



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 3, 1997

Mr. Steve Aragón
General Counsel
Texas Health and Human Services
Commission
P.O. Box 13247
Austin, Texas 78711

OR97-2427

Dear Mr. Aragón:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 109755.

The Texas Health and Human Services Commission (the "Commission") received a request for the following information:

copies of or access to the proposals submitted by the four companies competing for the contract to provide professional management and technical services related to the development of a plan to integrate the state's eligibility determination and service delivery functions for health and human services and workforce programs. The information includes but is not limited to the proposed payment for the services.

The Commission asserts that the requested proposals are excepted from required public disclosure based on section 552.104 of the Government Code. Pursuant to section 552.305 of the Government Code, the Commission also asks that we determine whether the information is excepted from disclosure based on section 552.110 of the Government Code. *See* Open Records Decision No. 542 (1990) (where third party's privacy or property interests are implicated, governmental body may rely on third party to establish applicability of exceptions). The Commission takes no position with regard to the applicability of section 552.110 to the requested information.

The Commission received a second request for three items of information:

1. A complete copy [of] any contract that exists as a result of the Invitation to Negotiate for Business Process Reengineering and Automation Systems Procurement Assistance.

2. A list of vendors who submitted proposals in response to the Invitation to Negotiate.
3. A copy of the proposal by the vendor who was awarded the contract.

The Commission has released to the second requestor the first two requested items. Without taking a position as to the applicability of section 552.110 to the requested proposal, you raise section 552.110. *See id.* As the first request for the four submitted proposals encompasses the information requested in the second request, the winning proposal, we have combined the two requests for issuance of one decision.

Section 552.104 states that:

Information is excepted from the requirements of Section 552.021 if it is information that, if released, would give advantage to a competitor or bidder.

The purpose of this exception is to protect the interests of a governmental body usually in competitive bidding situations. *See Open Records Decision No. 592 (1991)*. Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. This exception protects information from public disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See Open Records Decision No. 463 (1987)*. Generally, section 552.104 does not except bids from public disclosure after bidding is completed and the contract has been awarded. *See Open Records Decision 541 (1990)*.

You state that “[u]ntil a binding contract is signed, the Commission’s interest would be harmed by disclosure of the requested information. . . . Should the content of proposals be disclosed before the Commission enters into a contract, the Commission’s negotiating position will seriously be compromised.” We are informed that the relevant contract was executed on August 18, 1997. Consequently, we conclude that section 552.104 is inapplicable in this instance. *See id.*

This office notified the four companies whose proposals are the subject of this request to provide those companies an opportunity to raise and explain the applicability of exceptions to disclosure. This office notified Cambridge Management Consulting (“Cambridge”), Deloitte & Touche Consulting Group (“Deloitte & Touche”), Electronic Data Systems Corporation (“EDS”) and Eligibility Management Systems, Incorporated (“EMS”). The notification states that, if the company fails to respond to the notification, this office will assume that the company has no privacy or property interest in the requested information. Only Deloitte & Touche responded to our notification. Consequently, we have no basis for applying any exceptions to required public disclosure to information submitted by the three companies who did not respond to the notification. *See Open Records Decision*

No. 552 (1990). Because neither the Commission nor the companies have contended to this office that the requested information should be withheld, you should release the information from Cambridge, EDS and EMS at this time.

Deloitte & Touche asserts that certain sections of its proposal are excepted from disclosure by section 552.110 of the Government Code as commercial or financial information. Section 552.110 excepts from disclosure two categories of information: (1) “[a] trade secret” and “commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. In applying the “commercial or financial information” branch of section 552.110, this office now follows the test for applying the correlative exemption in the Freedom of Information Act, 5 U.S.C. § 552(b)(4). See Open Records Decision No. 639 (1996). That test states that commercial or financial information is confidential if disclosure of the information is likely either (1) to impair the government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. See *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). A business enterprise cannot succeed in a *National Parks & Conservation Ass’n* claim by mere conclusory assertion of a possibility of commercial harm. “To prove substantial competitive harm, the party seeking to prevent disclosure 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 No. 639 (1996) (citing *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), cert.denied, 471 U.S. 1137 (1985).

Deloitte & Touche argues that section II.2, which contains customer references and resumes, section II.3, which identifies key personnel and contains an organizational chart and manning charts, and section IV.1, which contains a table showing estimated hours, hourly rates and total estimated fees for certain labor categories, are confidential commercial or financial information. We note that prior decisions of this office have determined that section 552.110 is inapplicable to resumes listing the education and experience of employees. See Open Records Decision Nos. 309 (1982), 306 (1982).

We have reviewed the arguments of Deloitte & Touche and the requested proposal. The Deloitte & Touche proposal submitted to this office does not contain the proposal’s section IV.1. Therefore, we cannot address Deloitte & Touche’s section 552.110 argument in regard to section IV.1 nor can we conclude that the Commission must withhold section IV.1 based on section 552.110 of the Government Code.

As for sections II.2 and II.3, we believe that Deloitte & Touche has not shown that substantial competitive injury would likely result from disclosure of the information. Accordingly, we conclude that the Commission may not withhold from disclosure sections II.2 and II.3 of the Deloitte & Touche proposal based on section 552.110.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Hastings
Assistant Attorney General
Open Records Division

KHH/rho

Ref.: ID# 109755

Enclosures: Submitted documents

cc: Ms. Peggy Fikac
The Associated Press
1005 Congress, Suite 995
Austin, Texas 78701
(w/o enclosures)

Mr. Michael Gross
Vice-President
Texas State Employees Union
700 South 1st Street
Austin, Texas 78704-5454
(w/o enclosures)

Mr. Brian H. Scarth
Cambridge Management Consulting
CMC Group Manager-Dallas
2828 Routh Street, Suite # 825
Dallas, Texas 75210
(w/o enclosures)

Mr. Robert N. Campbell, III
Principal
Deloitte & Touche Consulting Group
700 Lavaca, Suite 1501
Austin, Texas 78701
(w/o enclosures)

Mr. Stan Hinton
Baker & Botts, L.L.P.
2001 Ross Avenue
Dallas, Texas 75201-2980
(w/o enclosures)

Ms. Marybeth Ryben
Vice President, State and Local Government
Electronic Data Systems Corporation
11050 Olson Drive, Suite 210
Rancho Cordova, California 95670
(w/o enclosures)

Mr. Charles F. Cain
Vice President/Secretary
Eligibility Management Systems, Incorporated
1106 Clayton Lane, Suite 100E-1
Austin, Texas 78723
(w/o enclosures)