



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

November 4, 2008

Ms. Pamela Smith  
Assistant General Counsel  
Texas Department of Public Safety  
P.O. Box 4087  
Austin, Texas 78773-0001

OR2008-15081

Dear Ms. Smith:

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# 327212.

The Texas Department of Public Safety (the "department") received a request for the winning bidder's proposal submitted in response to RFO 405-IT8-0258, and any correspondence between the department and the winning bidder.<sup>1</sup> You state you have provided most of the requested correspondence to the requestor. You claim the submitted floor plans, e-mail, and bid proposal are excepted from disclosure under sections 552.101, 552.104, and 552.108 of the Government Code. Furthermore, you claim the submitted information may contain proprietary information subject to exception under the Act. Accordingly, you state, and provide documentation showing, you notified Red Hawk Industries, LLC ("Red Hawk") of the department's receipt of the request for information and of the company's right to submit arguments to this office as to why its information should not be released to the requestor. See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Red Hawk. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the e-mail submitted in Attachment B was created after the date the request was received. Thus, this information, which we have marked, is not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

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<sup>1</sup> The department states it sought and received clarification about the request from the requestor. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

Next, we must address the department's obligations under the Act. Pursuant to section 552.301(b) of the Government Code, the governmental body must state the exceptions to disclosure that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). Although you raised sections 552.101 and 552.108 of the Government Code by the appropriate deadline, you did not claim an exception under section 552.104 of the Government Code until after the ten-business-day deadline. Thus, we find the department failed to comply with the requirements of section 552.301 with respect to its claim under section 552.104.

Generally, a governmental body's failure to comply with section 552.301 results in the waiver of its claims under the exceptions at issue, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *Cf. id.* § 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, a compelling reason exists when third party interests are at stake or when information is confidential under other law. Open Records Decision No. 177 (1977). Section 552.104 is discretionary in nature, and serves only to protect a governmental body's interests; as such, it is waived by a governmental body's failure to comply with section 552.301. *See* Open Records Decisions Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 592 at 8 (1991) (statutory predecessor to section 552.104 subject to waiver). Consequently, the department may not withhold any of the submitted information pursuant to section 552.104 of the Government Code. However, we will consider the applicability of your claims under sections 552.101 and 552.108 to the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information other statutes make confidential. The department contends Red Hawk's bid proposal is excepted from disclosure under section 552.101 in conjunction with section 2156.123 of the Government Code, which provides:

(a) The commission or other state agency shall avoid disclosing the contents of each proposal on opening the proposal and during negotiations with competing offerors.

(b) The commission or other state agency shall file each proposal in a register of proposals, which, after a contract is awarded, is open for public inspection unless the register contains information that is excepted from required disclosure under Subchapter C, Chapter 552.

*Id.* § 2156.123(a), (b). Subchapter C of chapter 2156 of the Government Code prescribes procedures for the use of competitive sealed bid proposals by state agencies. *See id.*

§ 2156.121. We note section 2156.123 does not contain express language that makes information confidential. This office has held the statutory confidentiality protected by section 552.101 requires express language making certain information confidential or stating information shall not be released to the public. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Thus, because section 2156.123 does not expressly make information confidential or expressly state the information shall not be released to the public, the department may not withhold Red Hawk's proposal under section 552.101 in conjunction with section 2156.123 of the Government Code.

As part of the Texas Homeland Security Act ("HSA"), the Seventy-eighth Legislature passed House Bill 9, which added sections 418.176 through 418.182 to chapter 418 of the Government Code. These provisions make certain information related to terrorism confidential. Section 552.101 also encompasses section 418.182 of the Government Code, which provides in relevant part:

(a) Except as provided by Subsections (b) and (c), information, including access codes and passwords, in the possession of a governmental entity that relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity is confidential.

...

(c) Information in the possession of a governmental entity that relates to the location of a security camera in a private office at a state agency, including an institution of higher education, as defined by Section 61.003, Education Code, is public information and is not excepted from required disclosure under Chapter 552 unless the security camera:

(1) is located in an individual personal residence for which the state provides security; or

(2) is in use for surveillance in an active criminal investigation.

Gov't Code § 418.182. The fact information may be related to a governmental body's security concerns does not make such information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the

scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You contend the floor plans submitted in Attachment A are confidential under section 418.182. You explain the floor plans depict some of the department's driver's license offices and include the locations, or proposed locations, of security cameras in those offices. You also state the security cameras are part of the department's "security system intended to prevent or detect acts of terrorism or other criminal activity in [the department's] driver's license offices." Furthermore, you state the exception in section 418.182(c) does not apply in this instance. Having considered your arguments and reviewed the submitted floor plans, we agree the floor plans identify the locations of security cameras in department driver's license offices. Thus, the department must withhold the floor plans in Attachment A under section 552.101 in conjunction with section 418.182 of the Government Code.<sup>2</sup>

Red Hawk asserts its bid proposal is excepted from disclosure pursuant to section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. Section 552.104, however, is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that 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 department has waived its claim under this exception, we find Red Hawk's proposal may not be withheld under section 552.104. *See* ORD 592 (governmental body may waive section 552.104).

Red Hawk claims specified pricing information in its bid proposal is excepted under section 552.110(b) of the Government Code, which protects "[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[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the information at issue. *Id.* § 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).

Red Hawk argues its pricing information is confidential commercial and financial information, the release of which would prejudice the company's future business dealings. Upon review, we find Red Hawk has failed to provide specific factual evidence demonstrating release of any of the specified pricing information would result in substantial competitive harm to the company. *See* Open Records Decision Nos. 661 (for information

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<sup>2</sup> As our ruling for this information is dispositive, we need not address your remaining argument against disclosure for this information.

to be withheld under commercial or financial information prong of section 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), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Furthermore, we note Red Hawk was the winning bidder at the time the request for information was received, and the pricing information of a winning bidder is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Accordingly, we determine Red Hawk's pricing information in the submitted bid proposal may not be withheld under section 552.110(b) of the Government Code.

We note Red Hawk's bid proposal contains insurance policy numbers. Section 552.136 of the Government Code provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding 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.<sup>3</sup> We conclude the insurance policy numbers we have marked constitute access device numbers for purposes of section 552.136. Thus, the department must withhold the marked insurance policy numbers in the submitted bid proposal under section 552.136 of the Government Code.

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<sup>3</sup> The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

We note part of the remaining information appears 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). Accordingly, the remaining information must be released to the requestor in accordance with copyright law.

In summary, the department must withhold the floor plans in Attachment A under section 552.101 of the Government Code in conjunction with section 418.182 of the Government Code, and the insurance policy numbers we have marked in the submitted bid proposal under section 552.136 of the Government Code. The remaining information must be released in accordance with copyright law.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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).

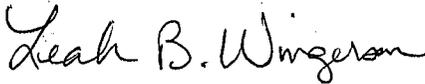
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 challenge 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,



Leah B. Wingerson  
Assistant Attorney General  
Open Records Division

LBW/ma

Ref: ID# 327212

Enc. Submitted documents

c: Mr. Richard Martinez  
Turnkey Security  
P.O. Box 1889  
Manchaca, Texas 78652  
(w/o enclosures)

Mr. Jon P. Martin  
Red Hawk Industries, LLC  
A UTC Fire & Security Company  
9 Farm Springs Road  
Farmington, Connecticut 06034-4065  
(w/o enclosures)