



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 5, 2004

Ms. Elaine S. Hengen
Assistant City Attorney
City of El Paso
2 Civic Center Plaza, 9th Floor
El Paso, Texas 79901-1196

OR2004-6622

Dear Ms. Hengen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 206601.

The City of El Paso (the "city") received two requests for information relating to Airport Marketing & Advertising Services bid #2004-125. You inform us that you have released some of the requested information. You assert that the remaining information may be excepted from disclosure under sections 552.101, 552.104, and 552.110 of the Government Code but take no position and make no argument regarding these exceptions. In addition, pursuant to section 552.305 of the Government Code, you notified companies whose proprietary interests may be implicated by the request: the Gwinn Company d/b/a Advertising Ink ("Advertising Ink"); Lopez Advertising Group, Inc. ("Lopez"); MithoffBurton Partners ("Mithoff"); SWG&M Advertising, Inc. ("SWG&M"); and Two Ton Creativity, Inc. ("Two Ton"). 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 to disclosure in certain circumstances).

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, Advertising Ink, Mithoff, SWG&M, and Two Ton have not submitted to this office any reasons explaining why their information

should be excepted from disclosure. We thus have no basis to conclude that the submitted information which relates to these companies constitutes proprietary information. *See* Gov't Code § 552.110; 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), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, we conclude the submitted information may not be withheld from disclosure based on the proprietary interests of Advertising Ink, Mithoff, SWG&M, or Two Ton.

Lopez did, however, respond to the city's section 552.305 notice by asserting that portions of its bid proposal constitute proprietary information. Lopez claims this information is excepted from disclosure under sections 552.101 and 552.104 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Although Lopez raises section 552.101, it does not provide any arguments to demonstrate that the information it seeks to withhold is confidential by law. Additionally, we are not aware of any provision of law that makes this information confidential. Therefore, the city may not withhold any information under section 552.101.

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests 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. *See id.* at 8-9. The city does not argue that the release of any portion of Lopez's bid proposal would harm the city's interests in a particular competitive situation. Therefore, no portion of Lopez's bid proposal is excepted from disclosure under section 552.104 of the Government Code.

In summary, none of the submitted information is excepted from disclosure and therefore it must be released 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 Dep't of Pub. 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,



W. David Floyd
Assistant Attorney General
Open Records Division

WDF/sdk

Ref: ID# 206601

Enc. Submitted documents

c: Mr. Morris Pittle
President
Two Ton Creativity, Inc.
303 Texas Avenue, Suite 1002
El Paso, Texas 79912
(w/o enclosures)

Ms. Joanne Burt
The Gwinn Company d/b/a Advertising Ink
114 South Oregon Street
El Paso, Texas 79901
(w/o enclosures)

Mr. Joe Lopez
Lopez Advertising Group, Inc.
7500 Viscounty, Suite 222
El Paso, Texas 79925
(w/o enclosures)

Mr. Peter Fraire
President
MithoffBurton Partners
4105 Rio Bravo Street, Suite 100
El Paso, Texas 79902
(w/o enclosures)

Mr. Robert V. Wingo
President
SWG&M Advertising, Inc.
A4050 Rio Bravo, Suite 230
El Paso, Texas 79902
(w/o enclosures)

Ms. Janis Paul-Robertson
Lara & Robertson Creative Advertising & Design
800 East Wyoming, Suite B
El Paso, Texas 79902
(w/o enclosures)