



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 3, 2006

Ms. Cary Grace
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-1088

OR2006-00024

Dear Ms. Grace:

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# 239265.

The City of Austin (the "city") received a request for "the top 4 proposals for RFP VC05300034 - Digital Management System for [the city police department]." You state that some responsive information has been made available to the requestor. Although you make no arguments and take no position as to whether the submitted information is excepted from disclosure, pursuant to section 552.305 of the Government Code, you notified two interested third parties of the request and of each company's right to submit arguments to this office as to why the requested information should not be released to the requestor.¹ See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

Initially, we note, and you acknowledge, that the city has not complied with the time periods prescribed by section 552.301 of the Government Code in seeking an open records decision from this office. When a governmental body fails to comply with the procedural

¹The third parties which received notice pursuant to section 552.305 are Hummingbird USA, Inc. ("Hummingbird") and Mideo Systems, Inc. ("Mideo").

requirements of section 552.301, the information at issue is presumed public. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). To overcome this presumption, the governmental body must show a compelling interest to withhold the information. *See* Gov't Code § 552.302; *Hancock*, 797 S.W.2d at 381. This office has held that a compelling reason exists to withhold information when the information is confidential by another source of law or affects third party interests. *See* Open Records Decision No. 150 (1977). Because third party interests are affected, a compelling reason exists to overcome the presumption of openness.

We next note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Hummingbird has not submitted comments to this office in response to the section 552.305 notice; therefore, we have no basis to conclude that this company has a proprietary interest in the submitted information. *See* Gov't Code § 552.110(b) (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); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, we conclude that the city may not withhold any portion of the submitted information pertaining to Hummingbird on the basis of any proprietary interest that this company may have in the information.

Mideo has submitted comments to this office contending that portions of its bid proposal are excepted from disclosure under section 552.110 of the Government Code. Specifically, Mideo objects to the release of the following sections of its proposal: 6.7.3 Financial Statements; 6.7.4 System Process Flow Diagrams; 6.7.5 Functional Requirements (section 3.0); and 6.7.6 Technology Requirements (section 4.0). However, the city did not submit this information to this office for review. Accordingly, this ruling does not address information related to Mideo beyond what the city submitted to us for review and is limited to the information the city submitted as responsive to the instant request. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested). As Mideo does not argue to withhold any of the information submitted by the city, the city may not withhold any portion of the submitted information pertaining to Mideo on the basis of any proprietary interest that the company may have in the information.

Finally, we note that portions of the submitted information not excepted from disclosure may be protected by copyright. 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 allow inspection of copyrighted materials unless an exception applies to the information. *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). Accordingly, the city must release the submitted information; however, in releasing information that is protected by copyright, the city must comply with applicable copyright law.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Dep't of Pub. 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 Office of the Attorney General 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 239265

Enc. Submitted documents

c: Mr. Samuel Yamthe
Applied Network Security
9800 North Lamar, Suite 218
Austin, Texas 78753
(w/o enclosures)

Mr. Gary Crawford
Mideo Systems, Inc.
15206 Transistor Lane
Huntington Beach, California 92649
(w/o enclosures)

Ms. Cindy Brown
Hummingbird USA, Inc.
Suite 900 East
13601 Preston Road
Dallas, Texas 75240
(w/o enclosures)