



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 9, 2006

Ms. Maleshia B. Farmer
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street
Fort Worth, Texas 76102

OR2006-04771

Dear Ms. Farmer:

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# 248515.

The City of Fort Worth (the "city") received a request for a specific proposal.¹ You claim that portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code. In addition, pursuant to section 552.305 of the Government Code, you notified Cingular Wireless ("Cingular") of the request and of its opportunity to submit comments to this office. *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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have considered the arguments and reviewed the submitted information. We have also

¹The city informs us that it previously requested a ruling regarding this request for information, which this office issued in Open Records Letter No. 2005-11582 (2005). In that ruling, we held that the city must withhold Cingular's pricing information and customer list under section 552.110 of the Government Code. Since then, however, the city has discovered additional information responsive to the request. The city now asks that we incorporate their prior objections to this additional information. We will also incorporate the requestor's prior comments and Cingular's prior objections to this additional information.

considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, you acknowledge, and we agree, that the city has not complied with the statutory deadlines prescribed by section 552.301 of the Government Code in seeking an open records decision from this office. Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless a compelling reason exists for withholding the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Generally speaking, a compelling reason exists when third party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Because third party interests and section 552.101 can provide compelling reasons to withhold information, we will consider if any of the submitted information must be withheld to protect Cingular's interests, as well as address your argument concerning section 552.101.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information protected by other statutes. The city asserts that section 252.049 of the Local Government Code protects the submitted information from disclosure. Section 252.049 provides as follows:

- (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. As a general rule, statutory confidentiality 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. The provision merely duplicates the protection offered to proprietary information under section 552.110 of the Government Code. Accordingly, we will address whether the submitted information is protected under section 552.110.

Cingular claims that the requested information is excepted from disclosure under section 552.110(b) of the Government Code, which 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.” Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

After reviewing the arguments and the submitted information, we find that release of the marked pricing information would result in significant competitive harm to Cingular’s interests for purposes of section 552.110(b). Cingular has failed, however, to provide specific factual evidence substantiating its claims that release of the remaining portions of its proposal would result in significant competitive harm. *See* Open Records Decision Nos. 661 (1999) (for information to be withheld under commercial or financial information prong of Gov’t Code § 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue); 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative). Accordingly, the city must withhold the pricing information in Cingular’s proposal, which we have marked, under section 552.110(b) of the Government Code.

We note, however, that portions of Cingular’s proposal appear to 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). Therefore, the remaining information in Cingular’s proposal must be released. However, information in the proposal protected by copyright must be released only in accordance with applicable copyright laws.

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 Office of the Attorney General 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,



José Vela III
Assistant Attorney General
Open Records Division

JV/krl

Ref: ID# 248515

Enc. Submitted documents

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