



September 3, 2002

Mr. Ross T. Foster
Ross T. Foster, P.C.
9001 Airport Freeway, Suite 675
Fort Worth, Texas 76180

OR2002-4938

Dear Mr. Foster:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 167952.

The City of Colleyville received a request for proposals submitted by two specific companies in response to RFP no. 02-001. You claim that some of the requested information is excepted from disclosure under sections 552.101 and 552.104 of the Government Code. You also claim that the release of the proposals may implicate the proprietary interests of the third parties. You state that you have notified IESI TX Corporation and Waste Management, the third parties whose proprietary interests have been implicated by the request, 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); 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). We have considered the exceptions you claim and reviewed the submitted information.

First, the city asserts that the pages marked WMI 00020-WMI 00036, WMI 00043-WMI 00064, WMI 00066 and IESI 00050-IESI 00070, IESI 00135-IESI 00136, and IESI 00142 are excepted from disclosure based on section 552.104 of the Government Code. Section 552.104 states that information is excepted from required public disclosure if release of the information 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). 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).

The city states that it has solicited proposals for a solid waste disposal service for which it has received several responses that it has not disclosed. The city also states that the various competitors for the city's contract do not know what their competitors' proposals contain. Accordingly, the city informs us that "[i]f the content of [the] proposal is made public then the ability of the [c]ity to negotiate with others [would] be detrimentally affected." We therefore conclude that the information at the pages marked WMI 00020-WMI 00036, WMI 00043-WMI 00064, WMI 00066 and IESI 00050-IESI 00070, IESI 00135-IESI 00136, and IESI 00142 are excepted from disclosure based on section 552.104 until such time as the contract is awarded.

The city next argues that the pages marked IESI 0002-IESI 00151 and WMI 00001-WMI 00157 of the 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.¹ 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). As a general rule, the statutory confidentiality protected by section 552.101 requires express language making certain information confidential or stating that information shall not be released to the public. Open Records Decision No. 478 (1987). By its plain language, section 252.049 does not expressly make bid proposals confidential. Section 252.049 only requires a governmental body to take adequate precautions to protect bid proposals from competing bidders. The city has taken the necessary precautions by withholding the information and requesting an open records ruling from this office. Accordingly, we find that none of the bidding information is deemed confidential under section 252.049.

Finally, pursuant to section 552.305(d), an interested third party has 10 business days after the date of its receipt of the governmental body's notice 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, IESI TX Corporation and Waste Management have not submitted to this office reasons explaining why the submitted information should not be released. Therefore, we have no basis to conclude that the release

¹ 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.

of the submitted information would implicate the proprietary interests of these two companies. *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. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, with the exception of the information you seek to withhold under section 552.104, you must release the requested proposals.

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).

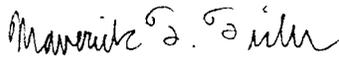
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

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 Texas Building and Procurement 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. 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,



Maverick F. Fisher
Assistant Attorney General
Open Records Division

MFF/seg

Ref: ID# 167952

Enc. Submitted documents

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