information, as it is not the city's electricity contract. This ruling does not address the public availability of non-responsive information, and the city is not required to release non-responsive information in response to this request.

Next, we note that although the city argues the submitted information is excepted under section 552.110, that exception is designed to protect the interests of third parties, not the

interests of a governmental body. Thus, we do not address the city's arguments under section 552.110.

The GLO raises section 552.104 of the Government Code for the responsive information. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." *Id.* § 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 or natural gas 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 responsive 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 submitted information 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 responsive information would cause specific harm to the GLO's marketplace interests. *See* ORD 593. We therefore conclude the city may withhold the responsive information under section 552.104 of the Government Code.<sup>1</sup>

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<sup>1</sup>As our ruling is dispositive, we need not consider the remaining arguments against disclosure of the information at issue.

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](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,



Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/som

Ref: ID# 472363

Enc. Submitted documents

c: Requestor  
(w/o enclosure)

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