



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

April 20, 2009

Ms. Evelyn Njuguna  
Assistant City Attorney  
City of Houston  
P.O. Box 368  
Houston, Texas 77001-0368

OR2009-05163

Dear Ms. Njuguna:

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# 340448 (ORR # 15146).

The City of Houston (the "city") received a request for information regarding a particular aviation department vendor, including a copy of a letter of understanding executed between the vendor and the city, complaints that mention the vendor at issue or the wireless internet provider at the airport, and e-mails to or from any aviation department employee that mention the vendor at issue. You claim a portion of the requested information is excepted from disclosure under section 552.104 of the Government Code.<sup>1</sup> In addition, although you take no position as to whether the remaining requested information is excepted under the Act, you state release of this information may implicate the proprietary interests of Boingo Wireless ("Boingo"). Accordingly, you state and provide documentation showing you notified Boingo of the city's receipt of the request for information and of its right to submit arguments to this office as to why the requested 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). Boingo states the requested letter of understanding does not exist. The Act does not require a governmental body to disclose information that did not exist at the time the request was received or to create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.— San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

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<sup>1</sup>We note although the city also raises sections 552.101, 552.110, 552.113, 552.131, and 552.133 of the Government Code, the city makes no arguments to support these exceptions. Therefore, we assume the city has withdrawn its claim that these sections apply to the submitted information.

We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>2</sup>

Section 552.104 of the Government Code excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The purpose of this exception is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Furthermore, section 552.104 does not protect information relating to competitive bidding situations once a contract has been awarded. *See* Open Records Decision No. 541 at 4 (1990).

You state Exhibit 2 pertains to the city's correspondence with Boingo regarding the clarification of their bid to provide wireless internet service to the city. You further state the city is no longer accepting bids, but is currently evaluating the submitted bids and no contract has been finalized by the City Council. You argue release of Exhibit 2 would compromise the city's negotiating position because if the city cannot finalize a contract with Boingo, the city would have to seek to contract with another entity, and new proposers will have the advantage of knowing what Boingo has submitted thus far and what the city was willing to negotiate. Based on your representations and our review of the information at issue, we conclude the city may withhold Exhibit 2 under section 552.104 of the Government Code until such time as a contract has been executed.<sup>3</sup> *See* Open Records Decision No. 170 at 2 (1977) (release of bids while negotiation of proposed contract is in progress would necessarily result in an advantage to certain bidders at expense of others and could be detrimental to public interest in contract under negotiation).

Boingo asserts Exhibit 3 is excepted under section 552.110(b) of the Government Code. Section 552.110(b) protects "[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[.]" Gov't Code § 552.110(b). This exception to disclosure 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. *Id.* § 552.110(b); *see also* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

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<sup>2</sup>We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

<sup>3</sup>As this ruling is dispositive, we need not address Boingo's argument against disclosure for Exhibit 2.

Upon review of the submitted arguments and information, we conclude Boingo has made only conclusory allegations that release of Exhibit 3 would cause it substantial competitive injury, and has provided no specific factual or evidentiary showing to support such allegations. Therefore, the city may not withhold Exhibit 3 under section 552.110(b) of the Government Code.

In summary, the city may withhold Exhibit 2 under section 552.104 of the Government Code. The city must release the remainder.

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.

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 [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Emily Sitton  
Assistant Attorney General  
Open Records Division

EBS/eeg

Ref: ID# 340448

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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