



August 15, 2000

Ms. Nanette Williams
Assistant City Attorney
City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901-1196

OR2000-3113

Dear Ms. Williams:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 138064.

The City of El Paso (the "city") received a request for documents provided to the city by Siemens, the company to which a contract was awarded to provide the city an automated vehicle location system, pursuant to RFP No. 1999-38-109R. The requestor seeks price proposals, including Best and Final Offers; technical proposals; compliance matrices, specifications, performance standards and product and system information; and the contract and amendments and modifications thereto.¹ The city does not argue that the information requested is excepted from disclosure. You have notified Siemens, in accordance with section 552.305 of the Government Code, in order to allow it to establish the applicability of an exception to disclosure.² *See* Open Records Decision No. 542 (1990)(governmental body may rely on third party to show why information is excepted from disclosure). We

¹We have been informed that the contract actually setting the price that the city will pay Siemens for the Automatic Vehicle Location System was not in existence at the time of the request. The Public Information Act does not require a governmental body to make available information which does not exist at the time of the request. Open Records Decision No. 362 (1983). The city need not comply with that portion of the request.

²We note that your June 12, 2000, letter to this office states that "the City is notifying Siemens of this request as required by Section 552.305 *by copy of this letter*" (emphasis added). The proper form of notice under section 552.305 must include all information itemized at section 552.305(d); the prescribed form for this notice may be found in the 2000 Public Information Handbook, Appendix C. The handbook is available online at the Office of the Attorney General's web site at <http://www.oag.state.tx.us>.

have considered the exceptions claimed by Siemens and reviewed the submitted information.³

We first note that, 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) general 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. You did not, however, submit to this office copies or representative samples of the specific information that was requested within the mandated fifteen business days.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). The interests of third parties may provide such a compelling interest; therefore, we will consider Siemens' arguments.

Siemens submitted arguments asserting that portions of the information are excepted from disclosure based on sections 552.102, 552.104, and 552.110 of the Government Code. Siemens does not object to the release of enclosures 2 and 5 of the Best and Final Offer ("BAFO") or to the release of the following parts of the technical proposal: the appendix to section 1 consisting of published articles, section 4, the first two columns of section 7, pages 53-58 and 60-68 of section 11, and section 12. The city must release those portions of the requested information. However, Siemens indicates that the articles appended to section 1 of the technical proposal may be copyrighted material. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must,

³When requested documents are numerous and repetitive, a governmental body should submit a representative sample; but if each record contains substantially different information, all must be submitted. *See Open Records Decision Nos. 499 (1988), 497 (1988)*. If a governmental body submits to this office a "representative sample" of the requested records, we assume that the sample submitted is truly representative of the requested records as a whole. When a representative sample of the requested information is submitted to this office, the open records letter ruling does not reach, and therefore does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than those submitted to this office.

however, allow inspection of copyrighted materials to which no exception applies. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990). Therefore, the city must allow access to those materials that are copyrighted and not otherwise excepted from required disclosure but may not copy them or assist the requestor in copying them.

As to the exceptions to required disclosure asserted, we first note that Section 552.104 of the Government Code protects from required public disclosure "information which, if released, would give advantage to a competitor or bidder." As this exception is intended to protect a governmental body's interests, that body may waive section 552.104. *See* Open Records Decision No. 592 at 8 (1991). The city has not stated a claim for the application of section 552.104. In addition, section 552.104 does not except bids or proposals from disclosure once the bidding is over and the contract is in effect. Open Records Decision Nos. 306 (1982); 184 (1978). Therefore, the city may not withhold any information under section 552.104.

Siemens also raises section 552.102 to except from disclosure section 9 of the technical proposal. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 regarding "information in the personnel file of an employee of a governmental body" is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Government Code (emphasis added). *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Section 552.102 is designed to protect the privacy of employees of a governmental body, not of private entities doing business with a governmental body. ORD 192 at 4 (1978). As no personnel files of employees of the city are at issue here, section 552.102 does not apply. The city may not withhold any information from disclosure under section 552.102.

Siemens makes specific arguments to withhold three diagrams appended to section 1 of the technical proposal, follow-up questions 200 through 207 from the city requesting pricing and technical clarification, and Siemens' answers to those questions. This office has not been furnished those documents to examine; therefore, that information is protected only to the extent that it is represented by information that has been submitted for review and allowed to be withheld according to this ruling. *See supra*, footnote 3.

We now turn to the primary argument, that the information requested constitutes commercial or financial information protected by section 552.110(b). Section 552.110(b) excepts from required disclosure:

(b) Commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained [.]

The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. *See* Open Records Decision No. 661 (1999); *see also National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

Siemens contends that the release of the information at issue would result in substantial harm to its competitive position in the marketplace because, with the information, “competitors could improve their own schedules and performance,” and “could seek to emulate our successful marketing approach.” Siemens at length describes the highly technical nature of much of the submitted information and its potential value to competitors.

We have reviewed the arguments made by Siemens and the documents identified by the company as commercial or financial information. Siemens has made a specific factual showing that some of the information it seeks to withhold is excepted from required public disclosure under section 552.110(b). The city may not release: enclosures 3 and 4 of the BAFO or sections 1, 2, 5, and 6, the third and fourth columns of section 7, section 8, pages 10-14 of section 9, section 10, page 59 of section 11, and section 13 of the technical proposal.

In summary, the city must release all the information which Siemens does not contest releasing, in addition to the information we have examined and determined not be excepted from required disclosure. Therefore, the city must release BAFO enclosures 1, 2, 5, and must allow the requestor to inspect copyrighted materials following section 1 of the technical proposal, and must release sections 3 and 4, the first two columns of section 7, pages 1-9 of section 9, pages 53-58 and 60-68 of section 11, and section 12 of the technical proposal.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited

from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Patricia Michels Anderson
Assistant Attorney General
Open Records Division

PMA/pr

Ref: ID# 138064

Encl. Submitted documents

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