



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

August 11, 2020

Mr. Jerry E. Drake, Jr.  
First Assistant City Attorney  
City of Denton  
215 East McKinney  
Denton, Texas 76201

OR2020-20050

Dear Mr. Drake:

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# 839287 (Reference# C000631-052120).

The City of Denton (the "city") received a request for records relating to the sale of the Gibbons Creek Power Plant. You state the city does not have some of the requested information.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.104, 552.105, 552.107, 552.111, and 552.133 of the Government Code.<sup>2</sup> Additionally, you state release of this information may implicate the proprietary interests of BTU Solutions DE, LLC; Charah Solutions, Inc. d/b/a Gibbons Creek Environmental Redevelopment Group, LLC ("GCERG"); Forsite Development, Inc.; Frontier Applied Sciences; Melt Solutions, LLC; Redevelopment Capital Partners, LLC; TEERP Power Station; LLC d/b/a Genova Power Advisors; and the Texas Municipal Power Association ("TMPA"). Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their right to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code §§ 552.304 (interested party may submit comments stating why information should or should not be released), .305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party

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<sup>1</sup> The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup> Although you also raise section 552.101 of the Government Code for the submitted information, you provide no arguments explaining how this exception is applicable to the information at issue. Therefore, we assume you no longer assert this exception. *See* Gov't Code §§ 552.301, .302.

to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from GCERG and TMPA. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>3</sup>

Section 552.104(a) of the Government Code excepts from disclosure information that a governmental body demonstrates, if released, would “harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation or in a particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future.” Gov’t Code § 552.104(a). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex. 2015). After review of the information at issue and consideration of the arguments, we find the city has established the release of the information at issue would harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation. Thus, we conclude the city may withhold the submitted information under section 552.104(a) of the Government Code.<sup>4</sup>

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Kelly McWethy  
Assistant Attorney General  
Open Records Division

KM/be

Ref: ID# 839287

Enc. Submitted documents

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<sup>3</sup> We assume the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

<sup>4</sup> As our ruling is dispositive, we need not address the remaining arguments against disclosure of the submitted information.

c: Requestor  
(w/o enclosures)

10 Third Parties  
(w/o enclosures)