



August 2, 2001

Ms. Anne M. Constantine
Legal Counsel
Dallas/Fort Worth International Airport
P.O. Drawer 619428
DFW Airport, Texas 75261-9428

OR2001-3360

Dear Ms. Constantine:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150219.

The Dallas-Fort Worth International Airport Board (the "board") received a request for a copy of the bids placed for a specified contract, as well as all information pertaining to the contract. You state that the requestor narrowed the request for bid proposals to the bid proposals of York International Corporation ("York") and The Trane Company ("Trane").¹ We note that you did not submit any information to us pertaining to the specified contract. Therefore, we assume that you provided the requestor with any other information pertaining to the specified contract to the extent that it exists. *See* Gov't Code §§ 552.006, .301, .302; *see also* Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information it must release information as soon as possible under the circumstances to the extent that it exists). You submit documentation showing that you notified York and Trane of the request for information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). You state that York and

¹ We note that the Public Information Act contemplates a tolling of the ten business days during the interval in which a governmental body and a requestor are communicating in good faith to clarify or narrow a request. *See* Open Records Decision No. 663 at 5 (1999). Although you state that "[t]he requestor was contacted by telephone to clarify the request," you did not state which day the requestor was contacted. For purposes of this letter ruling, we assume that you contacted the requestor on the day that you received the request for information.

Trane object to the release of their respective bid proposals. You raise no exception to disclosure on behalf of the board and make no arguments regarding the proprietary nature of the proposals.

York responded to your notice by asserting that sections 3 through 8 of its bid proposal documents dated February 5, 2001 and April 5, 2001 constitute proprietary information that is excepted from disclosure pursuant to sections 552.101, 552.104, and 552.110 of the Government Code.² Trane responded to your notice by asserting that its original and supplemental bid proposals constitute proprietary information that is excepted from disclosure pursuant to sections 552.101 and 552.110 of the Government Code. We note that you submitted York bid proposal documents dated March 14, 2001 for our review. However, neither your office nor York submitted comments stating the reasons why any exceptions to disclosure apply that would allow the March 14, 2001 bid proposal documents to be withheld from disclosure. Therefore, we have no basis on which to conclude that these particular bid proposal documents are excepted from disclosure under the Public Information Act. *See* Open Records Decision Nos. 552 at 5 (1990) (stating that if governmental body takes no position, attorney general will grant exception to disclosure under statutory predecessor to Gov't Code § 552.110(a) if third party makes *prima facie* case that information qualifies as trade secret under section 757 of Restatement of Torts, and no argument is presented that rebuts claim as matter of law), 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under Gov't Code § 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm). Accordingly, we conclude that you must also release these documents to the requestor. We now address York's and Trane's arguments against disclosure of the remaining submitted information.

York claims that sections 3 through 8 of its bid proposal documents dated February 5, 2001 are excepted from disclosure pursuant to section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Section 552.104 was not intended to protect the interests of business entities that submit information to governmental bodies. This exception protects information from disclosure when the governmental body demonstrates potential specific harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 592 at 8-9 (1991), 593 at 2 (1991), 463 (1987), 453 at 3 (1986). The board has not argued that the release of York's bid proposal documents dated February 5, 2001 would harm its interests in a particular competitive situation. Accordingly, this information is not excepted from disclosure pursuant to section 552.104 of the Government Code.

² We note that we did not receive any York bid proposal documents dated April 5, 2001 from your office. Therefore, this letter ruling does not address any of those documents to the extent that they exist.

York and Trane argue that their bid proposals are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 252.049 of the Local Government Code.³ Section 252.049 provides:

- (a) Trade secrets and confidential information in competitive sealed bids are not open for public inspection.
- (b) If provided in a request for proposals, proposals shall be opened in a manner that avoids disclosure of the contents to competing offerors and keeps the proposals secret during negotiations. All proposals are open for public inspection after the contract is awarded, but trade secrets and confidential information in the proposals are not open for public inspection.

Local Gov't Code § 252.049(a), (b). However, this provision is merely duplicative of the protection offered to proprietary information under section 552.110 of the Government Code. Therefore we will address York's and Trane's arguments with respect to section 252.049 of the Local Government Code under their claims regarding section 552.110.

Section 552.110(b) excepts from disclosure "[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." An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. *See Open Records Decision Nos. 639 at 4 (1996)* (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).

York argues that disclosure of its bid proposal documents would allow its competitors to adjust their bids against York in future procurements for similar equipment. York argues that this adjustment would result in "future lost sales where the recipient competitor underbids York's bids based on enhanced knowledge of the cost and performance of York's equipment." After reviewing York's bid proposal documents dated February 5, 2001 and the arguments presented, we conclude that York has demonstrated based on specific factual evidence that the release of certain portions of its proposal would cause it substantial competitive harm. Consequently, you must withhold from disclosure the "Description of

³ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses information protected by other statutes.

Offerings” part of section 1, the “Previous Projects” part of section 3, and sections 5 through 7 of York’s bid proposal documents dated February 5, 2001 pursuant to section 552.110(b) of the Government Code. However, we conclude that you must release the remaining portions of this bid proposal to the requestor. *See* Open Records Decision Nos. 319 (1982) (finding information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not ordinarily excepted under section 552.110), 306 (1982) (finding that pricing proposals may only be withheld during bid submission process), 184 (1978), 175 (1977).

Trane argues that disclosure of its original and supplemental bid proposals would allow its competitors to “reverse engineer” Trane’s technological advances, predict Trane’s likely technical solutions and pricing for similar contract requirements, and closely underbid Trane in future procurements.” Trane also argues that such knowledge would result in a loss of business opportunities for Trane. After reviewing Trane’s original and supplemental bid proposal documents and its general and specific arguments presented, we conclude that Trane has demonstrated based on specific factual evidence that the release of certain portions of its proposals would cause it substantial competitive harm. Consequently, you must withhold from disclosure Tabs 1 through 6, 8, 10 through 13, and 15 of Trane’s original bid proposal and the submitted blueprint pursuant to section 552.110(b) of the Government Code. In addition, you must withhold Trane’s supplemental proposal from disclosure in its entirety. However, we conclude that you must release the remaining portions of Trane’s original bid proposal to the requestor. *See id.*

In summary, you must release any other information pertaining to the specified contract to the extent that it exists. You must release the York bid proposal documents dated March 14, 2001 in their entirety. You must withhold from disclosure the “Description of Offerings” part of section 1, the “Previous Projects” part of section 3, and sections 5 through 7 of York’s bid proposal documents dated February 5, 2001 pursuant to section 552.110(b) of the Government Code. You must release the remaining portions of this bid proposal to the requestor. You must withhold from disclosure Tabs 1 through 6, 8, 10 through 13, and 15 of Trane’s original bid proposal and the submitted blueprint pursuant to section 552.110(b) of the Government Code. You must withhold Trane’s supplemental proposal from disclosure in its entirety. You must release the remaining portions of Trane’s original bid proposal 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).

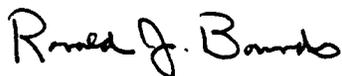
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 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 General Services 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. 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 150219

Enc. Submitted documents

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