



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 1, 2020

Mr. Kieran Hillis
Public Information Coordinator and Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2020-22038

Dear Mr. Hillis:

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# 842515 (OOG ID# 327-20).

The Office of the Governor (the "governor's office") received a request for electronic communications between government officials and Tesla, Inc., pertaining to potential Texas Enterprise Fund incentives during a certain time period. You claim the submitted information is excepted from disclosure under section 552.104 of the Government Code. You also state you notified an interested third party of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the exception you claim and reviewed the submitted information.

Initially, you state some of the requested information was the subject of a previous request for a ruling, as a result of which this office issued Open Records Letter No. 2020-19236 (2020). In that ruling, we determined the governor's office (1) may withhold certain information under section 552.104 of the Government Code, (2) may withhold certain information under section 552.111 of the Government Code, and (3) must release the remaining responsive information. We understand the law, facts, or circumstances on which the prior ruling was based have not changed. Thus, the governor's office may continue to rely on Open Records Letter No. 2020-19236 as a previous determination and

withhold or release the information at issue in accordance with that ruling.¹ See Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

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). You explain the governor’s office is tasked by statute with “[facilitating] the location, expansion, and retention of domestic and international business investment to the [S]tate [of Texas (the “state”)]” and “[promoting] and [administering] business and community economic development programs and services in the state, including business incentive programs.” Gov’t Code § 481.022(2)-(3). You also explain the governor’s office competes on behalf of the state with other states for the expansion and recruitment of businesses by “providing various incentives and employing strategies to attract new business to the state or assist with the expansion of existing business in the state.” Thus, you assert the governor’s office has specific marketplace interests in the information at issue because it competes on behalf of the state to recruit and expand businesses within the state. You argue release of the information at issue would provide a competitive advantage to competing states, as well as companies considering relocation or expansion in the state. Based upon your 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. We also find you have demonstrated release of the information at issue would give advantage to a competitor or bidder. Accordingly, the governor’s office may withhold the remaining information under section 552.104(a) of the Government Code.

In summary, the governor’s office may continue to rely on Open Records Letter No. 2020-19236 as a previous determination and withhold or release the information at issue in accordance with that ruling. The governor’s office may withhold the remaining information under section 552.104(a) 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.

¹ As we are able to make this determination, we need not address your argument against the disclosure of this information.

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,

Emily Kunst
Assistant Attorney General
Open Records Division

EK/rm

Ref: ID# 842515

Enc. Submitted documents

c: Requestor
(w/o enclosures)