



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 29, 2011

Ms. Lillian Guillen Graham
Assistant City Attorney
City of Mesquite
P.O. Box 850137
Mesquite, Texas 75185-0137

OR2011-09462A

Dear Ms. Graham:

This office issued Open Records Letter No. 2011-09462 on July 5, 2011, pertaining to the City of Mesquite (the "city"). In that ruling we determined, among other things, that because JCW Electronics I Ltd., L.L.P. ("JCW") did not submit comments to this office explaining why its requested information should not be released, we had no basis to withhold the information. We therefore ordered the release of JCW's information. However, we understand that JCW was not notified of the request for information and its opportunity to submit comments to this office prior to the issuance of Open Records Letter No. 2011-09462. In a letter to this office from a representative of JCW, JCW objects to release of its information and JCW submits arguments explaining why its information should not be released. We understand JCW is asking this office to reconsider Open Records Letter No. 2011-09462. We have considered JCW's request and will reconsider the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on July 5, 2011. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act")). Your request was assigned ID# 432721.

The city received a request for copies of recent proposals from vendors providing inmate phone service at the city jail and the final contract from the selected vendor.¹ We understand

¹As you have not submitted a copy of the request for information, we take our description from your brief.

the city does not have any information responsive to the request for the final contract.² You claim the submitted information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. You indicate release of this information may implicate the proprietary interests of the third parties that submitted proposals, which are JCW and SECURUS Technologies (“SECURUS”). Pursuant to section 552.305 of the Government Code, you were required to make a good faith effort to notify JCW and SECURUS of the request and of their opportunity to submit comments to this office explaining why the submitted information should be withheld from disclosure. *See id.* § 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). We have received comments from JCW. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note Exhibits #3 and #4 are not responsive to the present request because they do not consist of the requested proposals or the final contract. The city need not release nonresponsive information in response to this request, and this ruling will not address that information.

Next, we must address the city’s procedural obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(e) of the Government Code, 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. Gov’t Code § 552.301(e)(1)(A)-(D). In this instance, you state the city received the request for information on April 15, 2011. However, as of the date of this letter, you have not submitted a copy of the written request for information. Consequently, we find the city failed to comply with the requirements of section 552.301 in requesting this decision from our office.

Pursuant to section 552.302 of the Government Code, a governmental body’s failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to

²The Act does not require a governmental body to disclose information that did not exist at the time the request was received, nor does it require a governmental body to prepare new information in response to a request. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *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 section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Although you raise section 552.104 of the Government Code as an exception to disclosure of the responsive information, this is a discretionary exception that protects only a governmental body's interests and may be waived. *See* Open Records Decision Nos. 592 (1991) (governmental body may waive statutory predecessor to section 552.104), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). As such, section 552.104 does not constitute a compelling reason to withhold information for purposes of section 552.302. Accordingly, the city may not withhold any of the responsive information under section 552.104 of the Government Code. However, because third party interests can provide a compelling reason to withhold information, we will consider whether any of the responsive information may be excepted under the Act.

Although the city argues that the responsive information is excepted under section 552.110 of the Government Code, that exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the city's argument under section 552.110. We 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 information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, this office has not received comments from SECURUS explaining its submitted information should not be released. Therefore, we have no basis to conclude SECURUS has a protected proprietary interest in the responsive information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the city may not withhold any portion of the responsive information based upon any proprietary interests SECURUS may have in it.

We understand JCW to raise section 552.110(b) of the Government Code as an exception to disclosure of its information. 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.*; *see also* ORD 661 at 5-6 (to prevent disclosure of commercial or financial information, party must

show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm).

Upon review of JCW's arguments, we find that JCW has established that its pricing information, which we have marked, constitutes commercial or financial information, the release of which would cause the company substantial competitive injury. Therefore, the city must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find that JCW has made only conclusory allegations that the release of any of its remaining information would result in substantial damage to the company's competitive position. Thus, JCW has not demonstrated that substantial competitive injury would result from the release of any of its remaining information at issue. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (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 is too speculative). Accordingly, none of JCW's remaining information may be withheld under section 552.110(b).

In summary, the city must withhold the information we have marked under section 552.110(b) of the Government Code. The remaining information must be released.

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, 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, toll free, at (888) 672-6787.

Sincerely,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 432721

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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