



July 24, 2002

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

OR2002-4064

Dear Ms. Reyes:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 166131.

The City of El Paso (the "city") received a request for a copy of the scoring sheet and the top three proposals submitted in response to bid number 2002-055R. You state that the city has released some of the requested information. We understand you to assert that the submitted vendor evaluation sheet and score sheets of individual bidders have been released to the requestor. If not, you must do so immediately. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under the circumstances). You claim that portions of the submitted bid proposals may be excepted from disclosure under sections 552.101, 552.104 and 552.137 of the Government Code.¹ You also state that release of the information may implicate the proprietary interests of the third party bidders. You state that you have notified third parties of the request and of their right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances). We have considered the arguments presented and reviewed the submitted information.

At the outset, we address the city's obligations under section 552.301 of the Government Code. Sections 552.301(a) and (b) provide:

¹ You have submitted hard copies and electronic copies of the requested proposals, relating to bid number 2002-055R, for our review. We note that among the CD-ROM-format copies, you have included a bid proposal for a different bid number that is not responsive to the present request. This ruling does not further address this non-responsive bid proposal.

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the tenth business day after the date of receiving the written request.

You state that the city received this request for information on April 30, 2002. Therefore, you were required to submit your request for a decision from this office no later than May 14, 2002. Your request for a decision bears a post office cancellation mark indicating it was mailed on May 16, 2002. Consequently, we find that you failed to request a decision within the ten-business-day period mandated by section 552.301(a) of the Government Code. *See* Gov't Code § 552.308(a) (ten-day requirement met if request bears post office cancellation mark indicating time within ten-day period).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *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). Section 552.104 is a discretionary exception under the Public Information Act and may be waived by the governmental body. Thus, this exception does not demonstrate a compelling reason to withhold information from the public. *See* Open Records Decision No. 592 (1991) (governmental body may waive section 552.104). A compelling interest can be demonstrated, however, where third party interests are at stake. Open Records Decision No. 150 at 2 (1977).

In this case, two bidders, Network Architects and ESEI, have not submitted arguments to this office pursuant to section 552.305 of the Government Code. Thus, we have no basis to determine that the respective proposals of these bidders contain proprietary information that must be withheld. *See* Open Records Decision Nos. 639 at 4 (1996) (party must provide specific factual evidence that release of commercial or financial information would likely result in substantial competitive injury), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). With respect to the third bid proposal, however, we note that bidder Cervantes Consulting Center, Inc. ("C3I") has submitted comments asserting that its proprietary interests are implicated by this request. Consequently, we address the arguments submitted by C3I with respect to its bid proposal.

C3I states that its proposal is annotated as corporate proprietary information. We note, however, that information that is subject to disclosure under the Public Information Act may not be withheld simply because the party submitting it anticipates or requests confidentiality. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Further, it is well-settled that a governmental body's promise to keep information confidential is not a basis for withholding that information from the public, unless the governmental body has specific authority to keep the information confidential. *See* Open Records Decision Nos. 514 at 1 (1988), 476 at 1-2 (1987, 444 at 6 (1986). Consequently, the submitted information must fall within an exception to disclosure in order to be withheld.

C3I also raises section 552.104 of the Government Code. Section 552.104 excepts information from disclosure if a governmental body demonstrates that the release of the information would cause specific harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). The purpose of section 552.104 is to protect the purchasing interests of governmental bodies in competitive bidding situations prior to the awarding of a contract, not the interests of third party bidders. Open Records Decision No. 592 (1991). Because the city waived its claim under section 552.104, none of the submitted information may be withheld under that exception.

Next, C3I argues that its proposal is excepted under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (2) 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. *See* Gov't Code § 552.110(a), (b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Open Records Decision No. 661 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm); *see also* *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). Upon careful review of C3I's comments and the submitted information, we find that C3I has provided a general, conclusory statement that release of the information would be inimical to its business interests. Moreover, C3I has not substantiated its comments with any specific factual evidence. Thus, we are unable to determine that section 552.110(b) applies to the information in C3I's bid proposal. *See* Open Records Decision No. 509 at 5 (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative); *see also* Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor). Accordingly, the city may not withhold C3I's bid proposal under section 552.110 of the Government Code.

Finally, you contend that the three submitted bid proposals contain e-mail addresses that are protected under section 552.137 of the Government Code. Section 552.137 provides:

- (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.

Therefore, unless the relevant individuals have affirmatively consented to the release of their e-mail addresses, the city must withhold the e-mail addresses in the submitted information that we have marked under section 552.137 of the Government Code.²

In summary, with the exception of the e-mail addresses of individuals we have marked, the bid proposals relating to bid number 2002-055R must be released to the requestor.

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

² We note that among the information you have marked to withhold under section 552.137, you have included the URLs of sites on the World Wide Web. Please note that section 552.137 only applies to e-mail addresses and does not apply to website URLs.

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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 166131

Enc: Submitted documents

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