



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 25, 2005

Mr. David Caylor
City Attorney
City of Irving
825 West Irving Boulevard
Irving, Texas 75060

OR2005-07719

Dear Mr. Caylor:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 231029.

The City of Irving (the "city") received requests for proposals submitted in response to RFP 108-05 and 113-05. You claim that release of the submitted information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, that you notified GRS Asset Consulting Group ("GRS"), Citigroup Global Markets Inc. ("Citigroup"), RBC Dain Rauscher ("RBC"), First Southwest Company ("Southwest"), UBS Financial Services Inc. ("UBS"), Wells Fargo Trust & Custody Solutions ("Wells Fargo"), Bank of Texas, Comerica Bank ("Comerica"), and Wachovia Retirement Services ("Wachovia") of the requests and of their right to submit arguments to this office as to why the submitted information should not be released. *See Gov't Code § 552.305(d); see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits a governmental body to rely on an interested third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances). We have reviewed the submitted arguments and information.

Initially, we note that section 552.305 of the Government Code allows an interested third party ten business days from 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 not be released. *See Gov't Code § 552.305(d)(2)(B)*. Southwest indicates that it does not object to the release of its information; therefore, the submitted information pertaining to this company may not

be withheld as proprietary information. However, as of the date of this letter, we have not received arguments from GRS, Citigroup, RBC, UBS, Bank of Texas, and Wachovia for withholding their proposals. Therefore, we have no basis to conclude that the release of any of the submitted information would harm the proprietary interests of these companies. See Gov't Code § 551.110(b); Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence 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). Accordingly, we conclude that the city may not withhold any portion of the submitted information on the basis of any proprietary interest that GRS, Citigroup, RBC, UBS, Bank of Texas, and Wachovia may have in the information.

Next, we address Comerica's assertion that its proposal is excepted from disclosure under section 552.104. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." However, we note that section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. See Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the city does not seek to withhold any information pursuant to section 552.104, we find this section does not apply to Comerica's proposal. See Open Records Decision No. 592 (1991) (governmental body may waive section 552.104). Therefore, the city may not withhold Comerica's proposal pursuant to section 552.104.

Next, we address Wells Fargo's claim that Section F and Appendix 8 of its Supplemental Benefit Plan are excepted from disclosure under section 552.110 of the Government Code. We note, however, that Appendix 8 was not submitted to us by the city for review. Accordingly, this ruling does not address Appendix 8. See Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested, or representative sample if voluminous amount of information was requested).

Section 552.110(b) protects commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. See 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. Gov't Code § 552.110(b); see also *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999). Wells Fargo states that Section F of its Supplemental Benefit Plan is protected proprietary and confidential information for the exclusive use of the city and should not be disclosed to any outside vendors. Wells Fargo indicates that Section F consists of the company's pricing information. Having considered

Wells Fargo's arguments, we find that the release of Section F would cause the company substantial competitive injury. Therefore, the city must withhold Section F of Wells Fargo's Supplemental Benefit Plan, which we have marked, under section 552.110(b).

We note that the proposals submitted by GRS, Citigroup, and RBC contain insurance policy numbers. Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. In accordance with section 552.136 of the Government Code, the city must withhold the insurance policy numbers we have marked in the submitted documents.

Finally, we note that the proposals submitted by GRS, Citigroup, Comerica, and Wachovia contain information that may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the city must withhold the information we have marked under sections 552.110 and 552.136 of the Government Code. The remaining information must be released. In doing so, however, the information must be released in accordance with applicable copyright laws for any information protected by copyright.

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, upon receiving this ruling, the governmental body

will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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,



James A. Person III
Assistant Attorney General
Open Records Division

JAP/sdk

Ref: ID# 231029

Enc. Submitted documents

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