



October 25, 2001

Ms. Julie Reagan Watson
Assistant General Counsel
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2001-4874

Dear Ms. Watson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 153891.

The Texas Department of Human Services (the "department") received a request for copies of the proposals submitted to the department and an awarded contract pertaining to the Texas Integrated Eligibility Redesign System Phase One Request for Offers (the "RFO"). You state that you have no objection to releasing the contract that was awarded for parts A through C of the RFO. You claim, however, that the submitted information is or may be excepted from disclosure pursuant to sections 552.104 and 552.110 of the Government Code. You also state, and provide documentation showing, that you notified Sagem Morpho, Inc. ("Sagem"), American Management Systems, Inc. ("American"), Andersen Consulting, Inc. (formerly Andersen, now "Accenture"), and Deloitte Consulting, L.L.C. ("Deloitte") of the request for information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). We have considered the exceptions claimed and have reviewed the submitted information.

You claim that the proposals submitted by Accenture and Sagem are excepted from disclosure in their entirety pursuant to section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage

to a competitor or bidder.” The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations prior to the awarding of a contract. *See* Open Records Decision Nos. 593 at 2 (1991), 463 (1987). In these situations, section 552.104 protects the government’s interests in obtaining the most favorable proposal terms possible by denying access to proposals and related information prior to the award of a contract. However, section 552.104 is not applicable where the bidding on a contract has been completed and the contract is in effect. *See* Open Records Decision Nos. 541 (1990), 514 (1988), 509 (1988). In Open Records Decision No. 170 (1977), this office stated:

[s]o long as negotiations are in progress regarding interpretation of bid provisions, and so long as any bidder remains at liberty to furnish additional information relating to its proposed contract, we believe that the bidding should be deemed competitive. Release of the bids while the bidding is still competitive would necessarily result in an advantage to certain bidders at the expense of others and could be detrimental to the public interest in the contract being let.

Open Records Decision No. 170 at 2 (1977).

You state that a decision to award the contract for part D of the RFO has been made by the department, but that federal approval for that award has not yet been gained. You claim that bidders may be called upon to submit additional information relating to the proposed contract pending federal approval. You also state that if the department’s decision for the award of part D of the RFO is not given federal approval, negotiations regarding this part will be reopened or new proposals may be solicited. Finally, you state that the release of the proposals submitted by Accenture and Sagem would specifically harm the department by damaging its commitments to negotiate in good faith without interference from third parties. Based on your representations and our review of the proposals submitted by Accenture and Sagem, we conclude that the competitive bidding process is still operative with regard to part D of the RFO. Therefore, you may withhold those portions of Accenture’s and Sagem’s proposals pertaining to part D of the RFO from disclosure pursuant to section 552.104 of the Government Code. We note, though, that once a contract pertaining to part D of the RFO has been executed and the competitive bidding process is completed, you may not continue to withhold these portions of Accenture’s and Sagem’s proposals from disclosure under section 552.104 of the Government Code. *See* Open Records Decision No. 541 (1990). However, with regard to parts A through C of Accenture’s proposal and part C of Sagem’s proposal, we conclude that you have not demonstrated that the department would suffer specific competitive harm to its interests if these parts of the proposals were released to the requestor. Accordingly, we conclude that parts A through C of Accenture’s proposal and part C of Sagem’s proposal are not excepted from disclosure pursuant to section 552.104 of the Government Code.

Next, we note that as of the date of this letter, neither American nor Sagem has submitted any comments to this office explaining why portions of their proposals should be withheld from disclosure. Therefore, we have no basis to conclude that any portion of American's proposal or part C of Sagem's proposal is excepted from disclosure pursuant to section 552.110 of the Government Code. See Open Records Decision Nos. 552 at 5 (1990) (stating that if governmental body takes no position, attorney general will grant exception to disclosure under statutory predecessor to Gov't Code § 552.110(a) if third party makes *prima facie* case that information qualifies as trade secret under section 757 of Restatement of Torts, and no argument is presented that rebuts claim as matter of law), 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under Gov't Code § 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm). Accordingly, the department may not withhold from disclosure any portions of American's proposal or part C of Sagem's proposal pursuant to section 552.110 of the Government Code.

However, we note that American's proposal contains tax return information which is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of Title 26 of the United States Code.¹ Section 6103(a) provides that tax return information is confidential. See 26 U.S.C. § 6103(a)(2),(b)(2)(A), (p)(8); see also Open Records Decision No. 600 (1992); Attorney General Opinion MW-372 (1981). Accordingly, you must withhold from disclosure the 1120S forms in American's proposal that we have marked pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. However, you must release the remaining portions of American's proposal to the requestor.

We note that email addresses contained within Accenture's and Deloitte's proposals are excepted from disclosure pursuant to section 552.137 of the Government Code. The Seventy-seventh Legislature recently added section 552.137 to chapter 552 of the Government Code. This new exception makes certain e-mail addresses confidential.² Senate Bill 694, as passed May 14, 2001, signed by the Governor May 26, 2001, and made effective immediately, provides in relevant part:

Sec. 552.137. CONFIDENTIALITY OF CERTAIN E-MAIL ADDRESSES.

¹ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses information protected by other statutes.

² House Bill 2589, which also makes certain e-mail addresses confidential, took effect on September 1, 2001. See Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (to be codified at Gov't Code § 552.136). The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Act of May 14, 2001, 77th Leg., R.S., S.B. 694, § 1 (to be codified at Gov't Code § 552.137). Accordingly, the department must withhold these email addresses from disclosure pursuant to section 552.137 of the Government Code.

Accenture and Deloitte responded to the department's notice and argue that portions of their respective proposals are excepted from disclosure pursuant to section 552.110 of the Government Code. Section 552.110(b) excepts from disclosure "[c]ommercial 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." An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. *See Open Records Decision Nos. 639 at 4 (1996)* (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure).

Accenture and Deloitte initially argue that portions of their proposals must be withheld from disclosure, since they each designated portions of their information as being confidential and proprietary. We note that information that is subject to the Public Information Act is not confidential simply because the party submitting the information anticipates or requests that it be treated as confidential information. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). However, Accenture also argues that portions of the following sections of its proposal are excepted from disclosure under section 552.110(b) as confidential commercial or financial information: Section 3.0, Executive Summary; Section 4.0, Corporate Background and Experience; Section 5.0, Management Approach Overview; Section 6.0, Technical Approach; Section 7.0, End-User Training Approach; Section 9.0, Appendices; Table of Contents; and Cost Offer.

Accenture argues that the release of these portions of its proposal would result in financial losses to Accenture and would require Accenture to create new formats, approaches and

methodologies for proposals developed in the future. Accenture also argues that the release of this information could lead to the loss of contracts and future revenues, since competitors would have a marked competitive advantage over Accenture and would attempt to undercut Accenture by offering more services and, thus, better pricing as part of their packages. Based on Accenture's arguments and our review of the relevant information, we conclude that the department must withhold from disclosure most of the information that Accenture claims is excepted under section 552.110(b). However, we conclude that the department must release the remaining submitted information that we have marked in Accenture's proposal that is not excepted from disclosure pursuant to section 552.110. *See* Open Records Decision Nos. 319 (1982) (finding that information relating to organization, personnel, market studies, professional references, qualifications, and experience not excepted under section 552.110).

Deloitte also argues that portions of the following sections of its proposal are excepted from disclosure under section 552.110(b) as confidential commercial or financial information: Volume I, Section 3; Volume I, Section 4.3; Volume I, Section 4.4; Volume I, Section 5; Volume II, Section 6; Volume III, Section 7; Volume IV, Appendices B through I; and an unnumbered section entitled "Cost Offer." Deloitte argues that the release of these portions of its proposal which compose its basic approach to creating and implementing a web-based integrated eligibility system would result in the loss of Deloitte's self-created edge in the consulting market. Deloitte also argues that the release of this information to competitors would allow these competitors to gain an advantage over Deloitte in other states in which Deloitte is also marketing similar project strategies. Deloitte also argues that competitors could easily transfer the information learned through the release of portions of its proposal to proposals they are developing in these other states in which Deloitte also competes in the marketplace. Based on Deloitte's arguments and our review of the relevant information, we conclude that the department must withhold from disclosure most of the information that Deloitte claims is excepted under section 552.110(b). However, we conclude that the department must release the submitted information that we have marked in Deloitte's proposal that is not excepted from disclosure pursuant to section 552.110. *See* Open Records Decision Nos. 319 (1982) (finding information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110), 306 (1982) (finding that pricing proposals may only be withheld during bid submission process), 184 (1978), 175 (1977).

In summary, the department may withhold from disclosure those portions of Accenture's and Sagem's proposals that pertain to part D of the RFO pursuant to section 552.104 of the Government Code. The department must withhold from disclosure the 1120S forms from American's proposal that we have marked pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The department must release the remaining portions of American's proposal and the entirety of part C of Sagem's proposal to the requestor. The department must withhold email addresses contained within Accenture's and Deloitte's proposals from disclosure pursuant to section 552.137 of the Government Code. The department must withhold the remaining

portions of Accenture's and Deloitte's proposals from disclosure pursuant to section 552.110(b) of the Government Code, with the exception of the information that we have marked and the information for which neither Accenture nor Deloitte make any arguments against disclosure.

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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 153891

Enc. Marked documents

cc: Mr. Richard J. Couture
Contract Relations
IBM
6300 Diagonal Highway
Boulder, Colorado 80301
(w/o enclosures)

Mr. Jerry Lozano
Project Manager
Sagem Morpho, Inc.
8701 Cross Park Drive #110
Austin, Texas 78754
(w/o enclosures)

Mr. David S. Turner
Principal
American Mangement Systems, Inc.
Human Services Group
12601 Fairlakes Circle, 9th Floor
Fairfax, Virginia 22033
(w/o enclosures)

Mr. Richard M. Dorman
Principal
Deloitte Consulting, L.L.C.
400 West 15th Street, Suite 1700
Austin, Texas 78701-1648
(w/o enclosures)

Mr. Pat A. Jury
Anderson Consulting, L.L.P.
1501 South Mopac, Suite 300
Austin, Texas 78746-7569
(w/o enclosures)